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JUDGES OF THE HIGH COURT.

JANUARY—JUNE, 1952.

Chief Justice.

The Hon'ble Mr. P. V. Rajamannar, B.A., B.L.

Puisne Judges.

The Hon'ble Mr. Justice P. Satyanarayana Rao, M.A., M.L.
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THE

Madras Law Journal Reports.

1] JANUARY [1952

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE SOMASUNDARAM.

K. Anandan Nambiar .. *Petitioner**.

Constitution of India (1950), *Article* 226—*Scope and exercise of the powers conferred by—Lawful detention of member of Legislative Assembly under Preventive Detention Act,* 1950—*Permission to attend the sitting of the Assembly during detention—Right to correspond with the Speaker of the Assembly.*

Article 226 confers on the High Court extremely wide powers of interference and a corresponding extremely heavy burden of responsibility. The framers of the constitution could never have contemplated High Courts constituting themselves on applications by all sorts of aggrieved persons into inquisitorial tribunals supervising, ciriticising, modifying or cancelling the actions and orders of different departments of executive authority, institutions, public bodies and last but not least of the Legislatures as regards their internal affairs which are controlled by the Speaker of the House and its committees. It is only in exceptional cases that writs under the wide powers "for any other purpose" can be issued, such as for instance, where there has been a clear violation of statutory law, when principles of natural justice have been violated or perhaps where there has been *mala fide* discrimination against an individual to the detriment of his rights.

If a member of a Legislative Assembly is arrested and lawfully detained, though without actual trial under any Preventive Detention Act and the detention is lawful, *bona fide* and for proper grounds, he cannot be permitted to attend the sittings of the House. But if a party in power detains a political opponent or continues his detention with the *mala fide* object of stifling opposition and prejudicing the party to which he belongs in a forthcoming election, there would be an undermining of the basis of the Constitution.

During the period of his detention under the Preventive Detention Act a member of the Legislative Assembly has a right to correspond without let or hindrance with the Speaker and chairman of the Committee of Privileges of the House. This right flows not merely from principles of natural justice, which will be violated by such letters being withheld, but as a continuing member of the House, he would be entitled to this privilege under Article 194 (3) of the Constitution.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of mandamus directing the state to permit the petitioner to proceed to the Madras Legislative Assembly Hall and back to attend the Legislature Session commencing from 20th August, 1951, and to have him produced before the High Court to argue his case in person.

S. Mohan Kumaramangalam for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and the Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

The Judgment of the Court was delivered by

Mack, J.—This is a petition under Article 226 of the Constitution by K. Anandan Nambiar, a Member of the Madras Legislative Assembly. He was arrested on 4th May, 1949, and detained under the Maintenance of Public Order Act. He

* Crl. M. P. No. 1767 of 1951. 11th September, 1951.

has since been continuously under detention. He has applied to us for the issue of a writ by way of mandamus or other appropriate writ to declare and enforce his right to attend the present sittings of the Legislative Assembly now in progress either freely or with such restrictions as may be reasonably imposed. He also complains that his letters to the Legislature addressed to the Chairman of the Committee of Privileges have been withheld by the Superintendent, Central Jail and seeks a declaration of his right to communicate with the Legislature in his capacity as a member without let or hindrance from prison.

Petitioner was elected from the Railway Trade Union Labour Constituency at the general elections in 1946 on the communist party ticket. He still retains his seat and received the usual summons sent to all members dated 6th August, 1951, with a message from H. E. the Governor requiring his attendance on Monday, the 20th of August, 1951, on the occasion of his special address to both Houses.

Petitioner filed a *Habeas Corpus* petition Crl. M. P. No. 1490 of 1949 under section 561-A, Criminal Procedure Code, to set him at liberty so as to enable him to attend the Legislative Assembly sittings. This was dismissed by Govinda Menon and Rajagopalan, JJ. He filed another *Habeas Corpus* petition Crl. M. P. No. 3022 of 1949 for his release, *inter alia*, on the ground that he was, as a Member of the Legislative Assembly, immune from arrest. That petition was dismissed by the another Bench Govinda Menon and Basheer Ahmed Sayeed, JJ. He now applies to us for a similar but slightly different relief invoking Article 226 of the Constitution contending that on the basis that his continued detention is lawful, he has a right to attend the sittings of the Legislative Assembly even from prison under prison escort.

The petition raises substantially a very short and simple point for determination though we have heard a long and elaborate argument both from Mr. Kumaramangalam for the petitioner and the learned Advocate-General. Petitioner does not now press any position before us that he, as a Member of the Legislative Assembly, has a privilege of immunity from preventive detention. This postion was fully canvassed before a learned Bench Govinda Menon and Krishnaswami Naidu, JJ., in the case of P. Venkateswarlu, another Member of the Legislative Assembly in Crl. M. P. No. 2059 of 1949, a decision reported in *Venkateswarlu* v. *District Magistrate, Guntur*[1]. They held in their decision, dated 27th March, 1950, following the decision in the *Ramsay case*, that a Member of the Legislative Assembly could claim no privilege from arrest and detention under Preventive Detention legislation. Petitioner has filed along with his petition copy of a letter from the Secretary of the Madras Legislature, dated 29th August, 1950, in reply to a letter from him, dated 12th August, 1950, and a telegram to the Chief Secretary, dated 22nd July, 1950, referring him to the *Ramsay case*, in which the Committee of privileges of the House of Commons held that preventive arrest under statutory authority by executive order was not within the principle of the case to which the privilege from arrest could be extended. It is not necessary to elaborate the law in England relating to privileges of Members of Parliament regarding freedom from arrest and only sufficient to say that while they were entitled to immunity from arrest by a process of civil law 40 days before and 40 days after and also, during the sittings of the House, there was no privilege of arrest when charged or convicted of an indictable offence. Preventive detention not being an indictable offence, the question whether a member of Parliament could claim immunity from such detention was considered by the Committee of Privileges after an elaborate enquiry at which Captain Ramsay, who was at the time detained under Regulation 18 (*b*) of the Defence (General) Regulations 1939, was heard and the Home Secretary Sir John Anderson and other eminent witnesses examined. The enquiry was held on representation made by

1. (1950) 2 M.L.J. 207: I.L.R. (1951) Mad. 135.

Captain Ramsay that the privilege of a Member of Parliament from arrest and detention had been infringed to the Speaker, who referred the matter to the Committee of Privileges. These facts are necessary, Article 226 of the Constitution being invoked, in view of the powers, privileges and immunities of the Legislature of a State, its members and committees being defined under Article 194 (3) of the Constitution according to which they

> "shall be such as may from time to time be defined by Legislature by law and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution."

We have to examine this petition in the light of Article 226 of the Constitution, unlike the English Courts who have no such heavy burden imposed upon them. It is conceded for the petitioner that no fundamental rights set out in Part III of the Constitution is violated, all freedoms and rights of an ordinary citizen being restricted by lawful preventive detention. There remains only the responsibility of interference on our part "for any other purpose" and whether this petition can be brought within this very wide and extensive discretion. Article 226 confers on us extremely wide powers of interference and a corresponding extremely heavy burden of responsibility. The framers of the Constitution could never have contemplated High Courts constituting themselves on applications by all sorts of aggrieved persons into inquisitorial tribunals supervising, criticising, modifying on cancelling the actions and orders of different departments of executive authority, institutions, public bodies and last but not least of the Legislatures as regards their internal affairs which are controlled by the Speaker and the House and its committees. It is only in exceptional cases that writs under these wide powers "for any other purpose" can in our opinion be issued, such as for instance when there has been a clear violation of statutory law, when principles of natural justice have been violated or perhaps where there has been *mala fide* discrimination against an individual to the detriment of his rights. It is impossible to define with exactitude the cases in which Article 226 of the Constitution can be rightly invoked. They should be comparatively exceptional and very few. But we view with growing apprehension and alarm the very large number of petitions under this Article seeking our intervention and to make it an avenue for redress. This may be partly due to a tendency to exploit this avenue with legal ingenuity seeking fresh avenues for the invocation of this Article. A contributory reason may also be the growing tendency to depart from standards of justice and fair play in a day to day administration. It is in the light of this approach to Article 226 that we shall consider this petition.

Mr. Kumaramangalam, though he concedes no violation of any fundamental right, would base petitioner's right to attend the sittings of the Legislature even from the confines of preventive detention on something more fundamental than the fundamental rights set out in Part III of the Constitution. He urges that the very basis of the sovereignty of the people will be undermined and imperilled if a member of a Legislature is deprived of his right to sit in it and if the electorate are to be for years deprived of any representation in the house. He points out that petitioner still continues to be a member, that he draws his salary as a Legislator, that though a detenu he has been under section 64 (*b*) of the Representation of Peoples Act, 1951, accorded the right of vote by postal ballot and finally urges that he is even entitled under this Act to stand for and contest an election though a detenu. We do not propose to canvass the correctness of this last contention, which does not fall for our determination. The position both for the petitioner and his electorate has no doubt been most unfortunate but that by itself can give petitioner no legal right to the relief he now seeks to attend the Legislature while under detention.

We have tried to follow Mr. Kumaramangalam in his underground exploration of the foundations of the Constitution. But we cannot see how they could be placed in jeopardy by Members of the Legislative Assembly under the lawful preventive deten-

tion being permitted (?) while under such detention to attend the sittings of the House. We are able to discern two main massive and indispensable pillars underground on which the Constitution is founded. The first pillar is unswerving loyalty by each and every citizen to the Constitution and to the flag of the Indian Union, the Constitution to be changed only by Constitutional means eschewing any form of violence. The second pillar we may describe as honesty, character and integrity in the component organs of the Constitution, *viz.*, the Legislature and the Executive and the Judiciary. We are called upon to consider the legal position with regard to all forms of preventive detention, whether for action prejudicial to the security of the State itself or the maintenance of public order which threatens to undermine the first pillar, or for action prejudicial to the maintenance of essential services particularly those affecting the supply of food, such as black-marketing and hoarding and cornering operations by which fortunes can be accumulated at the expense of the suffering poor, which threatens to undermine the second pillar. If a case should ever arise of a Member of a Legislative Assembly being preventively detained for black-marketing operations prejudicial to such essential services, involving as it does social and moral turpitude, really worse than that of many criminals imprisoned under ordinary law, can it possibly be said that his being restricted from attending the House while under such detention in the slightest degree puts in jeopardy any basis of the Constitution? On the contrary, both justice and law require that he should be restrained from further legislative activity and further misuse of his position till the electorate call upon him to account at the next election. We are unable to differentiate in law any treatment of cases of preventive detention. Once a member of a Legislative Assembly is arrested and lawfully detained, though without actual trial under any Preventive Detention Act, there can be no doubt that under the law as it stands, he cannot be permitted to attend the sittings of the House. A declaration by us that he is entitled to do so even under armed escort is entirely out of the question. We however readily concede the contention of Mr. Kumaramangalam that if a party in power detains a political opponent or continues his detention with the *mala fide* object of stifling opposition and prejudicing the party to which he belongs in a forthcoming election, there would be an undermining of the basis of the Constitution, putting in jeopardy the second pillar to which we have adverted. That contention is wholly irrelevant for the purposes of this petition, which proceeds on the basis that detention is lawful *bona fide* and for proper grounds.

There remains the subsidiary prayer by the petitioner for a declaration that he is entitled to correspond with the Legislature of which he still continus to be a member without let or hindrance. This is in our opinion well founded. As long as a detenu continues to be a member of a Legislature, drawing the emoluments of his office, receiving summons to attend, he is entitled to the right of correspondence with the Legislature, and to make representations to the Speaker and the Chairman of the Committee of Privileges and no executive authority has any right to withhold such correspondence. It is conceded in the affidavit of the Superintendent of the Jail, who is impleaded as the second respondent, that under the orders of the Inspector-General of Prisons, he withheld a petition to the Chief Secretary to Government, who is the first respondent, and a copy thereof to the Speaker of the Legislative Assembly. Government appear to have acted under rule 11 of the Madras Security Prisoners' Rules, 1950, passed under section 4 of the Preventive Detention Act regulating correspondence permissible to detenus. We see no grounds for any differentiation in treatment as between a member of a Legislative Assembly detenu and any other ordinary detenu in the application of these rules, but in this one respect we hold that during the period of his detention, a detenu, who continues to be a member of the Legislative Assembly, has a right to correspond with the House. This right, as it appears to us, flows not merely from principles of natural justice, which will be violated by such letters being withheld, but as a continuing member of the House, he would also appear to be entitled to this privilege under

Article 194 (3) of the Constitution under which English Parliamentary practice has to be followed until a law is enacted by the Legislature defining the powers, privileges and immunities of the House, its committees and its members. Capt. Ramsay was permitted to correspond with the House of Parliament while under detention and was also given a personal hearing in an elaborate enquiry conducted by the Committee of Privileges. It is true that some early letters of the petitioner were forwarded to the House who sent him a reply but he is entitled to continue making further representations.

We accordingly declare the right of the petitioner as a Member of the Legislative Assembly to correspond without let or hindrance with the Speaker and the Chairman of the Committee of Privileges through the Secretary of the Legislature during his period of detention and issue a writ by way of mandamus directing the Chief Secretary to Government and the Superintendent of the Central Jail to forward to the House any letters from the petitioner held up on executive orders so that the Legislative Assembly may deal with them in accordance with Parliamentary law and practice prevailing in England by which the Legislature is bound. In other respects we dismiss this petition.

Somasundaram, J.—I have perused the judgment of my learned brother and I agree with the orders proposed by him. As regards the case of P. Venkateswarlu, referred to by my learned brother, I think that the judgment in Cr.M.P. No. 2059 of 1949 was premature as in my opinion the obligation to ascertain and determine the privileges of a member of the House rests primarily and in the first instance with the House only and our jurisdiction comes in only later, *i.e.*, when the House fails to perform its duties or refused to perform its duties or performs it contrary to clause (3) of Article 194 of the Constitution. I do not think that the House can be found fault with for anything done or not done as the letter, dated 10th August, 1951, written by the petitioner to the Chief Secretary (copy of which was sent to the Speaker) has not even been placed before them for their consideration.

The question raised in this petition is whether the petitioner who is a member of the Madras Legislative Assembly and who has been detained under the Preventive Detention Act, 1950, has a right to participate in the deliberations of the Assembly " without let or hindrance ". If he has no right, can it be said that preventing him from attending the Assembly constitutes a breach of the privilege of a member of the House. Finally can the letter written by the petitioner to the Secretary (copy of which was sent to the Speaker) be withheld from being placed before the House or the Committee of Privileges, if there was one constituted. Mr. Mohan Kumaramangalam appearing for the petitioner has ably put forth his arguments from all aspects, *i.e.*, from the point of view of right as well as from the point of view of the privileges. I refrain from dealing with all his contentions as they may have to be dealt with by another and more appropriate body elsewhere, and any opinion I may express is likely to prejudice or prejudge the issue before that body. But in the light of the order proposed, I would deal only with one of the points raised, *viz.*, the validity of withholding of the letter dated 10th August, 1951, sent by the petitioner to the Chief Secretary (a copy of which as already stated was also sent to the Speaker).

Under clause (3) of Article 194 of the Constitution the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall till they are defined by the Legislature by law be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of the Constitution. The privilege of a member of the House of Commons when detained under the provisions of an Act somewhat similar to but not altogether similar to those of the Preventive Detention Act in India has been determined. I have used the words " somewhat similar but not altogether similar " advisedly because there was no provision in the English Act similar to section 14 of the Preventive Detention

Act and this in my opinion makes a lot of difference, in its bearing on the question of privileges of a member detained and on the principle governing these privileges. In England the question arose when Captain Ramsay was detained under section 18-B of the Defence (General) Regulations, 1939, made under the Emergency Powers (Defence Acts), 1939 and 1940. I find from Sir T. Erskine May's Parliamentary Practice (1950 Edition), page 81 that the detention led to the Committee of Privileges being directed to consider whether such detention constituted a breach of the privileges of the House. The Committee of Privileges then went into the whole question and made a report to the House of Commons stating that there was no breach of privilege involved. A copy of report has been made available to us by the kindness of the Advocate-General who appeared for the State. A perusal of the report shows that the Committee examined the Home Secretary and the clerk of the House of Commons, Sir Gilbert Champion and after obtaining necessary authority from the House of Commons, gave opportunity to Ramsay also, to make his representations with the aid of a Solicitor and he was fully heard. The question thus was gone into fully as in a judicial enquiry.

Paragraph 15 of the report shows how the Committee was satisfied that the grounds on which the Home Secretary acted did not arise from anything said by Captain Ramsay from his place in Parliament as any action taken by the Home Secretary from anything said in the Parliament would constitute a breach of the privilege. The Committee say that they attach great importance to this point and they were satisfied that the action of the Home Secretary did not arise from anything said by Captain Ramsay from his place in Parliament.

A perusal of the report shows how carefully the question was gone into and what great attention was bestowed upon it by the Committee. The regulations under which the member was detained, the history of the privilege claimed, the existence or the extent of the privilege were all gone into fully and thoroughly and in a manner which was not only satisfactory to all concerned but which is the pride and glory of the British Nation. I am referring to this aspect because I think that our House, *i.e.*, the Madras Legislative Assembly in this case is the proper and primary authority to decide what the privileges of the House or its members or the committees are and they should therefore follow the example of the House of Commons as the privileges of the member of our House are the same as the members of the House of Commons in England, in the absence of their being defined by law.

In this case the petitioner has written a letter to the Chief Secretary (copy of which was sent to the Speaker) asking that he should be permitted to attend the Assembly. This in substance raises the question of his right or privileges whatever it may be. This letter should not have been withheld, as has been done in this case. It should have been placed before the Committee of Privileges if there is one (we are told that there is one) and if there is no Committee before the House who should constitute a Committee and direct it to consider this report to the House. This course in my opinion is necessary to establish good, sound and healthy traditions which the House must develop.

I therefore agree with the order proposed by my learned brother that the letter of the petitioner be placed before the Madras Legislative Assembly which may deal with it in accordance with the practice prevailing in the House of Commons, in England.

V.S. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

P. P. Sivarama Pillai and another .. *Petitioners.**

Madras General Sales Tax Act (IX of 1939), section 15 (b)—Payment of tax by cheque—Fraud committed in the office of the Assistant Commercial Tax Officer and cheque cashed by a peon of the office—Assessee, if guilty of an offence under section 15 (b) of the Act.

Where an assessee sends a cheque in payment of his tax in accordance with the notice sent to him and if a fraud is committed in the office of the Assistant Commerical Tax Officer and a peon of the office cashes the cheque and it is not brought into the account, the assessee is not responsible for that. There has been a payment in law where the cheque has been honoured and cash paid, and the assessee cannot be found guilty of the offence under section 15 (b) of the Madras General Sales Tax Act.

Petition under sections 435 and 439 of the Code of Criminal Procedure praying that the High Court will be pleased to revise the order of the Court of the Sessions Judge of Mathurai in Criminal Appeal No. 66 of 1950 confirming the sentence on the petitioner in C. C. No. 564 of 1949 on the file of the Court of the City First Class Magistrate of Mathurai.

V. Sundaresan and *K. V. Srinivasa Ayyar* for Petitioners.

The Assistant Public Prosecutor (*A. C. Muthanna*) on behalf of the State.

The Court made the following

ORDER.—In this case the petitioner has been convicted under section 15 (b) of the Madras General Sales Tax Act for not having paid the tax due, *viz.*, a sum of Rs. 643-8-11. In the notice issued he has been asked to pay either in cash or by cheque. The petitioner sent a cheque, dated 29th June, 1948, drawn on the South India Bank, Mathurai. It was drawn in favour of the Assistant Commercial Tax Officer, Mathurai II. It appears to have been cashed by the peon on 21st July, 1948 and the money appears to have been misappropriated. The sum was not therefore credited to the account. Since the accounts do not bear evidence of payment by the petitioner the petitioner was prosecuted. It was found by both the Courts below that the cheque was sent as mentioned above and that it was cashed by the peon of the Assistant Commercial Tax Officer. There was no question of the cheque not being met without funds being provided for by the party concerned. The only thing that is established is that the amount has not been actually credited to the Government. It is therefore contended by the prosecution that the cheque cannot be treated as final payment in view of the specific provision in the Treasury Code. Under rule 31 framed under the General Sales Tax Act when any payment by cheque is permitted by the rules under the Act, the cheque shall be such as under the Madras Treasury Code are receivable by the Government Treasury concerned. According to the rule under the Treasury Code, a cheque received shall be treated as final payment only after it has been met and the amount has been actually credited to Government. The cheque that was sent was not a crossed cheque and it therefore facilitated the cashing of it by the peon. The cheque bears the stamp of the office receiving it. The contention of the petitioner's advocate is that he having sent a cheque in accordance with the notice sent to him and the cheque having been sent, it cannot be said that he has not paid the amount. So far as payment is concerned, in law, in my opinion, it amounts to payment. If in the office of the Assistant Commercial Tax Officer a fraud was committed by some of the subordinate officers or by the menials, the petitioner is certainly not responsible for that. In the absence of any proof that the petitioner was a party to the fraud which is not suggested by the prosecution and on the finding of the lower Court that the cheque was certainly honoured and cash has been paid, I hold that the petitioner paid the amount due and therefore he is not guilty of the

* Cr. R. C. Nos. 787, 788 and 1327 of 1950. 31st August, 1951.
Cr. R. P. Nos. 725, 726 and 1255 of 1950.

offence under section 15 (*b*) of the Sales Tax Act. The conviction and sentence are therefore set aside and the amount if it has been paid shall be refunded to the petitioner.

Cr. R.C. No. 788 *of* 1950.—In this case the amount involved is Rs. 440-8-0 and it has been paid by cheque, dated 24th September, 1948, which was cashed on 6th October 1948. For the reasons mentioned in my judgment in Cr.R.C. No. 787 of 1950 the conviction and sentence of the petitioner are set aside and the amount if it has been paid shall be refunded to him.

Cr. R.C. No. 1327 *of* 1950.—In this case the amount involved is Rs. 344 and it has been paid by the cheque, dated 13th October, 1948, which was cashed on 11th November, 1948. For the reasons mentioned in my judgment in Criminal Revision Case No. 787 of 1950 the conviction and sentence of the petitioner are set aside and the amount if it has been paid, shall be refunded to the petitioner.

V.S. ——— *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

R. S. Venkataswami Naicker .. *Petitioner**

v.

Chinnayapuram Co-operative Stores Q. 271 through its Secretary, S. Kandaswami Naicker and another .. *Respondents.*

Court-Fees Act (*VII of* 1870), *section* 7 (*iv-A*) *and* (*iv*) (c)—*Suit for declaration that award passed by Registrar of Co-operative Societies is not valid and binding and for injunction against attachment of plaintiff's properties in execution of award—Court-fee payable.*

An award of a Deputy Registrar of Co-operatives Societies cannot be equated to a decree of a Civil or Revenue Court though it may be executable as a decree. In a suit for a declaration that the award is not valid and binding against the plaintiff, court-fee under section 7 (iv-A) of the Court-Fees Act need not be paid. *Kuppa Govinda Chettiar* v. *Uttukottai Co-operative Society* by its Liquidator, (1937) 1 M.L.J. 640: I.L.R. (1938) Mad. 63; *Messrs. Kalla Surayya & Sons* v. *The Province of Madras*, (1949) 1 M.L.J. 379 : I.L.R. (1950) Mad. 34, applied. As regards a prayer for injunction restraining the Deputy Registrar of Co-operative Societies from attaching the property of the plaintiff, it will be a consequential relief and so section 7 (iv) (*c*) of the Court-Fees Act would not come into operation and the plaintiff will be entitled to fix his own valuation for the injunction he has applied for.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Munsif Court, Sattur, dated 29th March, 1951, in O.S. No. 274 of 1950.

T. R. Srinivasan and *S. Gopalaratnam* for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner in this Civil Revision Petition. He has preferred this petition against the order of the learned District Munsif of Sattur directing him to pay court-fees under section 7 (iv-A) and (iv) (*c*) of the Court-Fees Act. The petitioner's contention is that he is suing only for a declaration that the award passed by the Deputy Registrar of Co-operative Societies is not valid and binding against him and for injunction which he presses for against the attachment of his property which he is entitled to value according to his own calculations. The learned District Munsif treats the award of the Deputy Registrar on the same footing as a decree of a Civil Court. He has taken into account the mere fact that the award of the Deputy Registrar is capable of execution as if it was a decree of a Civil Court or a Revenue Court. He has failed to note that this by itself will not convert the award of the Deputy Registrar into a decree. Even so, tribunals such as Commercial Tax Officers and so forth stand on quite a different footing from Civil Courts. They are not defined as Courts, though for purposes of administrative convenience their decrees are allowed to be executed by Civil Courts

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* C.R.P. No. 383 of 1951. 21st August, 1951.

as if they are decrees of a Civil Court or a Revenue Court. Such being the case the ruling in *Kuppa Govinda Chettiar* v. *Uttukkottai Co-operative Society by its Liquidator*[1] would apply to this case. Agreeing with that decision, I think the learned District Munsif is not correct in equating the award by the Deputy Registrar to a decree of a Civil Court or a Revenue Court. Therefore so far as the declaration for setting aside that award is concerned, the finding of the learned District Munsif that the court-fees should be paid under section 7 (iv-A) of the Court-Fees Act cannot be correct and it cannot be upheld. The learned counsel for the petitioner has invited my attention to a further decision in *Messrs. Kalla Surayya & Sons* v. *The Province of Madras*[2] which has approved of the decision in *Kuppa Govinda Chettiar* v. *Uttukkottai Co-operative Society by its Liquidator*[1] and the decision in that case would apply to the facts of the present case and in view of that decision also the finding of the learned District Munsif that court-fee should be paid under section 7 (iv-A) is not tenable.

On the question as to proper court-fee to be paid on the prayer for injunction restraining the Deputy Registrar from attaching the property of the petitioner the prayer can be viewed either as in consequence of the prayer for declaration or it may be treated as an independent relief arising from a different set of facts. In fact in this case while the order has been passed on the 14th December, 1949, the attachment has taken place on the 27th of September, 1950. If the relief for injunction is not really consequent upon the relief for a declaration to set aside the award, then section 7 (iv) (*d*) of the Court-Fees Act would come into operation, in which case the petitioner will be entitled to fix his own valuation for the injunction he has applied for. Even in that case the principles that would be applicable in such cases have been discussed in the decision reported in *Messrs. Kalla Surayya & Sons* v. *The Province of Madras*[2]. Considered from this point of view also, the finding of the learned District Munsif that the court-fee should have been paid under section 7 (iv) (*c*) cannot be sustainable. I think therefore that the court-fee that has been paid on the plaint in the lower Court is the proper Court-fee and this petition is therefore allowed with costs. Costs will be paid by the parties other than Government.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

Parvathaneni Ramakrishnayya, Proprietor, Krishna Company, Vijayawada .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 10 (2)—Assessee agreeing to pay a company a fixed percentage of his net profits in addition to annual rent for certain machinery—If entitled to deduction from taxable profits.

The assessee who carried on the business of manufacturing fruit jam, jelly, etc., was also one of the directors of a company called the Canning Industrials Limited, and by a resolution of that company he was granted a lease of the concern subject to the conditions that he should pay at the rate of Rs. 4,000 to the company per annum and that the company should bear the depreciation of the assets leased out to him and that out of the net profits remaining and to be wholly enjoyed by him, he should pay 33-1/3 per cent. of them to the company besides the Rs. 4,000 mentioned above. The assessee claimed that the amount of 33-1/3 per cent. paid by him to the company should be allowed as deduction either as rent or as expenditure.

Held, that once profits are received by the assessee as his profits their destination is irrelevant. As the net profits are treated as profits belonging to the assessee and it is from that profit that the 33-1/3 per cent. should be paid, the assessee is not entitled to deduction for that amount.

1. (1937) 1 M.L.J. 640 : I.L.R. (1938) Mad. 63.
2. (1949) 1 M.L.J. 379 : I.L.R. (1950) Mad. 34.

*Case Referred No. 9 of 1949. 20th September, 1951.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act, 1922, as amended by section 92 of the Income-tax (Amendment) Act, 1939 (Act VII of 1939), in 66 R.A. No. 133 (Madras) of 1948-49 on its file for decision.

K. Srinivasan for Applicant.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—Under section 66 (1) of the Indian Income-tax Act the Income-tax Appellate Tribunal referred the following question for decision of this Court:

"Whether on the facts and circumstances of the case, the applicant in computing the profits of his business is entitled to deduct the sum of Rs. 13,588 paid to the India Canning Industrials, Limited, either under section 10 (2) (1) or 10 (2) (xv) of the Indian Income-tax Act?"

In the accounting year ending 30th June, 1943, the assessee paid this sum to the India Canning Industrials and he claimed that it was either rent for the machinery and the building of the company or an expenditure incurred for the purpose of the business. The assessee carried on the business of manufacturing fruit jam, jelly, etc. He was also one of the directors of the India Canning Industrials and by a resolution of the company, dated 7th June, 1941, he was granted a lease of the concern subject to two conditions, namely, that he should pay at the rate of Rs. 4,000 to the company per annum and that the company should bear the depreciation of the assets leased out to him, and secondly, that out of the net profits remaining and to be wholly enjoyed by him, he should pay 33-1/3, per cent. of them to the company besides Rs. 4,000 mentioned above. In the year of account ending with June, 1943, he paid a sum of Rs. 4,000 and also a sum of Rs. 13,588 representing 33-1/3 per cent. of the net profits as per the terms of the resolution. He claimed that the amount of Rs. 13,588 should be allowed as deduction either as rent or as expenditure. This claim was rejected by the revenue authorities and at his instance this reference has been made.

The clause under which his liability to pay 33-1/3 per cent. of the profits arises leaves no room for doubt that it is out of the entire profits that this amount is to be paid to the company. The net profits of his business are treated as profits belonging to him and to be wholly enjoyed by him. It is from that amount that this 33-1/3 per cent should be paid. If once profits are received by the assessee as his profits their destination is irrelevant. It is not a case where the net profits should be arrived at after deducting the 33-1/3 per cent. which has to be paid to the company. We do not suggest thereby that if it was so done, it would have been an expenditure within section 10 (2) (xv) of the Act, and it is unnecessary for us to decide that question. It is rather difficult, therefore, in view of the clear language of the resolution to accept the contention urged by Mr. Srinivasan, the learned advocate for the assessee, that it should be treated as a permissible deduction. The view taken by the revenue authorities is, in our opinion, correct and they were right in not permitting this deduction. The answer, therefore, to the question referred to us must be in the negative and against the assessee. As the assessee has failed, he must pay costs of Rs. 150 to the Income-tax Commissioner.

K.S. *Reference answered against the assessee.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

S. Narayanaswami Ayyar .. *Petitioner**

v.

Kesava Ayyar .. *Respondent.*

Court-Fees Act (VII of 1870), Schedule II, Article 17 and section 7 (v)—Suit for partition by alienee from co-sharer who had become divided in status and had been in joint possession—Proper court-fee payable.

Where an alienee from a co-sharer who got divided in status in effect alleges in his suit that his vendor has been in joint possession of some of the items of the suit properties as a tenant-in-common with the other co-sharer and seeks to convert such constructive joint possession as tenant-in-common to separate possession, the suit cannot be valued except under Article 17 of the second schedule to the Court-Fees Act. Such a case cannot be brought within the scope of section 7, clause (v) of the Court-Fees Act.

Nagendra v. *Appayya*, (1947) 1 M.L.J. 15 : I.L.R. (1947) Mad. 763, distinguished ; *Gill* v. *Varadaraghavayya*, (1919) 38 M.L.J. 92 : I.L.R. 43 Mad. 396 ; *Kandunni Nair* v. *Raman Nayar*, (1930) 58 M.L.J. 497 : I.L.R. 53 Mad. 540 ; *Prathipati Suryanarayana* v. *Prathipati Seshayya*, (1926) 90 I.C. 843 and *Kurshit Katham* v. *Hyder Khan*, (1923) 75 I.C. 93, applied

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order, dated 19th January, 1950, in Court-fee Examiner's Checkslip in O.S. No. 382 of 1949, District Munsif Court, Melur.

K. Vaitheeswaran for Petitioner.

The Government Pleader (*P. Satyanarayana Raju*) and *N. Sundara Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner. He seeks to revise the order of the learned District Munsif of Melur whereby he has been directed to pay court-fee on the plaint under section 7, clause (v) of the Court-Fees Act. A reading of his judgment would show that he has clearly misunderstood the facts averred in the plaint. He has followed the decision in *Nagendra* v. *Appayya*[1]. But the facts in that case are quite different from the facts in the present case and the decision cannot apply to the present case though the learned Government Pleader would urge to the contrary. In that case, it was a purchaser from a coparcener of a Hindu joint family that was filing the suit for partition and possession. But in the present case the plaintiff is an alienee from a co-sharer who got divided in status nearly 45 years ago. The plaint allegations in the present case also make it clear that the vendor of the present plaintiff has been in joint possession of some of the items of the suit property as a tenant-in-common with the other co-sharer. The purchaser therefore steps into the shoes of his vendor who was in constructive possession as co-sharer and what he is seeking now to do is to convert the joint possession as tenant-in-common to separate possession. In such a case the position is that the suit cannot be valued except under Article 17 of the second schedule to the Court-Fees Act where suits which cannot be valued will have to be paid a fixed court-fee prescribed in the said Article. That is what the plaintiff has done in this case. That this case cannot be brought within the scope of section 7, clause (v) has been made clear by a series of decisions. *Gill* v. *Varadaraghavayya*[2] seems to be a direct authority in support of the contention of the petitioner. Even so the observations made in *Kandunni Nair* v. *Raman Nair*[3] are very apposite and apply to the facts of the present case. *Prathipati Suryanarayana* v. *Prathipati Seshayya*[4] and *Kurshit Katham* v. *Hyder Khan*[5], are also on the same principle and the decisions therein apply to the facts of the present case. I do not think it is necessary for me to refer to any authority which would say that the plaintiff in this case who is a purchaser from one of the co-sharer who became divided several years ago steps into the shoes of that co-

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* C.R.P. No. 668 of 1950. 12th September, 1951.

1. (1947) 1 M.L.J. 15 : I.L.R. (1947) Mad. 763.
2. (1919) 38 M.L.J. 92 : I.L.R. 43 Mad. 396.
3. (1930) 58 M.L.J. 497 : I.L.R. 53 Mad. 540.
4. (1926) 90 I.C. 843.
5. (1923) 75 I.C. 93.

sharer and gets all the rights and interests that that co-sharer possessed in the properties. It is sufficient for me to refer to the passages cited by the learned counsel for the petitioner in the 1950 edition of Mitra's Limitation Act at pages 979 and 981. The learned District Munsif has failed to draw the distinction between an alienee from a coparcener of a Hindu joint family and an alienee from a member of such a family who became divided in status and whose possession thereafter became that of a co-sharer in the properties. The plaint allegations clearly point to this fact that not merely is the plaintiff in joint possession as a tenant-in-common but he is also a co-sharer and the plaintiff is only an alienee from the co-sharer. Such being the circumstances, the learned District Munsif was entirely wrong in having applied the principle laid down in *Nagendra* v. *Appayya*[1]. The proper court-fee that would be payable under such circumstances would be the one which the pliantiff has already paid. This petition is therefore allowed. There will be no order as to costs.

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Appellant**

v.

Valayangat Devassia .. *Respondent.*

Madras Prohibition Act (X of 1937), *section* 38 (3)—*Scope—Police Officer himself having investigated the case—If should make further enquiry before starting proceedings.*

It is wrong to say that the Police Officer should hold an enquiry in spite of the fact that he has himself investigated the case and filed the charge-sheet. All that section 38 (3) of the Madras Prohibition Act states is that such enquiry as the Police Officer thinks necessary shall be held. Where the officer after investigation searched and seized from the house contraband liquor in the possession of the accused all that remained was to register a case, prepare the first information report and despatch the charge-sheet. He need not make any further enquiry.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Joint Magistrate of Tellicherry in Criminal Appeal No. 6 of 1950 on his file (C.C. No. 1511 of 1949 on the file of the Sub-Magistrate of Kattuparamba).

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

C. K. Viswanatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is a criminal appeal filed against an acquittal by the Joint Magistrate, Tellicherry, in C.A. No. 6 of 1950.

The facts are these :—The accused (respondent before us) lives with his wife in Manathana amsom. On 26th November, 1940, at about 5-30 or 6 P.M., P.W. 1, the Sub-Inspector of Police, Peravur, searched the accused's house in the presence of P.W. 2 and other witnesses and recovered from inside a single room of the house, one jar M.O. 1 containing 14½ bottles of arrack and an empty bottle M.O. 2 which was kept by its side. P.W. 1 took M.Os. 1 and 2 into custody under a search list Exhibit P-1 in the presence of P.W. 2 and one Joseph Kutty who have attested Exhibit P-1. The accused was also in the house at the time of the search. P.W. 1 registered a case as Crime No. 25 of 1949 of the Peravur station, prepared the first information report and without further enquiry laid the charge-sheet on 6th December, 1949.

The case for the accused was that on 26th two police constables came to his house and asked him to accompany them to the Police Station, he started for the Police Station, that when they reached a place known as Pattanchara the constables took him to the forest nearby and pointed out M.O. 1 which was there and asked him what it was, that the accused stated that he did not know, that he was then asked

1. (1947) 1 M.L.J. 15 : I.L.R. (1947) Mad. 763.

* Crl. Appeal No. 587 of 1950. 24th October, 1951.

to carry it to the station and he refused, that the police constables tied up his hands and carried M.O. 1 with the help of one Verghese to the Peravur Police Station.

The accused examined two witnesses both of whom belonged to Manathana amsom and their version has been summarised by the learned Sub-Magistrate as follows :—

" D.W. 1 swears that about two months ago when he was going to Peravur at about 4 P.M. and was taking tea at Pottanchira two constables went to the shop and enquired about the locating of the accused's house. D.W. 1 took the constables to the accused's house. The accused was there in the house. The constables told the accused that P.Ws. want him to go to Peravur station. The accused replied that he will go after sometime. They said that he should go at once and arrested the accused and took him away. The witness followed them. When they had gone about 1½ furlongs they took a jar from the forest and asked the accused to carry it which he refused. Then they tied the accused's hands and took him and the jar with them. After going another half a furlong they had M.O. 1 carried by a cooly one Verghese. He further stated that the Police did not measure the contents of M.O. 1 nor does he know what it contained. Joseph Kutty was not in the accused's house. About two months ago when he was sitting in his varanda he saw two policemen and another going to the accused's house and returning with the accused after a quarter of an hour. He did not see any jar with them. P.W. 1 was also not with them."

The learned Sub-Magistrate found that the offence had been made out as charged by the prosecution and disbelieved the defence version and convicted the accused to undergo rigorous imprisonment for four months under section 4 (1) (*a*) of the Madras Prohibition Act. The contraband was directed to be destroyed. There was an appeal therefrom and the Joint Magistrate, Tellicherry, came to the conclusion that the conviction and sentence of the lower Court could not be supported for two reasons, namely, that there was no enquiry in this case as contemplated by section 38 (3) and secondly that a search in this case was bad, and acquitted the respondent.

The learned Public Prosecutor on instructions from the Government had filed the appeal against the acquittal on the ground that the learned Joint Magistrate erred in holding that there was no compliance with the provisions of section 38 (3) of the Madras Prohibition Act and secondly in holding hat there had not been a valid search within the meaning of section 103, Criminal Procedure Code.

I entirely agree with the contentions of the learned Public Prosecutor that on both points the learned Joint Magistrate completely went wrong.

So far as the first point is concerned all that section 38 (3) states is that such enquiry as the police officer thinks necessary shall be held. In this case there was nothing on which an enquiry could be held and the attention of the police officer was not also drawn to any matter on which he should enquire. In fact the entire enquiry was completed when the house was searched and contraband article in the possession of the accused was seized and all that remained was to register a case and prepare the first information report and despatch the charge-sheet. This has been done. This is not a case falling within the ambit of the decision referred to by the learned Joint Magistrate, In re *Kuppuswamy Naidu*[1], where there was necessity to make such an enquiry. Therefore on the mere ground that no enquiry was held when the police officer has a discretion to hold such an enquiry or not if he thinks on facts that no such enquiry was necessary or even possible the proceedings cannot be said to be vitiated. The spirit of section 38 (3) should be understood and applied as otherwise we would be merely reducing these provisions into an absurdity. The lower Court erred in holding that under section 38 (3) of the Madras Prohibition Act the Police Officer should hold an enquiry in spite of the fact that he has himself investigated the case and filed the charge-sheet and that under the aforesaid circumstances any omission to hold an enquiry by P.W. 1 was made out and that there had been no valid institution of proceedings in respect of the offence punishable under section 4 (1) (*a*) of the Madras Prohibition Act and in applying In re *Kuppuswamy Naidu*[1], which was a case firstly under the different Abkari Act and which decision has no application to the facts of this case.

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1. (1923) 17 L.W. 308.

Point 2.—The lower Court was wrong in holding that there was no valid and proper search of the accused's house by the Police Officer in the case. The grounds of appeal challenging the search before the Joint Magistrate are grounds 2, 3 and 4 and are as follows :—

"2. The lower Court ought to have held that there was no valid search of the premises in question either as regards the authority of the person searching or as regards the fulfilment of conditions precedent to search. The necessary formalities regarding the search have not been complied with either.

3. The search being illegal, the lower Court ought not to have relied on the results of such search in inferring the guilt of the accused.

4. The lower Court ought to have held that P.W. 2 had not witnessed the search as a fact and was in any view unreliable."

On the other hand, the evidence in this case shows that none of these criticisms was justified. The word 'locality' has not been defined and in Malabar where houses are situated furlongs from one another there is nothing wrong in a man like P.W. 2 being chosen as the search witness. Then this P.W. 2 has actually witnessed the search and seizure because he was able to see from the verandah all that went on in one room which constitutes the entire house and this is not a case of a search witness not seeing what actually happened and blindly attesting the mahazar. The Sub-Magistrate rightly found that all the formalities of a search had been complied with and the Joint Magistrate was not justified in holding that there had been no valid search within the meaning of section 103, Criminal Procedure Code and in any event ought to have found that it was not such an irregularity which could vitiate the conviction in the case. The net result is that the acquittal of the Joint Magistrate cannot be supported.

But in the circumstances of the case should I set aside this acquittal order in revision and convict the respondent? I do not think it is necessary to do so because the offence itself was in 1949 and the accused has stood the trial and appeal and has spent a portion of his time in jail and the offence itself was not accompanied by any aggravated circumstances. Therefore this is not a fit case for setting aside the acquittal order and convicting the respondent. With the observations made by me above which would clarify the legal position and prevent further public mischief this criminal appeal is dismissed.

K.S. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Mariyala Venkateswara Rao .. *Petitioner.**

Madras General Sales Tax Act (IX of 1939), *section* 14 (2)—*Powers of Commercial Tax Officer to inspect accounts and goods of dealers—Conditions necessary for exercise of—Obstruction to officer—What will amount to—Officer if can prepare a statement himself and insist on the dealer signing it against his will—Rule* 21 *of the rules under the Act—Scope.*

It is highly objectionable for officers like the Assistant Commercial Tax Officer, to prepare statements themselves and request for signature from the parties whom they want to charge-sheet later on relying on such statements as evidence. A party cannot be compelled to sign such a statement against his will. Rule 24 of the Madras General Sales Tax Rules giving the Assistant Commercial Tax Officer power to summon persons to give evidence before him did not empower him to go to the dealer's premises and prepare a statement himself incriminating the dealer and compel him to sign it.

Under section 14 (2) of the Madras General Sales Tax Act the Assistant Commercial Tax Officer is only empowered to inspect the accounts and registers maintained by dealers in the ordinary course of their business, and also the goods in their possession and their offices and shops, etc., at all reasonable times and they are not empowered to compel the production of private papers and cash.

Further a dealer is not bound to allow any inspection of the goods or accounts or registers at lunch interval or a holiday because section 14 (2) contains a significant phrase "at all reasonable times". The fact that the dealer was found in his shop then does not empower the Assistant Commercial Tax Officer to rush there for his inspection.

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*Cr.R.C. No.1370 of 1950. 29th August, 1951.
(Cr.R.P. No. 1296 of 1950.)

Accordingly the refusal to sign such a statement or to produce the cash and private papers by the dealer in the circumstances did not constitute the offence of preventing or obstructing any inspection by the Assistant Commercial Tax Officer under section 14 (2) of the General Sales Tax Act.

Obiter.—Natural physical force is not necessary for obstruction or prevention under section 14 (2). Words causing an apprehension of violence or acts preventing or obstructing the inspection, like locking the premises to prevent inspection, or running away with the goods and registers will do, in a proper case where there is a right of inspection under section 14 (2).

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Gannavaram at Vijayawada, in C.C. No. 46 of 1950, dated 5th October, 1950.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioner.

The Assistant Public Prosecutor on behalf of the State.

The Court made the following

ORDER.—This is a petition by one Mariyala Venkateswara Rao against his conviction, under section 15 (*c*) of the Madras General Sales Tax Act, by the Additional First Class Magistrate, Gannavaram at Vijayawada, and sentence of fine of Rs. 50, for alleged prevention or obstruction of the Assistant Commercial Tax Officer, Nuzvid, from checking his register and goods under section 14 (2) of the Madras General Sales Tax Act.

The facts are briefly these: On 13th January, 1930, a Friday and *admittedly* a shop-closing day for the petitioner's shop under the Shops and Establishments Act, the petitioner was said to have sold a shawl (*not* controlled article) for Rs. 22-5-6 to P.W. 4 and refused to give him a bill. Thereupon, at the instigation of P.W. 2, an enemy of the petitioner, P.W. 4, gave a report, Ex. P-1, to the Assistant Commercial Tax Officer, Nuzvid. On receipt of the report, P.W. 1 went to the shop of the petitioner at about 2-30 P.M. *that very day* with a view to examine the accounts and registers maintained by the petitioner and verify his cash and stock, presumably under section 14 (2) of the Madras General Sales Tax Act and in order to see if the petitioner was evading any sales tax by not entering this sale in his bills, books and other accounts, day book and ledger. The petitioner placed his bill books before the Assistant Commercial Tax Officer for scrutiny. P.W. 1 perused them and initialled in them. When asked to produce the cash for the sales made that day (P.W. 1 admitted that money was not "goods" which could be inspected by him), the petitioner stated that there were no sales that day, as it was a *holiday*. Then the petitioner took out some currency notes and red papers from a small wooden box *by the side of the cash box* (it will be noted that he did not take them from the cash box) and put them in his pocket. The Assistant Commercial Tax Officer demanded the production of these papers, and cash, but the petitioner said that they related to his *personal matters* and private affairs, and had nothing to do with the business, and refused to produce them. The Assistant Commercial Tax Officer's repeated requests to the petitioner to produce them were in vain. So, P.W. 1 said that he wrote in one of the shop books that the petitioner refused to produce the cash and some papers which he had removed from the wooden box. He then wrote out himself a statement, Ex. P-2, narrating that the petitioner took out some money and notes from a small box and put them in his pocket as they related to promissory notes and miscellaneous accounts of his. P.W. 1 gave Ex. P-2 to the petitioner for signing. The petitioner refused to sign that statement in spite of repeated requests by P. W. 1 to him to do so. At that time P.W. 2 with whom the petitioner had enmity and misunderstandings, went there and suggested to the Assistant Commercial Tax Officer to search the pocket of the petitioner and seize the papers and cash for verification, but the Assistant Commercial Tax Officer did not fall in with this perverse suggestion of an enemy. The petitioner and P. W. 2 had a "scuffle" in the presence of P.W. 1 for fifteen minutes. After that, P. W. 1 requested the petitioner again to sign the statement given to him. The petitioner again refused to do so, even though he wrote in it that P. W. 1 had told him that Government had exempted that day from being a holiday. P.W. 1 took back the statement

and wrote therein that the petitioner refused to sign it. He did not say that day was not a holiday. After that, he asked the petitioner to show him the stock of shawls in his shop, and the petitioner is stated to have refused to show the stock and to have asked him to get out of the shop. The Assistant Commercial Tax Officer, apprehending that the situation might get worse, left the shop peacefully and returned to his own office where he took statements from three witnesses (Anjayya, who was not examined on the ground that he had turned hostile ; P.W. 3, P.W. 1's own clerk, who admitted that he had bought cloth on credit from the petitioner for Rs. 10-14-9 and paid only Rs. 10 after some delay and claimed to have been excused Rs. 0-14-9 though expressing readiness to pay it also, if demanded ; and P.W. 5). These statements are Exs. P-3, P-4 and P-5, and they contain not a word about any request of the Assistant Commercial Tax Officer to the petitioner to show his stock of shawls and his refusal to do so and his asking the Assistant Commercial Tax Officer to clear out of the shop. The Assistant Commercial Tax Officer made a complaint to the Commercial Tax Officer who, after some enquiry, was responsible for laying this complaint against the petitioner under section 14 (2) read with section 15 (*c*) of the Madras General Sales Tax Act, for preventing or obstructing the inspection by the Assistant Commercial Tax Officer of the accounts and registers maintained by the petitioner in the ordinary course of his business and goods in his possession.

The learned Additional First Class Magistrate found that there was an omission in the statements, Exs. P-3 to P-5, regarding the Assistant Commercial Tax Officer's request to the petitioner for showing the stock of shawls and the petitioner's refusal and direction to him to clear out of the shop. But he stated that that was only a *minor incident*, while *the main offence* was the refusal of the petitioner to produce the cash and papers which he had put into his pocket, from the wooden box and which the Assistant Commercial Tax Officer suspected would contain the sale proceeds of the shawl sold to P.W. 4. I may add that P.W. 4 the man who started the whole enquiry by the Assistant Commercial Tax Officer, swore in cross-examination that the petitioner showed the stock of shawls to the Assistant Commercial Tax Officer and did not refuse to allow him to verify the stock and that four shawls were found in the show case in the petitioner's shop, and the Assistant Commercial Tax Officer saw them all. His clumsy attempt, in re-examination and examination by Court, to back out of these admissions, sounded thin and unconvincing especially in view of the omission in the Exs. P-3 and P-5.

I have perused the records, and heard the learned counsel for the petitioner and the learned Assistant Public Prosecutor *contra*. This is a very curious case. The main grievance of the Assistant Commercial Tax Officer has become submerged in the course of the case and some collateral matters have been relied on and have assumed great importance. The Assistant Commercial Tax Officer's main object in going to the shop was to enquire as to why the petitioner did not give a bill for the shawl alleged to have been bought by P.W. 4 that day from him for Rs. 22-5-6, and to book an omission of sale and evasion of sales tax. But that is not the subject of the charge and the learned Assistant Public Prosecutor frankly conceded that there is no proof that P.W. 4 bought that shawl that day from the petitioner or was refused a bill for it, or that the petitioner had omitted to enter a sale of shawl in his accounts or bill books or evaded any sales tax. Indeed, the evidence showed that P.W. 4 probably bought the shawl in question from P.W. 3, a dealer in the same premises !

The next grievance of the Assistant Commercial Tax Officer was that the petitioner would not sign the statement *prepared by him* and said to contain what the petitioner had told him. That statement is Ex. P-2. I have looked into this statement. The lower Court was wrong in holding that rule 24 of the Madras General Sales Tax Rules, giving P.W. 1 a power to summon persons to *give evidence before him* empowered him to go to the petitioner's premises and prepare a statement himself incriminating the petitioner and compel him to sign it. The learned Assistant Public Prosecutor did not contend that the Assistant Commercial

Tax Officer was given power *under any law*, to prepare such a statement himself and *compel* a party to *sign* such a statement incriminating him however slightly, *against his will.* In my opinion, it is *highly objectionable* for officers, like the Assistant Commercial Tax Officer, *to prepare statements themselves* and request for signature from the parties whom they want to charge-sheet later on relying on such statements as evidence. Even Magistrates authorised to record confessions have to observe many formalities and administer many warnings and *record what the party states* and cannot prepare *statements themselves and ask the parties to sign them.* So far as I know, no such power is given to *any officer in this country*, under our law, least of all to Assistant Commercial Tax Officers. It will be highly dangerous to the liberty and property of citizens if such statements prepared on the spot by Assistant Commercial Tax Officers and others have to be signed by them. The misunderstanding that day between the Assistant Commercial Tax Officer and the petitioner arose from the petitioner refusing to sign that statement in spite of repeated and *illegal* requests by the Assistant Commercial Tax Officer. In my opinion, that was probably even one of the causes for instituting this prosecution, let alone the encouragement of it by P. W. 2, the petitioner's enemy. This is the only prosecution under section 15 (*e*) instituted by P. W. 1 according to him. Even that is *not sustainable* in the circumstances.

Now I come to the third point, namely, the Assistant Commercial Tax Officer's requesting the petitioner to produce the cash and currency notes and stray papers he took out from the wooden box by the side of the cash box (and having nothing to do with the cash box) and put in his pocket in spite of the petitioner's assurance that they related to his *private* affairs. Exhibit P-2 does *not* mention any such refusal. Nor would the refusal even if true, be culpable. The learned Assistant Public Prosecutor concedes that, under section 14 (2) of the Madras General Sales Tax Act, the Assistant Commercial Tax Officer was only empowered to inspect *the accounts and registers maintained by dealers like the petitioner in the ordinary course of their business* and *also the goods* in their possession, and their offices and shops, etc., *at all reasonable times*, and that they are *not empowered to compel the production of private papers and cash* thus confirming P.W. 1's own admission in his deposition. "Money is not goods which can be inspected by me." *This is not an accidental slip* in section 14 (2) but a deliberate omission by the Legislature *so that the privacy of the subject may not be infringed unnecessarily by the myrmidons* of Government, under the pretext of examining registers and accounts and goods and shop premises. A man may have private papers which he may not like to show to all and sundry and especially to Government Officials. Thus, letters written by his sweetheart to him, or some private information of great use to him, like likely names of winning horses or about likely appreciation or depreciation of shares, etc., or even defamatory allegations about him made by some one, which he keeps for reading at leisure and consideration, about future action, need not be shown to Assistant Commercial Tax Officers under section 14 (2) nor need promissory notes or private accounts (which may sometimes show disbursements to concubines or illegitimate children) or currency notes, be shown to Assistant Commerical Tax Officers against the will of the person. Suppose for instance, a man has got a thousand rupee currency note, which has been demonetised and for which he cannot account, he is not forced, under section 14 (3), to show that currency note to the Assistant Commerical Tax Officers and bring himself to trouble. Nor, if he has got, let us take an extreme example, one or two counterfeit currency notes of five rupee or one rupee denominations, is he bound to reveal them to the Assistant Commerical Tax Officer. Section 14 (2) must be construed *strictly*. Even a businessman is not bound to reveal all his private secrets, much less incriminating secrets, to people who are not authorised under the law to pry into them. It is not alleged by the Assistant Commercial Tax Officer or his witnesses that the papers were proved to contain a bill about the alleged sale of this shawl or indeed any accounts relating to the petitioner's *business*.

I may even say also that under section 14 (2) the petitioner was *not bound* to allow any inspection of his goods or accounts or registers *at that hour* and *on that day*,

(*lunch interval* or a *holiday*) because section 14 (2) contains a significant phrase "*at all* reasonable *times*" which was misconstrued by the lower Court, relying on a contention of the petitioner, in Exhibit P-2 that P. W. 1 told him that the Government had exempted that day from being a holiday. P. W. 1 swore, in his deposition, that the day was a holiday. He never alleged that Government had cancelled the holiday. So, the lower Court was wrong in relying on the note of the petitioner in Exhibit P-2 *against him* when the note was not held to be true. Nor can the fact that the petitioner was actually found in his shop then empower P. W. 1 to rush there for *his inspection*. No sales were going on admittedly then. Nor will the alleged eagerness of P. W. 1 to discover an omitted entry about a sale and suspected evasion of tax empower him to insist on inspection during *lunch hour* or a *holiday*. The absurdity becomes all the mere ludicrous when P. W. 1 watched the scuffle between P. W. 2, the enemy of the petitioner and the hub of the whole show and the petitioner, for fifteen minutes there, and even after such warning of undesirable forces working underground, proceeded with his fussy business.

For all these reasons it is clear to me that the petitioner ought to have been acquitted of this offence as there was no proof whatever that he had prevented or obstructed any inspection by the Assistant Commerical Tax Officer authorised under section 14 (2) as section 15 (*c*) clearly stipulates. The allegation that the Assistant Commercial Tax Officer was asked peremptorily by the petitioner to clear out of the shop, with an implied threat of being forceably pushed out, if he did not clear out by himself, *is not proved* and is not found in Exhibits P-3 to P-5; and even if it is taken to be true, will not amount to an offence in the circumstances of this case where the Assistant Commerical Tax Officer went to the petitioner's shop on a holiday and during the lunch interval, which he had no right to do under section 14 (2) and also illegally insisted on the petitioners showing him some private papers and cash and signing in an unauthorised statement prepared by himself. Of course, natural physical force is not necessary for obstruction or prevention under section 14 (2). Words causing an apprehension of violence, or acts preventing or obstructing the inspection, like locking the premises to prevent inspection, or running away with the goods and registers will do, in a proper case where there is a right of inspection under section 14 (2).

In the end, therefore, the conviction and sentence of the petitioner are set aside, and the petitioner is acquitted. The fine, if paid, will be refunded.

K. S. ——— *Conviction and sentence set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE CHANDRA REDDI.

S. RM. S. T. Narayanan Chettiar and another .. *Appellants**

v.

The Kaleeswarar Mills, Ltd., and others .. *Respondents.*

Company—Meeting of shareholders—Chairman—How far entitled to decline to preside—Proxies given by shareholders—Revocation of—Right to—Limits—Proper stamp duty leviable on proxies—Decision of chairman of meeting as to sufficiency of stamp—Finality—Costs—Defendants with no separate interest in the suit and questions considered common questions—Defendants engaging separate advocates—If justifies award of separate sets of costs to each defendant.

The chairman of a meeting is not entitled to stop the meeting at his own will and pleasure. If a meeting is called for a particular purpose of the company, undoubtedly, a person should preside at that meeting and invariably the constitution of the company provides for the same. It is not open to the chairman to stop the meeting and dissolve it before the business of the meeting is finished. It is the privilege and the right of the shareholders assembled at the meeting to decide whether they should continue the business of the meeting on that day or adjourn it for a subsequent date. If the chairman unjustly and without the consent of the shareholders stops the meeting and declares it

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*Appeal No. 36 of 1950. 7th September, 1950.

dissolved, it is perfectly within the powers of the meeting to elect a chairman and conduct the business remaining unfinished; but there is nothing to prevent the chairman giving up his right to preside at the meeting. A person cannot be compelled to continue to act as chairman of a meeting of the shareholders. There is nothing in law to compel a man to do that which he is not willing to do.

Until recently, both in England and India, a member had no right to vote by proxy unless the articles provided for such a right as common law did not recognise voting by proxy. The articles, however, generally conferred such a right subject to such conditions and limitations as are prescribed thereunder. This right has now been recognised by the statute both in England from 1947 now enacted as section 136 of the Act of 1948 and by section 79 of the Indian Companies Act as amended in 1936. The relationship brought about between the shareholder and his proxy is that of a principal and agent and the incidents of that contract have to be determined by applying the law of contracts, whether it is in the form of a statute as in India or is ascertainable from judicial decisions as in England. It cannot be said that all the rights and liabilities which flow from a contract by reason of the application of the general law of contracts do not attach themselves to a contract unless they are enumerated in the contract itself. In the absence of any thing in the contract to the contrary (by some provisions in the Articles of Association) there is no reason to exclude the right of a shareholder to revoke the proxy.

The effect of the want of notice to the agent of the revocation does not invalidate the revocation or the termination of the authority but makes the principal liable for any damage that results to the agent by reason of such want of notice.

The ruling of a chairman given at one stage of a meeting is final and binding on the chairman or his successor at a later stage. The successor cannot go into the sufficiency or otherwise of the stamp on a proxy which had already been admitted as sufficiently stamped. He cannot at any rate reject such proxies without giving an opportunity to the party to make good the deficient stamp duty after ascertaining the opinion of the Collector on the matter. So long as a shareholder complies with the formalities laid down by the articles regarding stamp duty on the basis enacted in the articles, it is the bounden duty of the chairman to accept the proxy and he is not entitled to reject it.

A proxy providing "do hereby appoint as my attorney or substitute to vote for me and on my behalf at the (Ordinary or Extraordinary, as the case may be) general meeting of the company to be held on the 30th September, 1948 and at any adjourned meeting thereof, or at any meeting of the company that may be held within the period of one year from the date hereof, or generally as the case may be", means at any meeting of the company within a period of one year or generally without any limitation as to time. The instrument in the circumstances must be construed as intended to authorise the person to vote at any one meeting though the power is given in the alternative and the proper stamp duty payable will be two annas as a proxy within the meaning of Article 52 of the Stamp Act. It need not be stamped as a power-of-attorney. Assuming that the proxy is a general power-of-attorney the document would fall under clause (*g*) of Article 48 of the Stamp Act.

Where the defendants had no separate interest in the suit and the questions that were considered were common questions, merely because the defendants chose to engage separate advocates that will not justify the allowing of separate sets of costs to each of the defendants.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in O. S. No. 294 of 1949, dated 23rd December, 1949.

V. C. Gopalaratnam and *L. V. Krishnaswami Aiyar* for Appellants.

K. Rajah Aiyar, *K. Krishnaswami Aiyangar* and *K. Parasurama Aiyar* for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—This appeal relates to a dispute between two rival groups of shareholders of Kaleeswarar Mills, Ltd., Coimbatore, each attempting to obtain control over the management of the company. For this purpose, these two factions have engaged themselves in a battle of wits for a long time with the result that the business of the company has been seriously affected. For the purpose of this appeal, it is not necessary to advert to the incessant quarrels between the two groups since 1931. It would be sufficient to start from 1948. The two factions are led by Sathappa Chettiar on the one hand who represents the plaintiffs' group and A. L. A. R. family consisting of three brothers of whom the eldest, Kalairaja Chettiar is the leader. The annual meeting of the company which is the first defendant in the case, for the year ending 1947, was held on 30th September, 1948. The agenda paper for that meeting contained four subjects:

1. To receive and adopt the directors' report and the audited profit and loss account for the year ended 31st December, 1947, and the audited balance sheet as at 31st December, 1947;

2. To elect directors in the place of the two directors who retired by rotation;

3. To appoint an auditor or auditors and to fix his or their remuneration;

4. To approve the co-option of Messrs. P. K. Palaniappa Gounder and A. L. A. R. Arunachalam Chettiar.

The company was incorporated under the Indian Companies Act, 1882, in or about 1906. Its main object was to manufacture cotton goods. Among the signatories to the memorandum of association are included the legal luminaries of the Madras Bar at the time, *viz.*, Sri V. Bhashyam Aiyangar, P. R. Sundaram Aiyar, V. Krishnaswami Aiyar and S. Srinivasa Ayyangar besides business magnates. The Articles of Association of the company excluded the application of Table A in the first schedule to the Indian Companies Act; but the regulations framed were modelled more or less on the regulations contained in Table A. The capital of the company, which then consisted of nine lakhs of rupees, was divided into 9,000 shares of Rs. 100 each. Sathappa Chettiar's group owned in 1948 as many as 3,450 shares while the A. L. A. R. group owned only 2,300 shares. Before the general body meeting of September, 1948, however, the A. L. A. R. group increased their voting capacity by splitting their shares and transferring single shares to various individuals. About 450 single shares were registered with that end in view in the name of 450 individuals who were not members before.

The proceedings of the meeting of the 30th September, 1948 (Exhibit A-2 in A.S. No. 29 of 1949) show that Palaniappa Gounder, the present fifth defendant, who was the chairman of the Board of Directors entitled to preside at every general meeting under Article 78, presided at that meeting and disposed of the various objections raised at that meeting. Before the subjects on the agenda were considered, objection was taken on behalf of A. L. A. R. group that proxies filed on behalf of the plaintiffs' group were not valid as they were not given particularly for that meeting but they were general in language. The objection was answered on behalf of the plaintiffs' group by Mr. Lakshmanan, the present second plaintiff, stating that the proxies were intended only for that meeting which was made clear from the date given in the proxies. On this the chairman ruled that the proxies were valid. Mr. Lakshmanan also seems to have objected to the validity of about 49 revocations of proxies filed by the opponents but the chairman overruled that objection. The most important objection that had to be considered, however, raised by the second plaintiff was that shareholders owning less than five shares were not entitled to vote in view of Article 88 which provided that every shareholder not disqualified shall have one vote in respect of every five shares. After due consideration, the chairman overruled this objection. The subjects which were on the agenda were taken up for consideration and were put to vote one after the other. On a show of hands, the sense of the meeting was in favour of the resolutions and at each time a poll was demanded and on a poll, 859 votes were cast in favour of the resolutions and 703 votes against. At the end of each poll, the plaintiffs' party demanded a further poll which is styled under the articles, as a "poll of the whole company"; but this was rejected. The result, therefore, of the poll at this meeting was that the A. L. A. R. group were successful and the plaintiffs' party lost. The two plaintiffs in the present suit, who were the sitting directors, were unseated and in their place, defendants 6 and 7 were elected and the co-option of the 4th and 5th defendants was approved.

Two of the shareholders thereafter filed on the 7th October, 1948, a representative suit on behalf of themselves and on behalf of the shareholders of Kaleeswarar Mills, Ltd. (O. S. No. 325 of 1948, Sub-Court, Coimbatore) to declare that the resolutions passed at the general body meeting were illegal and void and that the newly elected and co-opted directors were not entitled to act. There were various objections to the resolutions passed at that meeting which were considered by the learned Subordinate Judge who tried the suit. He dismissed the suit overruling the contentions of the plaintiffs in that action. There was an appeal to this Court against that decision in A. S. No. 29 of 1949 and in that appeal, the plaintiffs confined their objections to the resolutions to three grounds: firstly,

that persons who owned less than five shares were allowed to vote when the poll was taken which was contrary to the provisions of the Articles of Association; secondly, the demand for a poll of the whole company should have been allowed by the chairman; thirdly, that Palaniappa Gounder, the present fifth defendant, was not competent to act as chairman of the meeting as the confirmation of his co-option as a director was one of the subjects comprised in the agenda for that meeting. On the first of the three questions there was a difference of opinion between Horwill, J., and Raghava Rao, J., who heard the appeal in the first instance, the former holding that every shareholder even if he owned less than five shares was entitled to vote but if a shareholder owned five or more shares, he would be entitled to one vote in respect of every five shares. In other words, a shareholder having between 5 and 9 shares will have only one vote and those having between 10 and 14 shares two votes and so on; but a person holding less than five shares would be entitled to one vote. This view, however, was not shared by Raghava Rao, J. As there was a difference of opinion on this point, the case was laid before a third Judge, Viswanatha Sastry, J., who agreed with Horwill, J. On the other two questions, both the learned Judges concurred. The second poll is no doubt a unique feature of this company, but according to the learned Judges, such a poll should be taken if demanded in the manner provided by the Articles of Association. A poll of the whole company was probably intended, as observed by Horwill, J.,

"to afford an opportunity, where a considerable number remain dissatisfied after the show of hands and polls are taken, for the whole company, including those not present in person or by proxy at the meeting, to express their opinion on the matter."

On the third question also, both the learned Judges were unanimous in holding that it was an elementary principle of justice that a person should not preside while the meeting is considering a question which personally affects him. The result was that the learned Judges directed that before the decisions on the various resolutions in which a second poll was demanded can be considered finally, there should be another poll at the registered office of the company at such time as the fifth defendant should direct and that he should vacate the chair when a resolution relating to his co-option is to be taken up for consideration. The decree of the High Court (Exhibit A-4) directed, after setting aside the decree of the trial Court dismissing the suit:

1. That before the decisions on the various resolutions in which the second poll was demanded can be considered final, a fresh poll shall be held at the registered office of the company at such time as the fourth defendant (the present fifth defendant) shall direct;

2. That the fourth defendant (the present fifth defendant) should not preside when the question of his co-option is in question;

3. That at the poll to be held in pursuance of clause (1) *supra*, each member will be entitled to vote, the number of votes being calculated according to the provisions of Article 88 of the Articles of Association.

The plaintiffs' party were anxious to know the addresses of some of the shareholders comprised in the newly added 450 members with a view to canvass their support for the second poll. Their complaint was that particulars regarding the shareholders so added were not given in the register as required by sections 31 and 32 and form E of the third schedule to the Indian Companies Act. There was some correspondence between Sathappa Chettiar and Kaleeswarar Mills, Ltd., on this point but there was no sign of getting the required information. On the 29th August, 1949, three of the directors of the plaintiffs' party sent notices calling for a meeting of the directors to be held at the registered office of the company on the 6th September, 1949, at 10 A.M., to consider the matters on which they required information and also to waive under Article 94 of the Article, the rule relating to deposit of proxies for the purpose of poll. On the same day the fifth defendant published a notice, Exhibit A-8, to the shareholders of the company intimating that the second poll of the annual general body meeting held on the 30th

September, 1948, would be taken on Monday, the 5th September, 1949, commencing from 3 P.M. at the registered office of the said company. The plaintiffs' party sent a circular to the shareholders newly added, Exhibit A-12, and obtained revocations of the proxies. On the 4th September, 1949, Exhibit A-11 was addressed to the fifth defendant, the chairman of the Board of Directors, by four people of the plaintiffs' group in which they impeached the *bona fides* of the chairman and intimated that they lost their confidence in him to act impartially as chairman at the meeting for conducting the second poll. They also anticipated that the chairman had made up his mind to summarily reject all revocations obtained by the plaintiffs' group. Some of these revocations have been marked as Exhibit B-3 series. It is agreed before us that the total revocations covered proxies in respect of 230 votes which were obtained by the plaintiffs and which would have the effect of cancelling the proxies already obtained and deposited by the defendants' group before the meeting of the 30th September, 1948. On the 5th September, 1949, at 3 P.M., the shareholders assembled at the registered office of the company and the revocation forms were handed over to the chairman. The chairman, the fifth defendant, then decided that he did not intend to preside at the meeting for two reasons: firstly, because the High Court had directed that he should not preside at the second poll when the subject of his co-option would be under consideration and secondly because he had received a communication from some shareholders, apparently referring to Exhibit A-11, in which advice was given to him as to how he should give his rulings. He requested the members to choose a chairman to take the poll. The names of two directors were suggested, Messrs. Alagappa Chettiar, the third defendant and K. Srinivasa Ayyar. The former belongs to the A. L. A. R. group and the latter to the plaintiffs' group. The plaintiffs did not then object that the chairman had no right to decline to preside at the poll. On the contrary, they accepted the position that the chairman was entitled to decline to preside and to put up a candidate of their own for the chairmanship. The plaintiffs' candidate Srinivasa Ayyar was defeated by a large majority and Alagappa Chettiar was elected chairman by the shareholders. Then the proceedings continued and Arunachala Ayyar and Narayanan Chettiar were appointed scrutineers. The revocations received that day were rejected as unacceptable. The first plaintiff objected that the revocations filed before 30th September, 1948, numbering 49 should not be accepted as they were not stamped; but his objection was overruled. At about 10 P.M., one of the scrutineers who belonged to the defendants' group filed a memo. before the chairman of the meeting raising three objections. The second of it was that the proxies filed by Narayanan Chettiar, Lakshmanan Chettiar and Ramanathan Chettiar (plaintiffs' group) for the meeting of the 30th September, 1948, were not properly stamped as they were not proxies but were powers-of-attorney and should have been stamped as such. The other scrutineer was however of the view that the objections of Arunachala Aiyar were untenable. The chairman adjourned this question for decision being given before 10 A.M. the next day. The poll was then taken on all the resolutions which resulted in securing 793 votes in favour of the resolutions and 767 against. On the next day, 6th September, 1949, the chairman gave his ruling that the proxies were invalid and they should be excluded. Consequently, 661 votes cast against the resolutions were excluded as a result of which the number of votes against the resolutions were reduced from 767 to 106. There were therefore 793 votes in favour of the resolutions and 106 against. The plaintiffs, therefore, lost in this poll and the election and co-option of directors was upheld and the two plaintiffs were unseated.

The unseated directors instituted the suit which has given rise to this appeal objecting to the poll taken on three grounds: firstly, Palaniappa Gounder the fifth defendant had no right to decline to preside at the poll and that the shareholders had no right to elect the third defendant as chairman; secondly, that the revocations should not have been rejected; and thirdly, that the proxies were valid and the votes recorded under those proxies should not have been excluded. The first defendant to the suit is the company, the fourth and fifth defendants are the co-opted directors, the sixth and seventh defendants the newly elected directors,

the third defendant is the chairman who presided at the poll and the second defendant is Kalairaja Chettiar, the leader of the defendants' group. In the lower Court, the parties did not lead any oral evidence and contented themselves by filing documents. The trial Court rejected the contentions of the plaintiffs and dismissed the suit. Hence this appeal.

The same questions have again been argued elaborately before us. The first question for consideration is whether the fifth defendant was bound to preside at the poll. On this point we have no hesitation in agreeing with the conclusion of the learned Subordinate Judge that the fifth defendant cannot be compelled to continue to act as chairman notwithstanding the fact that his *bona fides* were questioned earlier by the plaintiffs and this Court directed, at any rate, that so far as one of the subjects was concerned, he should not preside at the poll. The argument before us on behalf of the plaintiffs by the learned Advocate was that the decision of the High Court precluded the chairman from declining to preside at the poll. No doubt, the judgment of the High Court and the decree proceeded on the assumption that the chairman of the Board of Directors would continue to preside even at the poll as the poll was nothing but a continuation of the meeting of the 30th September, 1948. The decree directed that he should fix the time for the second poll. This was done by him and there is no other indication in the judgment preventing him from having the right recognised by Article 78. That article provides that the chairman of the Board of Directors should preside only if he is willing. There is nothing in law to compel a man to do that which he is not willing to do. Express power is recognised in the article itself to give up the right if he so chooses. The chairman of the meeting is not entitled to stop the meeting at his own will and pleasure. If a meeting is called for a particular purpose of the company, undoubtedly, a person should preside at that meeting and invariably the constitution of the company provides for the same. It is not open to the chairman to stop the meeting and dissolve it before the business of the meeting is finished. It is the privilege and the right of the shareholders assembled at the meeting to decide whether they should continue the business of the meeting on that day or adjourn it for a subsequent date. If the chairman unjustly and without the consent of the shareholders stops the meeting and declares it dissolved, it is perfectly within the powers of the meeting to elect a chairman and conduct the business remaining unfinished; but there is no authority in support of the proposition that a chairman is not entitled to give up his right to preside at a meeting. There is no direct authority on the question but Article 78 itself recognises that the chairman of the Board of Directors can preside over the meeting only if he is willing. That it is not open to a chairman of the meeting to stop the meeting or adjourn it at his sweet will and pleasure has been decided by Chitty, J., in *National Dwelling Society* v. *Sykes*[1]—*see also* 8 Halsbury, p. 61, para. 108 and 5 Halsbury, p. 364, para. 592, Hailsham Edn. *Chatesby* v. *Burnett*[2] is an instance in which also the chairman of the meeting declared that the business was closed and left the chair and the hall whereupon the shareholders elected another to the chair and carried on the business of the meeting. The second poll also is undoubtedly a part of the meeting and the contention of the appellants that it was not open to the shareholders to elect another chairman in our opinion, proceeds on a wrong hypothesis. In support of the contention, a passage in the judgment of Curgenven, J., in *Srinivasan* v. *Watrap Subramania Aiyar*[3] was relied on by the appellants where the learned Judge observed:

> "The original meeting in law continues until the chairman has carried out the directions given to him by the shareholders to take a poll. It is a notional meeting, not dependent for its existence and continuity upon the shareholders being actually in session and business being transacted. The actual process of holding the poll is not a 'meeting' at all. It differs in several of its features from any meeting of shareholders."

1. (1894) 3 Ch.D. 159.
2. (1916) 2 Ch.D. 325.
3. (1931) 61 M.L.J. 724.

These observations of the learned Judge have to be taken in relation to the facts of that case. In that case, the chairman of the meeting directed, when a poll was demanded on a resolution, that it should be taken on a subsequent day between 4 and 6 P.M., and appointed the company manager, one Mr. Church, as returning officer for the purpose of taking it. The poll, however, was not taken on the 20th as for some reason Mr. Church was unable to attend to the poll. The question that had to be considered was whether the process of holding the poll was a detached portion of the general meeting or was, at any rate, a meeting within the meaning of the Articles of Association. This point became material as it was contended that when the Commissioner, Mr. Church was absent to take the poll, it was open to the shareholders assembled to have elected a new chairman for the meeting and as they did not do so, the meeting was at an end. In answer to these objections, it was pointed out that the original meeting continued in law until the chairman had carried out the direction given to him by the shareholders to take a poll. The actual process of holding the poll was not a meeting at all though the result of the poll formed part of the meeting at which the poll was demanded. The meeting therefore did not come to an end until the result of the poll was ascertained in the manner provided by the articles. The original meeting continued therefore for the purpose of taking the poll until the poll was closed. For this position, the decisions in *Harben* v. *Phillips*[1], *The Queen* v. *Wimbledon Local Board*[2], *Shaw* v. *Tati Concessions, Ltd.*[3] and *Spiller* v. *Mayo Development Co., Ltd.*[4] were relied on. The decision in *Srinivasan* v. *Watrap Subramania Aiyar*[5], in our opinion, far from supporting the contention of the appellants, is against them. The meeting of the shareholders on the 5th September, 1949, was a continuation of the meeting and it was open to the shareholders to elect a chairman when the fifth defendant declined to preside at that meeting. The chairman so elected was not like the Commissioner, Mr. Church in the case in *Srinivasan* v. *Watrap Subramania Aiyar*[5]. His function was not merely to supervise the recording of the votes. He was entitled to exercise all the functions of a chairman at the meeting. For these reasons we think that the objections of the appellants on this point are not well founded and must be rejected.

The next point that has to be considered is whether the chairman was justified in rejecting the revocations. Until recently, both in England and in India, a member had no right to vote by proxy unless the articles provided for such a right as common law did not recognise voting by proxy. The articles, however, generally conferred such a right subject to such conditions and limitations as are prescribed thereunder. This right has now been recognised by the statute both in England from 1947 now enacted as section 136 of the Act of 1948 and by section 79 of the Indian Companies Act, as amended in 1936. As the articles generally recognised a right to vote by proxy, it is a contractual right as the Articles of Association undoubtedly constituted a contract between the company on the one side and the members on the other. Independently of the contract, therefore, until the statute altered it there was no right of voting by proxy. The reason why the right to vote by proxy was not recognised seems to be that "when persons agreed" as pointed out by Bowen, L.J., in *Harben* v. *Phillips*[1],

> "to act together in the conduct of a business, the way in which that business is to be carried on must depend on each case on the contract, express or implied, which exists between them as to the way of carrying it on."

The decision on every question relating to the business of an incorporated company should essentially be that of the shareholders, having regard to their interest in the company. Unless, therefore, there was a contract between the company and the shareholders, they could not delegate this power of expressing their opinion at a meeting of the company to another. These propositions are so well established as not to require citation of a number of authorities in support of them. It is

1. (1882) 23 Ch.D. 14 at p. 35.
2. (1882) 8 Q.B.D. 459.
3. (1913) 1 Ch. 292.
4. (1926) W.N. 78.
5. (1931) 61 M.L.J. 724.

summarised in Palmer's Company Law, 19th Edition, at page 153. A proxy is defined by Lord Hanworth, M.R., in *Cousins* v. *International Brick Co.*[1], as

> "a person representative of the shareholder who may be described as his agent to carry out a course which the shareholder himself has decided upon"

and the Lord Justice in the same case defined a proxy as an agent of the shareholder who, as between himself and the principal, was not entitled to act contrary to his instructions in the matter. It cannot therefore be seriously disputed that the relationship brought about between the shareholder and his proxy is that of a principal and agent. The argument of the respondents is that unless the power of revocation is expressly conferred by the Articles under which a right of voting by proxy is recognised, the power of revocation does not exist and that the contract creating the agency is exhaustive of the rights and duties of the proxy. This contention proceeds upon a wrong view of the incidents of a contract of agency. When once the relationship of principal and agent is created by contract, the incidents of that contract of agency are governed and have to be determined by applying the law of contracts. In India such law is to be found in the Contract Act. The argument on behalf of the respondents amounts to this that all the rights and liabilities which flow from a contract by reason of the application of the general law of contracts do not attach themselves to a contract unless they are enumerated in the contract itself. In other words, if there is a contract of sale of goods unless all the rights and liabilities of the seller and buyer which are to be found in the Sale of Goods Act are specifically enumerated in the contract itself, they have no application. When once there is a contract all the legal incidents of such a contract are governed by the law of contracts whether it is in the form of a statute as in India or is ascertainable from judicial decisions as in England. It will be an intolerable state of affairs if one is obliged to embody in every contract the provisions of the Contract Act or the Sale of Goods Act as the case may be relevant to such a contract. When once the relationship enters the region of contract, the law of contract alone must determine its incidents. On the argument of the respondents, the relationship of agent and principal brought about by the execution of the proxies cannot be terminated even by death though they are forced to concede that such a termination follows and that even when the principal is present in person at the meeting, the right of the proxy to exercise his vote on behalf of the principal must yield to the right of the principal to exercise the vote personally. If so much is conceded, it is difficult to see why the principal should be denied his right to revoke a contract which brought about the relationship of principal and agent. The Articles might make the proxy irrevocable or impose restrictions or circumscribe the limitations within which the power of revocation should be exercised. But all these are matters within the region of contract between the parties and in the absence of anything to the contrary, there is no reason to exclude the right of revocation which is recognised under section 203 of the Contract Act. There are other limitations imposed by the Contract Act on the exercise of the power of revocation, *e.g.*, if the revocation is made after the authority had been partly exercised, section 204 of the Act preserves the validity of such acts and obligations and makes the revocation effective only in respect of future acts. If the agency is limited to a period of time and without sufficient cause it is revoked before the expiry of the period under section 205, the agent is entitled to compensation. The principal is bound to give reasonable notice of revocation as otherwise he would be liable to pay damages to the agent which result from such act of his. As regards third persons, under section 208, the termination of authority of the agent does not take effect before it becomes known to them so that if third persons are sought to be affected by revocation of the authority of the agent, the principal must give due notice of the same. Termination of the authority by death of the principal is recognised under section 209. On an examination of the authorities cited at the Bar, it will be seen that the same principles have been applied for the revocation of proxy by a shareholder.

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1. (1931) 2 Ch. D. 90.

The subject of revocation of proxy is dealt with by Palmer in his book on Company Law, 19th Ed., page 154 and he summarises the law on the subject in these terms :

"The appointment of a proxy, unless made irrevocable for valuable consideration, can be revoked. The revocation must, however, conform to any provisions in the articles.

If the shareholder, after appointing a proxy, himself attends the meeting, he can vote in person. The right of the shareholder to vote in person is paramount to the right of the proxy. The presence of the shareholder does not avoid the instrument of proxy ; but if he votes before his proxy has voted for him, he impliedly revokes the proxy.

The death of a shareholder who has appointed a proxy, in the absence of the provisions in the articles, revokes the authority of the proxy."

This summary by the learned author is based on the decisions in *Spiller* v. *Mayo Development Co., Ltd.*[1], *Cousins* v. *International Brick Co.*[2], *Knight* v. *Bulkeley*[3]. The subject is also discussed and the same principles more or less have been recognised in Halsbury's Laws of England, Vol. 5, pages 364 and 365 where voting by proxy and revocation of proxy are discussed ; 8 Halsbury 61, paragraph 108 discusses the subject of proxies ; Buckley on Companies Acts, 12th Ed., pages 324 and 325; Shackleton on Law relating to Meetings, 1934 Edn., at page 62.

In *Spiller* v. *Mayo Development Co., Ltd.*[1] one of the articles provided that

"a vote given in accordance with the terms of an instrument of proxy or power of attorney shall be valid notwithstanding the previous death of the principal or revocation of the proxy, or power of attorney, or transfer of the share in respect of which the vote is given, provided no intimation in writing of the death, revocation, or transfer shall have been received at the office before the meeting."

After a poll for the election of a director the scrutineers discovered that a proxy was revoked by the principal before the poll. The votes recorded on the strength of that proxy were excluded from the poll. If such votes were allowed the plaintiff in the action would have been successful in the election as a director and the respondent would have been defeated. The question that had to be decided was whether the exclusion of the votes from the poll by the chairman was justified. The Article clearly provided that the notice of revocation should be received at the office before the meeting, *i.e.*, before the commencement of the meeting. The revocation in that case that had been received was communicated to the office only before the poll and not before the meeting. The communication therefore was ineffective to make the revocation operative. It was therefore held by Russell, J., that the votes were improperly rejected. In the course of the judgment, the learned Judge stated the law in these terms :

"The matter really turned upon Article 88, which he had been told was also in common form, but, if so, in his view it was a somewhat unfortunate common form. Omitting for the moment the proviso, it seemed quite clear, upon the construction of that article, that a vote given by proxy was by contract between the shareholders, to be valid notwithstanding that the shareholder had died before the vote was taken, and notwithstanding that the shareholder had revoked the proxy before the vote was given ; but that contractual result, which might in certain instances be somewhat startling, could be avoided if the proviso was complied with. It could be avoided apparently if an intimation in writing of the death or revocation was received at the office 'before the meeting'. Two points had been urged by Mr. Gordon Brown on behalf of the plaintiff why these votes should not have been objected to. The first point was there had been in fact no intimation of any revocation at all. In his Lordship's opinion that could not be sustained. The second point was in his view a more formidable one. It was said that no intimation of the revocation was received before the meeting. In his Lordship's opinion, if English language meant anything, the article required that in order to invalidate the vote, intimation in writing of the revocation must be received at the office before the meeting, and in his view that must mean before the commencement of the meeting. It was well settled that the taking of a poll was not a meeting of the company in the strict sense, but was in law a mere continuation of the meeting at which the poll was directed to be taken. For the particular purpose in question therefore the meeting must be held to have begun on December 15th and to have come to an end at the declaration of the poll, a week later. The intimation of revocation, however, had been received between those two dates. In his opinion it was impossible to say on the true construction of the particular article that the proviso has been complied with, namely, that intimation in writing of the revocation had been received before the meeting. In his Lordship's view it was received after the meeting had commenced ; it had been received during the meeting. Accordingly the proviso

1. (1926) W.N. 78 : 61 L.J. 901.
2. (1931) 2 Ch. 90.
3. (1859) 5 Jur. (N.S.) 817.

did not operate, and the original part of the article must be held to operate, namely, that the vote given by the proxy was valid notwithstanding the revocation of the proxy during the meeting."

If the articles lay down the limitations within which a power to vote by proxy can be exercised, it should be strictly observed. This follows from the fact that the right to vote by proxy is founded on contract. For this reason it was held in *Harben* v. *Phillips*[1], that where the articles required that the proxy papers should be attested in a particular manner and if this condition is not satisfied, they should be rejected. *Mclaren* v. *Thompson*[2] also illustrates the same principle. The article in that case required that the instrument appointing a proxy should be deposited at the registered office of the company not less than two clear days before the day of the meeting. The proxies were lodged between the dates of the original meeting and its adjournment. It was held that the adjourned meeting when held was really a continuation of the meeting at which the adjournment took place and as the proxies were not deposited before the date for holding the meeting as required by the article they were invalid and were therefore rejected. Astbury, J., says at page 46 :

"There is no inherent or equitable right in any shareholder to vote by proxy ; such right, if it exists, must be found in the contract binding the shareholders generally, that is in the company's regulations or constitution, and it then exists only in the form and subject to the limitations therein appearing. There is no room for contending that an appointment of a proxy, irregularly made, is within the spirit or equity of any inchoate right so to vote existing in the shareholder ; he has either complied with the terms of the contract upon which alone the right is based or he has not. *Prima facie* a provision that a proxy must be lodged before the day for holding or before the time for holding a meeting means that it must be lodged before the beginning and not before the end of the gathering."

These and similar observations in other decisions were relied on on behalf of the respondents as establishing the proposition that unless the right of revocation is expressly conferred by the articles, there is no right of revocation. The restrictions on the power to vote by proxy are undoubtedly absolute but the power of revocation is an incident of the contract of agency and wherever a power to vote by proxy is conferred, the power of revocation unless excluded under the articles, exists as the relationship of principal and agent is governed by the law of contract. The right to vote by proxy and the right of revocation are distinct powers. In *Cousins* v. *International Brick Co.*[3] there were two provisions in the articles of association, one providing that the instrument appointing a proxy should be deposited at the office not less than 48 hours, before the time of holding the meeting at which it should be used and the other regulation that a vote given in accordance with the terms of the instrument of proxy will be valid notwithstanding the previous revocation of the proxy provided no intimation in writing of the revocation shall have been received at the office before the meeting. Some shareholders purported by notice in writing to revoke the proxies given by them previously, while others without giving notice to revoke the proxies voted personally at the meeting. The revocation of the proxies was not in accordance with the articles of association as the intimation in writing of the revocation was not received at the office before the meeting. The case therefore was directly governed by the decision in *Spiller* v. *Mayo Development Co., Ltd.*[4] The further question was whether the shareholders were entitled to vote personally without revoking the proxies given by them. The Court of Appeal accepted the view of Russell, J., on the question whether the revocation was effective ; on the second question, it was held that the person by giving a proxy was not thereby deprived of exercising the vote personally before the proxy had exercised the vote. Lord Hanworth, M.R., pointed out in the course of his judgment that it is open to provide by articles to exclude the right to vote personally when a proxy was given ; but if this is not done and there are no clear words taking away the shareholder's personal right to vote after he has put in force the proxy system the personal right remains and the shareholder is entitled to attend and give his vote according to his choice. The proxy is not entitled to prevent him from exercising the vote. Lawrence, L.J. and Romer, L.J., put it also on the ground that

1. (1882) 23 Ch.D. 14.
2. (1917) 2 Ch.D. 41.
3. (1931) 2 Ch.D. 90.
4. (1926) W.N. 78 : 61 L.J. 301.

"every proxy is subject to an implied condition that it should only be used if the shareholder is unable or finds it inconvenient to attend the meeting. The proxy is merely the agent of the shareholder, and as between himself and his principal is not entitled to act contrary to the instructions of the latter."

"A proxy is always subject to an understanding that the shareholder giving it does not elect to give his vote in person and when he in fact gives a vote in person he is not revoking the proxy but taking a step which obviates the necessity of the proxy being used at all." (Per Romer, L.J., at page 103.)

From these observations it follows that the exercise of a personal vote by the shareholder after he had adopted the proxy system does not revoke the proxy but only prevents the exercise of the vote by the proxy. The decision in In re *Haven Gold Mining Co.*[1] and *Colonial Gold Reef, Ltd.* v. *Free State Rand, Ltd.*[2], also illustrates the same proposition that the various matters relating to the poll are matters of contract as provided by the articles. It is unnecessary to deal with those decisions in detail and none of the decisions, therefore, relied on on behalf of the respondents, support the proposition that the shareholder has no right to revoke a proxy once given unless such a power is expressly conferred by the articles.

Articles 91 to 97 of the Articles of Association of the first defendant company relate to proxies. None of these articles exclude the power of revocation nor do they lay down any restrictions as to the manner in which the power of revocation should be exercised as in *Spiller* v. *Mayo Development Co., Ltd.*[3] and *Cousins* v. *International Brick Co.*[4] The power of revocation, therefore, is unfettered and if it is communicated in due time to the company, there is no reason for holding that it does not take effect. The requirement as to notice to the company of the revocation is to be derived from the provisions of the Contract Act, section 208 which enacts that the termination of the authority of an agent does not take effect so far as third parties are concerned before it becomes known to them.

The next line of argument adopted by Mr. Rajah Aiyar, learned advocate for the respondents, is based on the language of Article 96 which states

"Any instrument appointing a permanent proxy or attorney to vote may be registered with the company once for all and shall be in force until the same shall be revoked."

It was suggested that this article specifically confers a power of revocation in respect of a permanent proxy or attorney and as express mention of specific power is made in the case of a permanent proxy, the power of revocation in the case of specific power must be deemed to have been excluded on the maxim *expressio unius est exclusio alterius* (the express mention of one thing implies the exclusion of another) which has been applied in the construction of written instruments. In the first place the article does not expressly confer a power of revocation. On the contrary it assumes that the power was existing and therefore lays down that the instrument appointing a permanent proxy will hold good until the same is revoked. The maxim, therefore, has no application at all. Further the subject-matter of Article 96 is a permanent proxy and not a specific proxy. If power of revocation of a limited nature is recognised in respect of a specific proxy by any article then it would be possible to contend that by reason of the express mention of the limited power any other power is excluded. The argument proceeds in a misconstruction of Article 96 and on a wrong appreciation of the scope of the maxim.

It is next contended that a proxy can be revoked only before its use and as in the present case, the proxies were used to exercise the vote at the first poll of the same meeting, it is too late to revoke the proxies. In other words, a proxy cannot be revoked between one poll and another and these two polls at the same meeting should be treated as one act and not as a series of acts. The power to revoke an authority given to an agent, after the authority has been partially exercised, has been recognised by section 204 of the Contract Act. The revocation cannot have the effect of invalidating acts and obligations already done in the exercise

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1. (1881) 20 Ch.D. 151.
2. (1914) 1 Ch.D. 382.
3. (1926) W.N. 78 : 61 L.J. 301.
4. (1931) 2 Ch.D. 90.

of that authority as an agent. The first poll of the meeting at which the proxies were exercised became final and the effect of revocation of the proxies cannot in any manner affect the declaration of the result of that poll; but the second poll which is styled as the whole company's poll is a different act in a series of acts done at the meeting. There is no reason nor is there any authority in support of the contention that at that point of time a proxy could not be revoked or authority of the agent could not be terminated. On the principle underlying section 204 of the Contract Act, it is difficult to accept the contention of the learned advocate for the respondents.

Lastly, it is urged that there was no notice by the principal to the agent and therefore the revocation was not valid. There is undoubtedly notice to the third party, *i.e.*, the company. But it is not suggested on behalf of the appellants that there was any notice of revocation to the proxy. The effect of the want of notice to the agent does not invalidate the revocation or the termination of the authority but makes the principal liable for any damage that results to the agent by reason of such want of notice. There is no complaint here by the persons in whose favour the proxies were given that they had suffered any damage nor is it relevant for the purpose of this case. The contention, therefore, that the revocation is invalid on this ground must be rejected.

From the foregoing discussion it follows that the rejection of the revocations by the chairman was wrong.

The next and the more difficult question for decision is whether the rejection of the proxies by the chairman was justified. The proxies were rejected on the ground that they were insufficiently stamped. According to the respondents, the proxies are in the nature of powers-of-attorney under Article 48 of the Indian Stamp Act and should have been stamped as required by that Article and that they were not proxies within the meaning of Article 52 to justify a stamp of two annas. The first defendant company was incorporated under the Indian Companies Act, 1882 and the Articles of Association were modelled on the Articles contained in Table A of that Act. The Indian Act of 1882 was framed on the lines of the English Companies Act, 1862 (25 and 26 Vict., Ch. 89). In Exhibit A-2, the Articles of Association of the defendant company, the form of the proxy is provided by Article 97. This form word for word is the same as the form in Article 51 in Table A of the Indian Act, 1882 and Article 51 of Table A of the English Act of 1862, though there are a few alterations particularly at the end where the words

"or, generally as the case may be in the same manner as I myself could vote if personally present provided he be then a member of the company and be entitled or admitted to vote"

are found. The addition of the expression "generally as the case may be" at the end of the sentence (or at any meeting of the company that may be held within the period of . . . . . from the date hereof, or generally as the case may be) is an innovation. The form also states that the stamp payable is one anna which was the stamp duty payable at that time as it is only in 1923 by an Amending Act that a duty of two annas was made payable in Article 52 of the Stamp Act.

The stamp duty fixed under the Articles was presumably on the footing that it was a proxy within the meaning of Article 52 of the Stamp Act and not a general power-of-attorney under Article 48. It must be remembered in this connection that the question whether it is a proxy of the specific meeting or it was a general power was specifically raised at the time of the poll on the 30th September, 1948 (Exhibit A-2 in A.S. No. 29 of 1949) by Arunachala Ayyar and the objection was met by Mr. Lakshmanan on the ground that the proxy objected to was intended only for the meeting of the 30th September, 1948, as was clear from the date given in the proxies. No doubt this objection was not based on insufficiency of stamp but if it is held to be a specific power, it follows that the proxy was properly stamped. The then chairman of the meeting, the fifth defendant, overruled the objection and allowed the proxies as valid. Under the above circumstances, the question

that naturally arises is whether the chairman of the meeting of the 5th September, 1949, was entitled to reopen the question.

As pointed out by the Earl of Selborne, L.C., in In re *Indian Zoedone Co.*[1], the duties of the chairman who presides at a meeting are :

> " has to receive the poll and declare its result, has *prima facie* authority to decide all emergent questions which necessarily require decision at the time, his decision of those questions will naturally govern, and properly govern the entry of the minute in the books ; and, though in no sense conclusive, it throws the burden of proof upon the other side, who may say, contrary to the entry in the minute book, following the decision of the Chairman, that the result of the poll was different from that there recorded ".

If the chairman in the exercise of his powers comes to a decision whether the votes which are in question shall be disallowed or not and if that decision is not vitiated by fraud or misconduct on the part of the chairman that decision is binding—see the observations of Pollock, M.R., in *Wall* v. *Exchange Investment Corporation, Ltd.*[2]. There is no decided case, however, how far and to what extent a ruling or a decision given by a chairman on a question raised at one stage of the meeting would bind himself or his successor at a later stage of the same meeting. Article 82 of Exhibit A-2 no doubt provides in the case of resolutions that a declaration given by a chairman at a meeting that a resolution has been carried thereat is conclusive. But there is no provision in the Articles giving finality to the rulings of the chairman at a meeting. There is no reason, however, to hold that the ruling of a chairman given at one stage of a meeting is not final and binding on the chairman or his successor at a later stage. If such a finality is not recognised, the proceedings of the meeting cannot be conducted in an orderly manner and will very often end in confusion and disorder. The chairman is expected to act impartially uninfluenced by party politics. He has to hold the scales even between the majority and the minority parties and his decision on all the questions must be unbiassed and impartial. It is not suggested that the ruling of the fifth defendant on the 30th September, 1948, was vitiated by fraud or misconduct and there is no reason to hold it as not being final. What would have happened if the objection on the ground of insufficiency of stamp was raised in a court of law and the Court decided at one stage of the suit that the disputed instrument was properly stamped ? Under section 36 of the Stamp Act if the instrument is admitted in evidence overruling the objection concerning stamp duty, such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. No doubt, a chairman is not a person authorised by law or consent of parties to receive evidence within the meaning of section 35 of the Stamp Act. But there is no reason for not applying the same principle of finality to the ruling of the chairman on the nature of the instrument in dispute.

There is another aspect from which the matter may be considered. The Articles of Association prescribe the form of the proxy by Article 97 and on the footing that it is a proxy within the meaning of Article 52 stated that the stamp duty payable was one anna under the law as it then stood and these articles we are told, were drafted by eminent lawyers of the Madras bar. If a shareholder complies with the requirements of that article and pays stamp duty of two annas under the law as altered on the footing that it is a proxy and not a general power-of-attorney, the chairman has no option but to accept the proxy even if he comes to a conclusion that the stamp duty was not proper. If the proxies conform to the Articles in all respects they cannot be rejected by the chairman (*see* Shackleton, Law of Meetings, page 98). The Articles constitute a contract binding on the company and the members in all matters. The chairman, therefore, was not entitled to go behind the Articles and to reject the proxies on the ground that they were not duly stamped. Insufficiency of stamp does not affect the validity of the instrument but makes it inadmissible—see *Joyma Bewa* v. *Easin Sarkar*[3] except in the case of instruments requiring one anna stamp. The policy underlying the provisions of the Stamp

1. (1884) 26 Ch.D. 70.
2. (1926) 1 Ch.D. 143 at 146.
3. (1926) I.L.R. 53 Cal. 515.

Act is as far as possible to give an opportunity to the person concerned to make good the stamp except in the case of instruments required to be stamped with one anna. Under section 35 in the case of instruments insufficiently stamped, the instrument may be admitted in evidence on payment of penalty and the deficit stamp duty. If an instrument is impounded under section 33 of the Act, the Collector gives an opportunity to the person concerned to make good the deficit stamp duty and also pay penalty—section 41. The final authority under the Act to decide the questions relating to stamp duty is the Collector (see section 31)—who however has the right in case of doubt to refer the matter for the opinion of the chief controlling revenue authority and the chief controlling revenue authority in his turn has the right under section 57 to refer the matter to the High Court for opinion. All these provisions clearly indicate that the instrument could always be validated by paying the deficit stamp duty at a later stage together with penalty and the sole authority vested with the power of finally deciding the question of stamp duty is the Collector acting under section 31 of the Act. If a person votes or attempts to vote under any proxy not duly stamped he is liable for punishment with a fine which may extend to Rs. 500 under section 62 (1) (*c*) of the Act. But as indicated in the proviso to section 43, the intention must be one of evading payment of the proper duty. In the present case, it is difficult if not impossible, to hold that there was an intention on the part of persons holding the proxies to evade the stamp duty as they had acted *bona fide* and followed the Articles of Association and paid two annas stamp on each proxy. The fifth defendant gave his ruling at the meeting of the 30th September, 1948, that it was a specific power. On the 6th September, 1949, when the chairman, the third defendant, gave his ruling that the proxies should be rejected as invalid, the plaintiffs' party filed a memo. Exhibit A-13, dated 6th September, 1949, in which it was pointed out that the form used by them was the exact one prescribed by Article 97 and the stamp duty paid was two annas instead of one anna under the altered law. They also offered that if the objection is to be sustained, it would only involve payment of extra stamp duty with penalty which may be fixed by the Collector and that they were prepared to pay it if and when it is decided that it is payable in the present case. Even at that stage, if the Chairman acted fairly and in a judicial manner, it was open to him to have referred the matter to the Collector for decision under section 31 of the Stamp Act particularly as the plaintiffs' party offered to pay the stamp duty and penalty if so decided by the Collector. The chairman could have postponed the declaration of the result of the poll until the decision of the Collector was obtained if he really was acting in an impartial manner. The objection itself was taken at a very late stage at about 10 P.M. in the night when the votes were being scrutinised by the scrutineers and there was hardly any time for the plaintiffs' party to ascertain the opinion of the Collector and to make good the deficit stamp duty if really such stamp duty was required. The chairman, in our opinion, acted very unfairly to the minority and was wrong in rejecting the proxies without giving an opportunity to the plaintiffs to make good the deficient stamp duty after ascertaining the opinion of the Collector in the matter.

The argument most strenuously pressed before us on behalf of the respondents is that a person in the position of a chairman was not bound to accept a document which was insufficiently stamped. In support of this proposition, reliance was strongly placed on the decision of the Court of Appeal in England in *Maynard* v. *The Consolidated Kent Collieries Corporation, Ltd.*[1], which related to a transfer of shares in a company. The instrument of transfer in that case was stamped in accordance with the consideration stated in the face of the document but it was discovered that the consideration appearing on the face of the document was far less than what it really was. The directors thereupon refused to register the transfer. An action was brought to recover damages for wrongful refusal of the registration of the transfer. It was decided by the Court of Appeal that it was the bounden duty of the plaintiff in the action who claimed the right to register the transfer to tender a

1. (1903) 2 K.B. 121.

transfer which was right in all respects and which would be available to the directors of the company in a Court of law if it became necessary to enforce the rights under the document against the transferee or if they were called upon to defend themselves against a hostile attack levelled against the transfer on the faith of which they acted. Similarly, if a vendor offers to the purchaser a sale deed not duly stamped, it is argued that he was not bound to accept it. This position regarding the right of a person who would be entitled to claim rights under an instrument cannot be questioned as he is entitled to get from the other party a deed valid in all respects and enforceable in a Court of law. But does that apply to a proxy under which a person is entitled to vote. The company, and much less the chairman of the meeting, claims no rights of property under the instrument. All that he is entitled to do under the instrument is to exercise the vote. No question of establishing rights in a Court of law under the document or defending the rights on the basis of the document ever arises under the proxy. So long as a shareholder complies with the formalities laid down by the Articles regarding stamp duty on the basis enacted in the Articles, it is the bounden duty of the chairman to accept the proxy and he is not entitled to reject it. We are not now concerned with a situation similar to the one that came up for consideration in In re *Tata Iron Steel Co., Ltd.*[1], where the proxies were unstamped. The contention, therefore, that the chairman was entitled to reject the proxies in the circumstances, on the ground that they were not duly stamped cannot be accepted.

We may dispose of a contention urged on behalf of the appellants based upon the decision of the House of Lords in the well-known case of *Kenneth Matheson* v. *Alexander Ross*[2]. The argument was based upon the assumption that the proxy contains two powers, one a specific power to vote at the meeting of the 30th September 1948, and the other a general power to vote at any other meeting. It is argued that, the two can be separated and that the chairman should have allowed the proxies as valid to the extent of voting at the specific meeting of the 30th September, 1948, which was adjourned to 5th September, 1949. There was a judicial conflict of opinion regarding the applicability of the principle of that decision under the Indian Stamp Act having regard to the language of section 35 of the Act. Under section 35, no instrument chargeable with duty shall be admitted in evidence *for any purpose* by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped. Notwithstanding the clear language that the instrument shall not be admitted in evidence for any purpose whatever, some decisions have taken the view that the instrument could be used for what is styled as a collateral purpose. This conflict, however, has now been set at rest by the Judicial Committee in *Ram Rattan* v. *Parma Nand*[3]. Sir John Beaumont observed at page 296 as follows:

> "As already noted, section 35 of the Indian Stamp Act enacts that no instrument chargeable with duty shall be admitted in evidence for any purpose. Mr. Rewcastle as part of his argument for the respondent adopted the note on the words 'for any purpose' in section 35 contained in the 4th edition of Sir Dinshaw Mullah's book on the Indian Stamp Act, 1899. He pointed out that the words 'for any purpose' first appeared in India in the Stamp Act of 1879, and in England in the Stamp Act of 1891, and that under the earlier Acts there were decisions in both countries that an unstamped document might be admitted in evidence for a collateral purpose, that is, to prove some matter other than the transaction recorded in the instrument, and he submitted that these cases applied even under the later Acts. Their Lordships do not take this view. A document admitted in proof of some collateral matter is admitted in evidence for that purpose, and the statute enacts that it shall not be admitted in evidence for any purpose. Their Lordships see no reason why the words 'for any purpose' in the Indian Act of 1879 should not be given their natural meaning and effect. Such words may well have been inserted by the Legislature in order to get rid of the difficulties surrounding the question of what amounted to a collateral purpose."

It must be remembered that the decision of the House of Lords was pronounced before the English Stamp Act of 1891. It is, therefore, impossible for the appellants to maintain that the document could be split up in the manner contended for. Especially in a Court of law it would not have been permissible to so dissect the

1. A.I.R. 1928 Bom. 80.
2. (1849) 2 H.L.C. 288 : 9 Eng. Rep. 1101.
3. (1946) 1 M.L.J. 295.

instrument into two parts and use the unobjectionable part in evidence. Under section 5 of the Stamp Act an instrument which comprises or relates to several distinct matters is chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under this Act. If therefore the proxy contains the specific power as well as the general power, it would be admissible only if the aggregate amount of the duties in respect of two such separate instruments is paid, as under the charging section, section 3, the instrument should be charged with the duty indicated in the schedule. Of course, the schedule must be taken along with the sections in order to determine the proper stamp duty. Under section 6 if an instrument falls within the several descriptions of Schedule I and the duties are different, it should be chargeable only with the highest of such duties.

Whether the proxies are general powers-of-attorney within the meaning of Article 48 of the Stamp Act or specific powers under Article 52 is a difficult question and does not seem to us as easy to decide as the chairman the third defendant, thought. One specimen form of proxy seems to have been marked for identification; but as we did not find it in the records sent to this Court, we called for the proxy forms and we find that they are similar in language as in Article 97 of Exhibit A-2. For easy reference the language in the form is quoted herein.

"Every proxy shall be in the following form, or shall contain words to the following effect.

(Stamp 1 anna) 'The Kaleeswarar Mills, Limited,' Coimbatore. I of being a member of 'The Kaleeswarar Mills, Ltd.' and entitled to vote, do hereby appoint of as my attorney or substitute to vote for me and on my behalf at the (Ordinary or Extraordinary, as the case may be) General Meeting of the company to be held on the day of and at any adjournment thereof (or at any meeting of the company, that may be held within the period of from the date hereof, or generally as the case may be) in the same manner as I myself could vote if personally present provided he be then a member of the company and be entitled or admitted to vote. As witness my hand this day of signed by the said in the presence of . ."

It consists of two parts :

"do hereby appoint as my attorney or substitute to vote for me and on my behalf at the (Ordinary or Extraordinary, as the case may be) General Meeting of the company to be held on the 30th September, 1948 and at any adjournment thereof".

The second part is

"(or at any meeting of the company, that may be held within the period of one year from the date hereof, or generally as the case may be)".

It is not disputed that so far as the first part is concerned, notwithstanding the words, "Ordinary or Extraordinary" within brackets, it authorises the person only to vote at the meeting of the 30th September, 1948 or at any adjournment thereof. The words "as the case may be" clearly indicate that the word "or" in the expression, "Ordinary or Extraordinary" is disjunctive and if the instrument had stopped with this clause, it is not disputed that the instrument was duly stamped. The trouble arises by the existence of the second clause. It is argued that the word "or" occurring at the beginning of the expression "or at any meeting of the company" is not disjunctive but is used as meaning "and". Having regard to the context, we are not inclined to accept the interpretation that the word "or" in the context means "and". It is "a co-ordinating participle" indicating an alternative.

The question then is even if "or" is disjunctive, whether the expression

"at any meeting of the company that may be held within the period of one year from the date hereof, or generally as the case may be"

means only at any one meeting of the company or at all the meetings of the company that may be held within a period of one year. There is also the question as to the meaning to be given to the expression "generally as the case may be". The construction suggested on behalf of the respondents is that it means at any meeting of the company within a period of one year or generally without any limitation as to time. The meaning of the expression, to our mind, is clear and it cannot be said that the contention urged on behalf of the respondents is unreasonable.

Even then does the word "any" mean all the meetings or at any *one* meeting of the company. If the latter, the object of the instrument is undoubtedly to give

an option to the person concerned to vote either at the meeting of the 30th or at any other one meeting of the company. If the former, it means the person is entitled to vote either at the meeting of the 30th or its adjournment or at his option at all the meetings of the company to be held within one year or without any limitation as to time. If the latter construction is to be adopted, undoubtedly as it gives a power in the alternative, in the first instance specifically and in the second instance, in the alternative generally, it would fall within section 5 of the Stamp Act and require to be stamped in accordance with it or at any rate under section 6 and the stamp duty will be one rupee in the latter case. If, on the other hand, it is confined to any one meeting of the company, the stamp duty paid is proper. The decisions under the English Act are of no assistance as the language is not similar. Section 80 of the English Stamp Act (1891, 54-55 Victoria, Chapter 39) requires that every letter or power-of-attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper, hereby respectively charged with the duty of one penny, is to specify the day upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified, and any adjournment thereof and the first schedule to that Act referring to letter or power-of-attorney and commission, factory, mandate or other instrument in the nature thereof for the sole purpose of appointing or authorising a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more, the duty payable is one penny. In other cases, it it ten shillings. The Act both in the section and in the schedule requires that it should be for the sole purpose of voting at any one meeting and the day upon which the meeting is to be held is also to be specified. The language of Article 52 of the Indian Act is

"proxy empowering any person to vote at any one election of the members of a district or local board, or of a body of municipal commissioners, or at any one meeting of (a) members of an incorporated company or other body corporate whose stock or funds is or are divided into shares and transferable". (The rest of it is omitted as being irrelevant)

It need not be for the sole purpose of voting at one meeting, but it must be sufficiently clear that the proxy is intended to exercise the vote at any one meeting of the company. If, therefore, on a fair reading of the instrument, it is possible to come to the conclusion that it is intended to authorise the person to vote at any one meeting, though the power is given in the alternative as "at the meeting of the 30th September or at any other meeting," the stamp duty payable would be two annas. That there is some indication that the parties intended that the sole object of the proxy is to enable the person to vote at any one meeting may be inferred to some extent from the fact that they fixed the stamp duty as one anna in the Articles of Association and the proxy holders also sent a covering letter (dated 25th September, 1948, page 140, Vol. I) along with the proxies that they were intended to be used at the meeting of 30th September, 1948. The word "any" as pointed out in Webster's dictionary has also the meaning of one of three or more and in the Oxford dictionary, its meaning is given as

"an indeterminate derivative of one, or rather of its weakened adjectival form, a, an, in which the idea of unity is subordinated to that of indifference as to the particular one or ones that may be selected" (Vol. I, page 378);

so that on a fair reading of the instrument, we have come to the conclusion, though with hesitation, that the instrument is a proxy within the meaning of Article 52 and the proper stamp duty payable is two annas. No doubt, as pointed by learned counsel for the respondents, in some context "any" may be read as "or" as in the case of the *Isle of Wight Railway Co.* v. *Tahourdin*[1] relied on in Stroud's Judicial Dictionary, Vol. I, page 92. We have to consider the context in which the word is used and interpret it and no invariable rule can be laid down. We felt some difficulty in deciding whether assuming that the proxy is a general power-of-attorney, the clauses in Article 48 of the Stamp Act apply to the present case. The clauses which have to be considered are clauses (*d*), (*e*) and (*g*) of Article 48. As pointed out in Donoughue's Indian Stamp

1. (1883) 25 Ch. D. 320 at 332.

Law, 9th Edn. at page 707, clause (*g*) has to be read with clause (*e*). When so read, it means that if there are more than ten persons authorised to act jointly or severally in more than one transaction or generally, then stamp duty payable is according to the number of persons and it is one rupee to each person authorised. Clause (*d*) applies when the authority is given to not more than five persons and relates to more than one transaction or generally. In Referred Case No. 15 of 1905 cited in the Stamp Manual, this Court decided that a document of the present description would fall under clause (*g*). We do not see any reason to differ from that view as otherwise a power-of-attorney in favour of one person in respect of more than one transaction would escape stamp duty altogether.

Lastly, Mr. Gopalaratnam, learned counsel for the appellants, argued that in any event the direction of the lower Court that the plaintiffs should pay separate sets of costs to the first defendant, second defendant, third defendant, fifth defendant and defendants 4 and 7 is not justifiable. The learned Judge did not give any reasons in his judgment for allowing separate sets of costs to each of the defendants. They had no separate interest in the suit and the questions that were considered were common questions. Merely because the defendants chose to engage separate advocates, that will not justify the course adopted by the learned Subordinate Judge. We think that this direction regarding costs is not justified.

Our conclusion in the result is that the rejection of the revocations affecting 230 votes and of the proxies relating to 661 votes was not justified. The defendants' party, according to the chairman, after these exclusions obtained 793 votes in favour of the resolutions while the plaintiffs' party obtained only 106. If the excluded proxies are added, the votes in favour of the plaintiffs' party will be 767, *i.e.*, 106 *plus* 661 while the votes obtained in favour of the resolution by the defendants' party would be 793 *minus* 230 leaving a balance of 563. The resolutions therefore must be taken to have been defeated. It follows from this result that the plaintiffs are entitled to the declarations asked for and they are also entitled to a permanent injunction restraining the first defendant company from giving effect to the said resolutions and defendants 4 to 7 from acting as directors of the first defendant company. The appeal therefore must be allowed and the decree of the learned Subordinate Judge dismissing the suit must be set aside and there should be a decree in favour of the plaintiffs as prayed for with costs here and in the Court below.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

Jerome D'Silva .. *Petitioner.**

v.

The Regional Transport Authority, South Kanara and another .. *Respondents.*

Motor Vehicles Act (IV of 1939)—Regional Transport Authority or Appellate Tribunal—Action taken by against lorry owner on the basis of criminal offence (transporting smuggled rice)—Acquittal by Criminal Court of that offence—Duty of Transport Authority to give effect to—Limits.

A *quasi* judicial Tribunal like the Regional Transport Authority or the Appellate Tribunal therefrom cannot ignore the findings and orders of competent Criminal Courts in respect of an offence when the Tribunal proceeds to take any action on the basis of the commission of that offence. As primarily the Criminal Courts of the land are entrusted with the enquiry into offences, it is desirable that the findings and orders of the Criminal Courts should be treated as conclusive in proceedings before *quasi* judicial Tribunals like Transport Authorities under the Motor Vehicles Act.

If there is a conviction by a competent Criminal Court, that would furnish conclusive ground for any penal action by the Transport Authorities. Equally if the criminal prosecution ended in a discharge or acquittal of the accused and that event happened before the order of the Road Transport Tribunal, then such Tribunal would not have the power to go behind the final order of a competent Criminal Court. If at the time the Road Transport Tribunal disposes of any application or before

*C.M.P. No. 6503 of 1951. 25th September, 1951.

such Tribunal passes an order no prosecution has been launched, then of course it is not incumbent on the Tribunal to await a criminal prosecution. But if a prosecution has actually commenced and the prosecution is in respect of the same offence by reason of which the Transport Authority proposes to take drastic action against the accused in the criminal case, then, it is desirable that the Transport Authority should await the decision of the Criminal Court. This procedure would avoid the spectacle of two departments of the Government proceeding on contradictory lines to the annoyance and hardship of the citizen.

Decision in C.M.P. No. 3367 of 1948 applied.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the proceedings, dated 26th March, 1951, before the Regional Transport Authority, South Kanara and in L. Dis. No. 2593/B-2, dated 3rd March, 1951, on the file of the Regional Transport Officer, Kozhikode, relating to Lorry No. MDX 1251 and to quash the said proceedings.

M. C. Sridharan for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for the State Counsel (*John and Row*) for Respondents.

The Order of the Court was pronounced by

The Chief Justice.—The petitioner is the owner of Lorry No. MDX 1251. He had a public carrier permit granted by the Regional Transport Authority, South Kanara and he was engaged in transporting milk, firewood, timber, stores and other materials from the neighbouring villages into Mangalore. On or about 14th April, 1950, the lorry was detained on suspicion that it contained smuggled rice. The driver of the lorry was subsequently charged by the police under section 186 of the Indian Penal Code and section 7 of the Essential Supplies (Temporary Powers) Act in C.C. No. 602 of 1950 on the file of the Court of the Additional First Class Magistrate, Mangalore. After a full enquiry the Magistrate discharged the accused driver holding that the accusation was groundless. This order was passed on 6th January, 1951.

Meanwhile, the Regional Transport Officer called upon the petitioner by a communication, dated 3rd November, 1950, to show cause why his permit should not be cancelled or suspended as the lorry was engaged in smuggling foodgrains. The petitioner submitted his explanation, but the officer passed an order on 3rd March, 1951, suspending the permit for a period of three months from 1st April, 1951 to 1st July, 1951. Though the order of the Magistrate had been passed prior to the order of the Regional Transport Officer, evidently the Magistrate's order was not brought to the notice of the Transport Authority. Subsequently, an application was filed by the petitioner to the Regional Transport Officer to reconsider his decision in view of the order of the Magistrate discharging him holding that the accusation was baseless. This application appears to have been treated as an appeal by the petitioner and was finally disposed of by the Regional Transport Authority by its order, dated 31st March, 1951. The appeal was dismissed. The order of the Magistrate was brought to the notice of the Authority, but that Tribunal thought that though the Criminal Court had held that there was no sufficient evidence against the accused, the circumstances of the case as found in the records of the subordinate officers of the Traffic Department showed that the owner had used the lorry for illicit smuggling of rice and therefore no interference with the orders of the Regional Transport Officer was called for. Thereupon the petitioner filed the above application praying that this Court might quash by a writ of *certiorari* the proceedings before the Regional Transport Authority and the order of the Regional Transport Officer abovementioned.

The application came on originally before Subba Rao, J. On similar facts he had expressed the view in C. M. P. No. 8482 of 1950 that though the attitude of a *quasi* judicial Tribunal like the Transport Authority in ignoring the judgment of a Criminal Court may be regrettable, it did not affect the jurisdiction of the Tribunal. There was nothing to compel the Tribunal to accept the judgment, though it was not proper for a *quasi* judicial Tribunal to ignore the well-considered

judgments of Courts, whether civil or criminal, without giving adequate reasons. After hearing arguments for some time, the learned Judge felt a doubt as to whether his prior view was correct. He was impressed by the other aspect, namely, that when a Criminal Court acquitted or discharged the driver of a public carriage on the ground that he did not commit an offence, and if the Regional Transport Authority had suspended the permit in respect of the vehicle on the basis of the very same offence, it must be held that the order of the Regional Transport Officer was based on a ground which must be deemed to be non-existent. The learned Judge therefore thought that it was a fit case for being heard by a Division Bench.

We have no hesitation in making it clear that a *quasi* judicial Tribunal like the Regional Transport Authority or the Appellate Tribunal therefrom cannot ignore the findings and orders of competent Criminal Courts in respect of an offence when the Tribunal proceeds to take any action on the basis of the commission of that offence. Let us take the instance before us. The offence consists in smuggling foodgrains. For that same offence, the petitioner was criminally prosecuted. He has also been punished by his permit being suspended for a period of three months. If the criminal case against him ends in discharge or acquittal, it means that the petitioner is not guilty of the offence and therefore did not merit any punishment. It would indeed be a strange predicament when in respect of the same offence, he should be punished by one Tribunal on the footing that he was guilty of the offence and that he should be honorably acquitted by another Tribunal of the very same offence. As primarily the Criminal Courts of the land are entrusted with the enquiry into offences, it is desirable that the findings and orders of the Criminal Courts should be treated as conclusive in proceedings before *quasi* judicial Tribunals like the Transport Authorities under the Motor Vehicles Act. A similar view was expressed by a Division Bench of which one of us was a member in C. M. P. No. 3367 of 1948. No doubt that case arose under the provisions of the Madras Rationing Order, but the principle of that decision applies to the facts of this case also. In that case the petitioner was an authorised dealer in rice. He was charged in the Criminal Court for having sold 30 measures to a person to whom he was not entitled to sell. The Rationing Officer on the same ground purported to cancel the authorisation in his favour. The criminal case had not been disposed of when the Rationing Officer passed an order cancelling the authorisation, but he was aware that the case was pending. It eventually turned out that the petitioner in that case was discharged by the Magistrate, because on the evidence on record, no *prima facie* case was made out. There was a revision petition to this Court, but this Court also took the view that there was no justification for setting aside the order of discharge. On these facts it was held by this Court that the Rationing Officer should not have passed final orders till the disposal of the criminal case and as his order cancelling the authorisation of the petitioner was passed on the sole ground that the petitioner had sold 30 measures of rice to an unauthorised person and that ground was found to be wrong, the order cancelling the permit was also void. It was observed that the Rationing Officer had no power to hold contrary to the order of a competent Magistrate, that an offence which was held by the Magistrate not to have been proved had been established to his satisfaction

The position then would be this. If there is a conviction by a competent Criminal Court, that would furnish conclusive ground for any penal action by the Transport Authorities. Equally if the criminal prosecution ended in a discharge or acquittal of the accused and that event happened before the order of any Road Transport Tribunal, then such Tribunal would not have the power to go behind the final order of a competent Criminal Court. If at the time the Road Transport Tribunal disposes of any application or before such Tribunal passes an order no prosecution has been launched, then of course it is not incumbent on the Tribunal to await a criminal prosecution. But if a prosecution has actually commenced and that prosecution is in respect of the same offence by reason of which the Transport Authority proposes to take drastic action against the accused in the criminal case,

then, it is desirable that the Transport Authority should await the decision of the Criminal Court. This procedure would avoid the spectacle of two departments of the Government proceeding on contradictory lines to the annoyance and hardship of the citizen.

In the case before us, the order of the Regional Transport Officer cannot be sustained, especially as it was long after the order of the Magistrate discharging the petitioner. In any event, there is no justification for the Regional Transport Authority to disregard the order of the Magistrate in disposing of the application of the petitioner. The orders of both the Regional Transport Officer and the Regional Transport Authority are hereby quashed. The petitioner will be entitled to the costs of this petition which we fix at Rs. 150.

K.S. *Orders quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

S. Ramakrishnaiah .. *Petitioner**

v.

The President, District Board, Nellore and others .. *Respondents.*

Constitution of India (1950), *Article* 19 (1) (*c*)—*Right of freedom of association guaranteed—If infringed by Madras G.O. No.* 416, *Education, dated* 24*th February,* 1939, *empowering the Director of Public Instruction to forbid existence of, and dissolve, any Teachers' Union not conforming to the rules and compelling teachers in Local Boards or Municipal service to obtain permission of the Board or Council concerned before forming unions and prohibiting membership of teachers' unions not constituted in accordance with the orders of Government.*

The rules contained in (Madras) G.O. No. 416, Education, dated 24th February, 1939, in so far as they empower, the Director of Public Instruction to forbid the existence of, and dissolve, any Teachers' Union not conforming to the rules and compelling teachers in Local Board or Municipal service to obtain the permission of the Board or Council concerned before forming unions and in so far as they prohibit teachers in recognised elementary schools from becoming members of teachers' unions or other teachers' organisations not constituted in accordance with the orders of the Government should be declared to be void as constituting an abridgment of the right of freedom of association guaranteed by Article 19 (1) (*c*) of the Constitution.

The exercise of any of the fundamental rights like the right of free speech, right of freedom of religion or the right of freedom of association cannot be made subject to the discretionary control of, administrative or executive authority which can grant or withhold permission to exercise such right at its discretion. There cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is in the nature of administrative censorship. The guaranteed freedoms cannot be abridged or abrogated by the exercise of official discretion.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ of certiorari* calling for the records relating to the proceedings in R.O.C. No. 466 of 1949, dated 16th September, 1950, on the file of the Divisional Inspector of Schools, Anantapur and to quash the order made therein and to issue such orders or directions to all the respondents to forbear from taking disciplinary action against the petitioner for being a member or office-bearer of the Andhra Rashtra Elementary Teachers' Federation or any of its affiliated bodies or for participating in the publication of "Upadhya" the official organ of the said Association and forbear from enforcing G.O. Ms. No. 416, Education, passed by the third respondent, dated 24th February, 1939 and also to award the costs of this petition.

K. V. Venkatasubramania Iyer for *Row and Reddy* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for the State Counsel (*John and Row*) for Respondents.

The Order of the Court was pronounced by

The Chief Justice.—The applicant in this case is a citizen of the Indian Union, a teacher by profession and employed as Junior Assistant, Board High School, Kurichedu, from 16th January, 1950 and from August, 1950, employed as Junior

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*C.M.P. No. 12219 of 1950. 19th October, 1951.

Assistant, Board High School, Singaroyakonda. An association called "The Andhra Rashtra Elementary Teachers' Federation" was formed in 1947 with certain objects which related to educational and cultural advancement. One of the objects was to organise Taluk and District Teachers' Unions and to affiliate them to the Federation. The applicant became a member of the Federation in 1947. He was elected as the Secretary of the Darsi Taluk Federation in the same year and in 1948 he was Joint Secretary of the Nellore District Federation, and in 1949 he was elected as the Secretary of the main Federation itself. On or about 23rd April, 1950, the applicant was served with an order of the President, District Board, Nellore, which ran as follows :—

"It is learnt that the Nellore District Board Elementary School teachers noted in the margin are working as members and office-bearers of the Nellore District Elementary Teachers' Federation and of the various Taluk Elementary Teachers' Federations in the District as noted against their names. As the above associations are not the usual departmental associations, they ought not to have accepted the above posts without obtaining previous permission from the executive authority of the District Board. They are therefore directed to submit their explanations within a week from the date of receipt of this communication for not obtaining such previous permission. As it is objectionable to continue as members and office-bearers of the above unrecognised Federations, they are directed either to cease their connection with the said Federations at once or resign their appointments as District Board teachers and report the fact to this office by 30th April, 1950, the latest; failing which disciplinary action will be taken against them.

(Signed) N. Chenchurama Naidu,

President."

The applicant states that this action was apparently taken by the District Board President in accordance with what was contained in G.O. Ms. No. 416, Education, dated 24th February, 1939 (printed as Appendix 5 at page 162 of the Madras Elementary Education Manual). The material portion of this order is as follows :—

"The Government consider that provision should be made for the departmental recognition of Elementary School Teachers' Unions with a view to ensure their working on useful lines. They have accordingly framed the rules set out in the anexure to regulate the working of these Unions. The Director of Public Instruction is empowered to accord recognition to unions functioning in accordance with these rules, and to forbid the existence of, and dissolve, any Teachers' Union not conforming to these rules.

2. Teachers in Local Board/Municipal service should obtain the permission of the Board/Council concerned before forming unions and should apply to the Director of Public Instruction for recognition through the President of the District Board/Executive Authority of the Council concerned.

3. Teachers in recognised elementary schools are prohibited from becoming members of teachers unions or other teachers' organizations not constituted in accordance with the orders herein contained.'

Admittedly, neither the Federation nor any of the Unions of which the applicant is a member is a recognised union. The applicant states that he along with other teachers who were served with similar notices waited on deputation on the President in May 1950 and requested him to withdraw his order. On or about 17th August, 1950, the applicant was served with another order bearing date 8th August, 1950. It runs as follows :—

"The teachers noted in the margin have neither submitted their explanations nor even cared to submit replies till now. If no replies are received from them by 15th August, 1950, the latest, regular charges will be framed against them, for removal from service. They cannot be continued in service if they want to continue as members of the unrecognised federation."

The applicant was under the circumstances compelled to resign his membership and post as office-bearer of the District and Taluk Federations already mentioned. There is the reference to another communication from the Divisional Inspector of Schools, Anantapur, but Mr. Venkatasubramania Aiyar, the learned counsel for the applicant, represented to us, that he was not dealing with that communication in this application and that he was confining himself to an attack against the validity of the rule in the G.O. No. 1939 which prohibited teachers in recognised elementary schools from becoming members of Teachers' Unions or Teachers' organisations not constituted in accordance with that order.

The attack is based on Article 19 (1) (*c*) of the Constitution which guarantees to every citizen the right to form associations or unions. The contention in brief

is that the rule which prevents the applicant from becoming a part member of an unrecognised teachers' union save at the risk of suffering dire consequences is inconsistent with the fundamental right of freedom of association. In any event it is an unreasonable restriction on the exercise of such freedom. On this point the counter-affidavit filed on behalf of the respondents does not meet the objection. The Assistant Secretary to Government (Education Department) who has sworn to the affidavit is merely content to state that the applicant's action was in direct contravention of the provisions of the Government Order and the first respondent, *i.e.*, the President, District Board, was within his rights and justified in the action taken by him. In another part of the affidavit, however, dealing with the later communication of the Divisional Inspector of Schools which was issued in pursuance of a memorandum by the Government, the following enunciation of the general policy of the Government is to be found :

> "The basic and fundamental rights referred to by the petitioner are not absolute and can never be so in practice. Reasonable restrictions in the interest of the profession have to be imposed, especially in a case like the teachers' profession whose primary duty is to educate along correct lines and form the character and conduct of the future generations of this country. While freedom of thought and action are necessary to deveop the inherent virtues, certain amount of dirciplinc also is necessary to develop them along right lines. The teachers' profession which is dedicated to the correct education of the young men of the country must therefore like any other profession throw themselves wholeheartedly into its work and not indulge in political ideologies."

We do not propose to discuss the very important and large question as to how far the employees of the State can be prevented either by legislation or by executive orders from taking part in active politics. Much can be said on both sides of the question as is evident from the differing judgments in *United Public Workers* v. *Mitchell*[1], in which the validity of an act of Congress making it unlawful for employees in the executive branch of the Federal Government to take any active part in political management or in political campaigns out of as well as in working hours, and a regulation of the Civil Service Commission making such conduct ground for removal of civil service employees came up for consideration before the Supreme Court of the United States. The point which arises for decision in the present case lies within a narrow compass. The question is whether any employee of the State or a local body could be prevented from becoming a member of an association which is not recognised by the Government, whether the previous permission or approval of the Government could be made a condition precedent for the exercise of the employee's right to become a member of an association. Of course, it is obvious that the Government as employer may choose to recognise only one association as representative of a particular class of employees ; but can the Government prohibit an employee from becoming a member of any association other than the recognised association ? Here again, we are not concerned with the complication of such an association being an unlawful one. In that case really, the employee voluntarily runs the risk of being penalised for becoming a member of an unlawful association. It has been held in *Whitney* v. *California*[2] and *New York Ex. Rel. Bryant* v. *Zimmerman*[3] that the constitutional right of freedom of association is not infringed by a statute providing punishment for one who knowingly becomes a member of or assists in organising, an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes or by a statute prohibiting, under penalty, membership in a secret, oath-bound organisation which has not filed its constitution, by-laws, rules, regulations and oath of membership. It was not contended by the learned Advocate-General that the associations of which the petitioner before us happened to be a member were unlawful associations.

It is well established that the exercise of any of the fundamental rights like the right of free speech, right of freedom of religion or the right of freedom of association cannot be made subject to the discretionary control of administrative or executive authority which can grant or withhold permission to exercise such right

1. 330 U. S. 74 : 91 Law Ed. 754.
2. 274 U. S. 357 : 71 Law Ed. 1095.
3. 278 U. S. 63 : 73 Law Ed. 184.

at its discretion. It is equally well established that there cannot be any restriction on the exercise of such a right which consists in a previous restraint on such exercise and which is in the nature of administrative censorship. The guaranteed freedoms cannot be abridged or abrogated by the exercise of official discretion. It suffices to give a few leading instances to illustrate this well established rule. In *Lovell* v. *Griffin*[1], a municipal ordinance prohibiting the distribution of circulars, handbooks, etc., without permission obtained from the City Manager was held to be invalid because it struck at the very foundation of the freedom of the press by subjecting it to licence and censorship. In *Hague* v. *Committee for Industrial Organisation*[2], a municipal ordinance requiring the obtaining of a permit for a public assembly in or upon the public streets, highways, etc., was held to be unconstitutional. It was observed by Mr. Justice Roberts in that case that uncontrolled official suppression of the privilege of free speech should not be made a substitute for the duty to maintain order in connection with the exercise of the right. In *Schneider* v. *Irvington*[3], a municipal ordinance which prohibited canvassing, soliciting and the distribution of circulars or calling from house to house without first having received a written permit from the chief of police was held to be bad, because the liberty of free speech was made to depend upon the exercise of the police officer's discretion. In *Largent* v. *Texas*[4], a municipal ordinance making it unlawful for any person to solicit orders or to sell books, wares or merchandise within the residential portion of a city without first obtaining a permit from the municipal authority was held to be an unconstitutional abridgment of the freedom of the press and of speech. It was observed in the opinion of Mr. Justice Reed :—

"Dissemination of ideas depends upon the approval of the distributor by the official.' This is administrative censorship in an extreme form."

Indeed we do not understand the learned Advocate-General to controvert this position which has also found favour with our Supreme Court (See *Romesh Thapper* v. *State of Delhi*[5].

Applying this principle we must hold that the rules contained in G.O. No. 416, Education, dated 24th February, 1939, in so far as they empower, the Director of Public Instructions to forbid the existence of, and dissolve, any Teachers' Union not conforming to the rules and compelling teachers in Local Board or Municipal service to obtain the permission of the Board or Council concerned before forming unions and in so far as they prohibit teachers in recognised elementary schools from becoming members of teachers' unions or other teachers' organisations not constituted in accordance with the orders of the Government should be declared to be void as constituting an abridgment of the right of freedom of association guaranteed by Article 19 (1) (*c*) of the Constitution. The application is to this extent allowed ; but there will be no order as to costs.

K.S. —— *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VENKATARAMA AYYAR.

Chenna Satyavathi and another .. *Petitioners**

v.

The State of Madras, represented by the Collector of West Godavari .. *Respondent.*

Constitution of India (1950), *Article* 31—*Provision of house sites for Adi-Andhras—If a public purpose.*

From several provisions of the Constitution it is clear that making provision for the advancement and development of the Harijan community is one of the avowed objects of the Government both of the States and the Union. It follows that acquisition of land for making provision for house sites for the Adi-Andhras, a houseless section of the community, would be a public purpose within the meaning of Article 31 of the Constitution.

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1. 303 U.S. 444 : 82 Law. Ed. 949.
2. 307 U.S. 496 : 83 Law. Ed. 1423.
3. 308 U.S. 147 : 84 Law. Ed. 155.
4. 318 U.S. 418 : 87 Law. Ed. 873.
5. (1950) S.C.J. 418.

*Writ Petition No. 429 of 1951. 16th October, 1951.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in regard to the acquisition of field No. 86/3, Mokhasa Bapat, wet situate in the village of Nandamuru, Tadepalligudem taluk, West Godavari district, and to quash the proceedings therein.

T. S. Narasinga Rao and *M. Balachandrudu* for Petitioners.

Respondent not represented.

The Court made the following

ORDER.—The petitioners attack the validity of the proposed acquisition of lands including lands of an extent of 95 cents belonging to them for the purpose of providing house sites for the Adi-Andhras of a village in West Godavari district. The only point pressed before us is that provision of house sites for Adi-Andhras is not a public purpose within the meaning of Article 31 of the Constitution, because in effect the result of the acquisition is to transfer property belonging to a certain individual to certain other individuals. We do not agree with this contention. From several provisions of the Constitution it is clear that making provision for the advancement and development of the Harijan community is one of the avowed objects of the Government, both of the States and of the Union.

It follows that making provision for house sites for the houseless section of the community would be a public purpose within the meaning of Article 31 of the Constitution. The application is therefore dismissed.

V.S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Sugali Latchigadu and others .. *Appellants**

Criminal Procedure Code (V of 1898), section 162—Destruction of notes of " inquest evidence "—Effect.

Destruction of the notes of " inquest evidence " constitutes a flagrant violation of the mandatory provisions of section 162, Criminal Procedure Code and as they could not be made available to the accused for cross-examination an inference arises that prejudice has been caused to the accused. In such circumstances the accused could not be said to have had a fair trial and their conviction must be set aside.

Appeal against the order of the Court of Session, Chittoor division, in C. C. No. 13 of 1950.

B. T. Sundararajan, P. V. T. D. Prasad and *P. Basi Reddi* for Appellants.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

The Court made the following

ORDER.—The six appellants were tried by the Sessions Judge of Chittoor for offences under sections 147, 148, 323, 342, 365, 307 and 302 read with section 149, Indian Penal Code. The first accused was charged directly with murder but was acquitted of the said offence but convicted under section 304, Indian Penal Code. Similarly, the second accused was acquitted under section 307, Indian Penal Code but convicted under section 324, Indian Penal Code. Accused 1 to 3 were also convicted under section 148, Indian Penal Code and accused 4 to 6, under section 147, Indian Penal Code. Accused 1 to 5 were convicted under section 365, Indian Penal Code and accused 1 to 6 were convicted under section 342, Indian Penal Code. Such of the other accused who were not directly charged were convicted constructively for offences for which the other accused were convicted under the direct charge. They were sentenced to varying terms of imprisonment from six months to three years, the sentences were ordered to run concurrently.

On the 22nd of December, 1949, at about 4 P.M., there was undoubtedly a rioting at Regulavaripalle, in the course of which one Kuntadu was shot dead.

*Cr.A. No. 590 of 1950. 27th July, 1951.

The rioting itself was in connection with the wrongful confinement of one Lingayya who has been examined as P.W. 6 in this case. On receipt of information the police went to the spot and there the Sub-Inspector held the inquest over the body of the deceased. He says in his evidence that he examined P.Ws. 6 to 9 and others as per the inquest report. I find the above witnesses and P.W. 10 who was also examined at the inquest are eye-witnesses to the occurrence. The Sub-Inspector made short notes, to use his own words, "of inquest evidence" and he says in evidence that the notes have been destroyed by him by his own authority even before the Circle Inspector arrived. The result is that the earliest statements made by these important eye-witnesses have not been made available to the accused. The learned Judge in paragraph 18 of his judgment says :

> "It is true that P.W. 13 (Sub-Inspector who held the inquest) destroyed the short notes of inquest evidence made by him. But the inquest report refers to that evidence and is attested by Panchayatdars who heard that evidence. The case diary maintained by P.W. 13 is intact and no portion of it has been destroyed."

The Circle Inspector came the day after the inquest was held by the Sub-Inspector. There is no doubt that he examined these witnesses and prepared the case diary. But there is nothing to show that these statements were the same that were made earlier at the inquest. The destruction of the notes by the Sub-Inspector has obviously rendered it impossible for the Circle Inspector to verify that what they stated before him was the same as they stated before Sub-Inspector.

The learned counsel for the appellants comments on this and contends that the deprivation of the earlier statements has resulted in prejudice to the accused and relied on the decision of the Privy Council reported in *Kotayya* v. *King Emperor*[1] where their Lordships observed as follows :

> " It is clear from the facts narrated above that there was a breach of the proviso to section 162, Criminal Procedure Code, and that the entries in the Police Sub-Inspector's note-book were not made available to the accused, as they should have been, for the cross-examination of the witnesses for the Crown. The right given to an accused person by this section is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate,and may lead to the ultimate break down of the whole of his evidence, and in the present case it has to be remembered that the accused's contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to section 162 as matter of gravity. *Baliram* v. *King Emperor*[2], where the record of statements made by witnesses had been destroyed, and *Emperor* v. *Bansidhar*[3], where the Court had refused to supply to the accused copies of statements made by witnesses to the police,afford instances in which failure to comply with the provisions of section 162 have led to the convictions being quashed. Their Lordships, would however, observe that where, as in these two cases, the statements were never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused."

In this case these statements were never made available to the accused and therefore an irresistible inference arises that prejudice has been caused to the accused. I have also pointed out in *Lingappa* v. *State*[4], how the denial of these statements to the accused results in the exclusion of evidence which could be used by him under section 145 of the Evidenc Act. The accused in this case cannot therefore be said to have had a fair trial and the convictions and sentences must be set aside. I would have ordered a retrial if at least the statements could be made available ; but as the Sub-Inspector says he has destroyed them, those statements will not be available. Therefore, no useful purpose will be served by ordering a retrial. The accused are therefore acquitted.

In this case if the accused are acquitted it is not because they have been found to be innocent but because of the *destruction* of the notes of "inquest evidence", which constitutes a flagrant violation of the mandatory provisions of section 162, Crimianl Procedure Code. In the circumstances, it cannot be said that the accused had a fair trial. It is necessary that the investigating officers should be warned against committing such breaches of the provisions of section 162, Criminal Procedure

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1. (1947) 1 M.L.J. 218 : L.R. 74 I.A. 65 : I.L.R. (1948) Mad. 1 at page 9 (P.C.).
2. I.L.R. (1945) Nag. 151.
3. (1930) I.L.R. 53 All. 458.
4. (1951) M.W.N. (Cr.) 15.

Code. This is the second or third case in which I came across such violations of section 162, Criminal Procedure Code. It is high time that this is put an end to. A copy of this judgment will be forwarded to the Inspector-General of Police.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

S. V. Sankaralinga Nadar .. *Appellant**

v.

P. T. S. Ratnaswami Nadar and others .. *Respondents.*

Specific performance—Laches and delay—When grounds for disentitling plaintiff to relief—Waiver, if can be inferred from delay in filing the suit—Increase in value of the property at the time of suit—If affects right to relief—Specific Relief Act (I of 1877), section 22 (II)—Question of hardship—Test—Relevant date.

Where it is not pleaded in the written statement that the plaintiff did anything to induce a belief in the defendants that the contract to sell the property had been abandoned or would not be enforced and that the defendants had changed their position by reason of such belief and no third parties have acquired any rights in the property, and the defence simply is that the plaintiff is not entitled to relief by reason of the delay in the institution of the suit, that would not be enough to disentitle the plaintiff to the relief of specific performance. Mere delay does not by itself, preclude the plaintiff from obtaining specific performance. Nor could waiver or abandonment of rights be inferred merely from delay in the institution of the suit.

Specific performance of a transaction which was for proper consideration when it was entered into could not be refused on the ground that at the time of the suit the value of the property had considerably risen. The validity of the transaction should, on principle be judged as on the date of the transaction.

With reference to section 22 (II) of the Specific Relief Act the question of hardship must be judged as on the date of the transaction and not in the light of subsequent events and further, the hardship should be one collateral to the contract and not in relation to a term of the contract such as the quantum of consideration. The rise in prices subsequent to the transaction will not be a relevant ground for refusing the plaintiff specific performance.

The discretion under section 22 is one to be exercised on "Judicial principles and capable of correction by a Court of appeal."

Appeal against the decree of the Court of the Subordinate Judge of Madurai in O. S. No. 35 of 1946, dated 31st October, 1946.

A. V. Narayanaswami Aiyar, P. R. Narayana Aiyar and *R. Venkatachalam* for Appellants.

R. Sundaralingam and *U. Somasundaram* for Respondents.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—The plaintiff is the appellant. He filed O. S. No. 35 of 1946 on the file of the Court of the Subordinate Judge of Mathurai for specific performance of an agreement to sell certain immoveable properties by defendants 1 to 3. Defendants 1 and 2 are brothers and members of a joint family and the first defendant is its manager. The 3rd defendant is the mother of defendants 1 and 2. The properties which are the subject-matter of the agreement are two godowns in Mathurai. Under Exhibit P-3, dated 30th June, 1937, the defendants had executed a usufructuary mortgage over those properties in favour of one Somasundara Nadar for Rs. 8,000 and a period of ten years was fixed for redemption. On 20th March, 1943, the defendants entered into agreement with the plaintiff, Exhibit P-4 which is the subject-matter of the present suit. Under Exhibit P-4 they agreed to sell the two godowns to the plaintiff for a consideration of Rs. 13,500. A sum of Rs. 750 was paid as advance. Deducting Rs. 8,000 which had to be paid for the redemption of the usufructuary mortgage, Exhibit P-3, the balance of Rs. 4,750 was to be paid at the time of the registration of the document and the transaction completed within one month.

*Appeal No. 416 of 1947. 17th August, 1951.

The second defendant was a minor at the date of the transaction and the 3rd defendant signed the agreement as his guardian and also on her own behalf. The case of the plaintiff is that about a week later a draft sale deed was prepared in consultation with the defendants, that it was approved by the 1st defendant and D. W. 3 and that a fair deed was actually engrossed on stamp paper on 16th April, 1943. Exhibit P-5 is the fair deed. It is stated by the plaintiff that this document was presented to the defendants for execution but they were putting it off. On 18th April, 1943, the plaintiff sent a wire, Exhibit P-6 and on 19th April, 1943, this was followed by a notice, Exhibit P-7. Therein the plaintiff called upon the defendants to execute the sale deed, register it and receive the balance of consideration. The defendants replied by wire Exhibit P-8 and notice, Exhibit P-10 both dated 19th April, 1943. They stated that the plaintiff had also agreed to execute a deed of indemnity in respect of any claim that might be made against them personally by the mortgagee under Exhibit P-3 and that they were willing to execute the sale deed if the plaintiff would execute the indemnity bond. The plaintiff denied that there was any agreement to execute an indemnity bond and by reason of this dispute the sale deed remained unexecuted. On 21st January, 1946, the plaintiff sent a lawyer's notice to the defendants again calling upon them to execute the sale deed within two days, Exhibit P-11 The defendants replied by Exhibits P-12, P-12 (*a*) and P. 12 (*b*) and therein it was alleged that the agreement, Exhibit P-4 was not binding on the 2nd defendants because there was no necessity for the sale and that accordingly the transaction was unenforceable in its entirety; that the consideration mentioned in Exhibit P-4 was inadequate and that the defendants had been duped into entering into the transaction by the plaintiff. The plaintiff replied by filing the suit on 20th February, 1946, for specific performance of the agreement Exhibit P. 4 or in the alternative for damages.

The suit was resisted by the defendants on the following grounds: (1) It was pleaded that the plaintiff had agreed on 20th March, 1943, that he would execute an indemnity bond in respect of any possible claims by the mortgagee under Exhibit P-3 and that as the plaintiff denied the agreement he was in default and the contract had been broken by him.

(2) The agreement was not binding upon the 2nd defendant who was a minor because there was no necessity for sale and that, therefore, the agreement could not be enforced even against the 1st defendant.

(3) The plaintiff was guilty of inordinate delay and laches and that therefore the Court should in its discretion refuse him relief by way of specific performance.

(4) And lastly the damages claimed were excessive.

The Subordinate Judge held that there was no agreement on 20th March, 1943, that the plaintiff should execute an indemnity bond and that, therefore, the contract was broken not by the plaintiff but by the defendants; that there was no necessity to sell the joint family properties and therefore the agreement was not binding on the 2nd defendant and under section 15 of the Specific Relief Act the plaintiff was not entitled to relief even as against the 1st defendant; that there was great delay leading to an inference that the plaintiff had waived or abandoned his rights under Exhibit P-4 and that as the value of the house property had vastly increased by the date of suit it would work great hardship on the defendants if specific performance were to be decreed and accordingly relief by way of specific performance was refused. The Subordinate Judge proceeded to deal with the claim for damages and assessed the same at Rs. 100 and passed a decree against the first defendant for payment of Rs. 952-8-0 made up of advance of Rs. 750 stamp charges and damages awarded. The plaintiff was also directed to pay costs of the 2nd defendant. Against this decree the plaintiff has preferred this appeal.

The first question that arises for determination in this appeal is as to whether the agreement, Exhibit P-4, is binding on the 2nd defendant. As he was a minor on that date, it will be binding only if there was necessity for the sale.

* * * * * *

[After discussing the evidence his Lordship concluded].

We are accordingly of opinion that there was necessity for the sale of the joint family properties and that the agreement, Exhibit P-4, is valid and binding on the 2nd defendant and enforceable against all the defendants.

We shall now consider the question as to whether the plaintiff is disentitled to relief on the ground of laches and delay. It is not pleaded in the written statement that the plaintiff did anything to induce a belief in the defendants that the contract had been abandoned or would not be enforced and that the defendants changed their position by reason of such belief. No third parties have acquired any rights in the property. The defence *simpliciter* is that the plaintiff is not entitled to relief by reason of delay in the institution of the suit. A number of authorities has been cited before us bearing on this question but as the position is well settled we do not consider it necessary to deal with them at any great length. In a recent decision of this Court in *Arjun Mudaliar* v. *Lakshmi Ammal*[1], to which one of us was a party the result is thus stated :

"It is now well established that mere delay does not by itself preclude the plaintiff from obtaining specific performance if his suit is otherwise in time. The delay must be such that it may be properly inferred that the plaintiff has abandoned his right or on account of delay there must have been such a change of circumstances that the grant of specific performance would prejudice the defendant."

Reference is then made to the well-known observations of Sir Berness Peacock in L. R. 5 P.C. in *Lindsay Petroleum Co.* v. *Hind,*[2]

"Where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to waiving of it or where by his conduct and neglect he has though perhaps not waiving that remedy yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material."

As already mentioned there is no plea that the conduct of the plaintiff has in any way brought about a change in the situation of the defendants. The only question therefore, that arises for consideration is whether on the facts of this case it can be said that the plaintiff has waived and abandoned his rights under the contract. The learned Subordinate Judge has held that he has. He observes :

"What other inference is to be drawn for such delay if not waiver or abandonment."

We are unable to agree with this conclusion. In this case no circumstance has been brought to our notice which will justify this inference. It is well settled that waiver is not to be inferred merely from delay in the institution of the suit. In *Arjun Mudaliar* v. *Lakshmi Ammal*[1], the learned Judge observes :

"With great respect to the learned Judge, we must say that we have not been referred to any authority in which it had been held that from long delay alone without anything further, an abandonment of rights could be inferred."

It is said that the defendants repudiated the contract on 19th April, 1943, and that, therefore, any action of the plaintiff thereafter must lead to an inference that he has abandoned the contract. The decision in *Nawab Begum* v. *A. H. Creet*[3], is relied on in support of this position. But that case has been considered in *Suryaprakasarayudu* v. *Lakshminarasimha*[4], which on the facts appears to be indistinguishable from the present case. In that case there was an agreement to sell on 4th November, 1904. Time for performance was fixed till 4th December, 1904. Disputes arose in January, 1905, as to the order in which reciprocal obligations should be performed. Thereafter nothing was done and the suit was instituted on 2nd December, 1907. The Subordinate Judge following the decision in *Nawab Begam* v. *A. H. Creet*[3], refused to grant a decree for specific performance on the ground that as the plaintiff had delayed the action after repudiation by the defendant the contract must be taken to have been abandoned. On appeal this Court reversed that judgment. It was held that abandonment could not be inferred from the delay because the parties were disputing the terms of the agreement. Sadasiva Aiyar, J., observed at page 521 :

1. (1948) 2 M.L.J. 271.
2. L.R. 5 P.C. page 221.
3. (1905) I.L.R. 27 All. 678.
4. (1914) 26 M.L.J. 518.

"Further having regard to the case in *Athikaranath Nanu Menon* v. *Erathanikat Komu Nayar*[1], and *Kissen Gopal* v. *Kalli Prasanno Set*[2], I am not satisfied that the decision in *Nawab Begum* v. *A. H. Creet*[3], has not been expressed in rather too wide and general language,"

and adds

"Then as regards the finding of the Subordinate Judge that the laches itself amounts to a waiver or abandonment I think it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to waiver or abandonment of the contract on the plaintiff's part. In this case there are no such circumstances proved."

In this case it may be mentioned that defendants sent a notice on 19th April, 1943, expressing their willingness to execute the sale deed if an indemnity bond was executed by the plaintiff. It was only in 1946 in their reply notices Exhibits P-12, 12 (*a*) and 12 (*b*) dated 1st February, 1946, 7th February, 1946 and 29th January, 1946, that they repudiated the contract as not binding on them. Applying the principle of the decision in *Suryaprakasarayudu* v. *Lakshminarasimha*[4], we are of opinion on that there has been repudiation only in 1946 and that as the suit was instituted on 20th February, 1946, there is no waiver or abandonment. On the other hand there is one circumstance which appears to us to go strongly against the theory of waiver. It will be remembered that on 20th March, 1943, the plaintiff paid an advance of Rs. 750 at the time of the agreement. That amount has all along been with the defendants. The plaintiff did not ask for its return. Nor did he abandon his claim to it. Now to hold that the plaintiff waived his rights under the contract would involve the conclusion that he gave up his rights to the advance amount as well for that would be the consequence if he abandoned the contract; he could not then claim return of the advance. But the Subordinate Judge has granted a decree for the return of the advance and even damages for breach of contract. This cannot be reconciled with the action that the contract had been waived. A contract which has been abandoned has no legal existence for any purpose and it cannot be the foundation for any relief whether it be specific performance or damages. The effect of waiving a contract is not merely to bar any particular remedy under that contract but to extinguish it altogether and the right to any relief thereunder. The grant of relief to the plaintiff for return of the advance and for damages is inconsistent with the theory that the contract had been waived or abandoned. We are satisfied that in this case the plaintiff had not waived or abandoned his rights and that he is not disentitled to relief by reason of any laches or delay.

A further ground was taken in the lower Court for non-suiting the plaintiff. During the period 1943 to 1946 there was a considerable rise in the value of house property in Mathurai as in other cities. The price of the suit property at the time of the action would be Rs. 20,000 according to the plaintiff and Rs. 30,000 according to the defendants. On this the lower Court has held that the sale price of Rs. 13,500 would be grossly inadequate as on the date of the suit and that, it would therefore be inequitable to grant the performance of the agreement.

It may be noticed that no such plea was taken by the defendants. They pleaded that the price fixed in the agreement, was inadequate as at the time of the agreement, that the plaintiff had imposed upon the 1st defendant and duped him into entering into a contract on fraudulent representations and therefore, it was unenforceable. The defendants gave evidence in support of these allegations but the lower Court disbelieved them. This is what the learned Subordinate Judge observes :

"I am not, therefore, satisfied that the price agreed to was inadequate or that the defendant were duped into entering into the agreement on any misrepresentation made by the plaintiff."

This finding has not been challenged before us.

The position therefore, is this :—

Here is a transaction which was for proper consideration when it was entered into. At the time of the suit the value of the properties had considerably risen.

1. (1897) I.L.R. 21 Mad. 42.
2. (1905) I.L.R. 33 Cal. 633.
3. (1905) I.L.R. 27 All. 678.
4. (1914) 26 M.L.J. 518.

Could specific performance be refused on this ground? The validity of a transaction should, on principle, be judged as on the date of the transaction. This is well established with reference to alienations by managers of a joint Hindu family. Is there any reason why a different rule should prevail as regards contracts entered into by them? None that we can see. The learned advocate for the respondents relied on certain observations in *Jamsetji N. Tata* v. *Kashinath*[1], as supporting this distinction. That was a suit for specific performance of a contract entered into by a mother and her son to sell certain properties to the plaintiff. The minor son of the vendor was also impleaded as a party to the suit and declaration sought that the sale was binding on him as well Russell, J., came to the conclusion on the evidence that the sale would not be binding on the minor son and therefore refused the declaration asked for by the plaintiff. On appeal this judgment was confirmed. There is, therefore, nothing in the decision of the case which helps the respondents. What is relied on is the following observation by Starling, J., at page 338:

> "To justify the court in making such a declaration I am of opinion that there should be evidence that there were and still are at the date of the suit certain debts to be paid off and that it was and is the intention of the vendor to apply the purchase money in paying such debts."

From this it is argued that the validity of the transaction should be established both on the date of the contract and on the date of the action. There, the learned Judge was not dealing with a case in which the transaction was valid at the date of the agreement. The finding was that it was not valid even at the date of the transaction and therefore the observations do not amount to a direct decision. On this point the passage above quoted came in for considerable criticism in a decision reported in *Venkateswara Iyer* v. *Raman Nambudri*[2], wherein Seshagiri Iyer, J., observed at page 334:

> "I can find no justification in reason or in authority for the proposition that the liability of a Hindu coparcener as regards executory contracts is different from his liability to executed contracts. In either case the same considerations regarding necessity or justifiable purposes would govern the decision. . . . . The learned vakil raised the contention that, whereas in executed contracts the question would be whether there was necessity at the time of the contract, in executory contracts the binding nature has to be determined with reference to the time at which the contract is to be completed. I see no force in this contention either. One can spell out from the observations of Starling, J., in *Jamsetji N. Tata* v. *Kashi ath*[1], some support for this contention. All that the learned Judge seems to have laid down is that before a court is asked to decree specific performance against a minor, it ought to satisfy itself that it is for the benefit of the minor that the decree should be passed. I do not think it was intended to declare that this benefit has to be ascertained not as on the date of the contract but as on the date that the decree is to be passed . . . . If this is the correct view, there can be no question that the enforceability of a contract must be traced back to the date of the agreement. There is nothing in the Hindu Law to warrant a departure from this rule."

We agree with these observations and hold that the validity of the contract should be judged as on the date when it was entered into and, so judged, Exhibit P-4 is binding on the 2nd defendant.

It was also urged that as the 2nd defendant was a minor at the date of the contract and at the time of the suit the Court must be satisfied about its validity at the time when the contract is sought to be enforced but we are not concerned here with a contract entered into on behalf of the minor. We are concerned with a contract by a manager of a joint Hindu family which *proprio vigoris* is binding on all the members of the family, majors and minors. The association of the 2nd defendant in the contract Exhibit P-4 is by way of abundant caution and it is more a matter of form than of substance. By such association the rights of the manager to sell the joint family properties for proper purposes do not, on the one hand, get enhanced nor do they, on the other, suffer dimunition. Vide *Charib Ullah* v. *Khalak Singh*[3].

It remains to consider whether the respondents could claim to be relieved from their obligation to perform the contract under section 22 (2) of the Specific

1. (1901) I.L.R. 26 Bom. 328.
2. (1916) 19 M.L.T. 329.
3. (1903) I.L.R. 25 All. 407.

Relief Act. It is argued that as the price of the properties had risen to Rs. 20,000 according to the plaintiff and Rs. 30,000 according to the defendants it would work a great hardship on the defendants such as they could not have foreseen and that therefore, the Court had a discretion to refuse specific performance. With reference to section 22 (2) it is well settled that the question of hardship must be judged as on the date of the transaction and not in the light of subsequent events and that further the hardship should be one collateral to the contract and not in relation to a term of the contract such as the quantum of consideration. Fry in his work on "Specific Performance" states the law in the following terms (page 199, section 418):

> "The question of the hardship of a contract is generally to be judged of at the time at which it is entered into; if it be then fair and just and not productive of hardship, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party except where these subsequent events have been in some way due to the party who seeks the performance of the contract . . . . It has been determined that the reasonableness of a contract is to be judged of at the time it is entered into, and not by the light of subsequent events and we have already seen that the same principle applies in considering the fairness of a contract"

and again

> "The question of the inadequacy of the consideration must, of course, be decided, at the time of the contract and not by the light of subsequent events." (Section 448, page 214.)

In *Shib Lal* v. *The Collector of Bareilly*[1], it was held on the strength of the passages quoted above that the validity of the agreement should be judged on the circumstances as they stood on the date of the agreement and not in the light of subsequent events. In that case the defendant agreed to grant some villages in consideration of the plaintiff withdrawing the claim which he made against the estate. Before the suit for specific performance was filed it had been held in a connected litigation that the plaintiff had no title. It was accordingly argued that the agreement was not supported by substantial consideration as proved by events and that therefore specific performance should be refused under section 22 (2) of the Specific Relief Act. This argument was repelled and it was held that as the agreement was valid and proper at the time it was entered into, the plaintiff had a right to specific performance without reference to subsequent events.

In *Pichai Moideen Rowthar* v. *Chathurbuja Das Kushal Das and Sons*[2], Ramesam and Cornish, JJ., make the following observations with reference to the scope of section 22 (2) of the Specific Relief Act:

> "Respondents relied on section 22 (2) of the Specific Relief Act but obviously the term 'hardship on the defendant' in this section is used in the sense of some collateral hardship and not merely the diminution of the purchase money. The illustrations which are all based on English law clearly show this and the term 'hardship' is used in the same sense as it is used in English law." (*Vide* Fry on Specific Performance, Chapter VI.)

On the principle of the above decisions, it must follow that we must have regard to circumstances only as they stood on 20th March, 1943, and if that is done the subsequent rise in prices will not be a relevant ground for refusing the plaintiff specific performance. We shall now consider the authorities cited by the advocate for the respondent for the position that such subsequent rise in prices can be taken into account. In *Govinda Naicken* v. *Apath Sahaya Iyer*[3], the facts were that the defendant agreed to sell a property in which he had only a half share, the other half share belonging to his divided brother. He resisted the suit for specific performance on the ground that a sale deed in respect of the whole property would lead to litigation and cast a cloud on the title of the co-owner. On this ground "specific performance" was refused Then with reference to the granting of relief under section 15 of the Specific Relief Act the learned Judges Sundara Ayyar and Spencer, JJ., observe at page 405:

> "Even in cases where the conditions of section 15 are fulfilled the use of the word 'may' indicates that the granting of a decree for part performance is discretionary with the Court and we should hold that when there has been great delay in attempting to enforce a contract and circumstances have

1. (1894) I.L.R. 16 All. 423.
2. (1933) 65 M.L.J. 491 at page 502.
3. (1912) 22 M.L.J. 257: I.L.R. 37 Mad. 403.

greatly changed either from a rise of prices or other causes in the interval, the courts would be justified in refusing to give legal effect to an inequitable arrangement."

It is obvious that the learned Judges considered the original arrangement as inequitable on the facts already mentioned. They were not considering the position under section 22 (2) of the Specific Relief Act. We cannot take this passage out of its context and read into it a general principle that even when the contract was entered into for proper consideration the Court had discretion to refuse specific performance by reason only of the rise in prices at the time of the suit.

Another case relied by the respondents is the one reported in *Maharaj Bahadur* v. *Suresh*[1]. There it was found that the plaintiff had at one stage abandoned the contract; that the tenants of the defendants agreed to pay higher rent in the belief that the plaintiff had abandoned his contract and thus there was an increase brought about in the value of the property by the conduct of the plaintiff himself. It was held that he was not entitled to specific performance. This would be within the principle enunciated by Fry in section 418 where an exception is made to the general rule where the subsequent events have been in some way due to the party who seeks the performance of the contract. The learned advocate for the respondents next relied on a case in *Narooshanker Pranshanker* v. *Rajumal Bhagwan Das*[2], which does lend some support to his position but for the reasons already mentioned we are unable to agree with that decision. The advocate for the appellant relied upon the following observations occurring in *Allah Ditta* v. *Jamna Das*[3]:

" The respective positions of the parties now before us have remained as they were though there has been a material rise in the price of the land which may explain the conduct of the plaintiffs but does not in any way affect their rights. The plaintiffs are not debarred by mere lapse of time from enforcing their remedy."

Though there is no discussion, the decision is in accord with the views which we have expressed.

The learned advocate for the respondents also sought to support the decree by contending that the plaintiff had agreed on 20th March, 1943, to execute a deed of indemnity and was in default in declining to do so. Exhibit P-4 contains no such term. The 1st defendant as D. W. 1 admitted that at the time of Exhibit P-4 there was no talk or agreement concerning the othi. That is also the evidence of P. Ws. 1 and 2. It is only D. W. 3 who deposes to such an agreement and the lower Court was right in rejecting that evidence and finding this issue in favour of the plaintiff. We accept this finding.

It was finally urged that as the relief is one by way of discretion we should not interfere in appeal with the decree passed by the lower Court. Section 22 provides that the discretion is one to be exercised on "Judicial principles and capable of correction by a Court of appeal". When once it is found that the contract sought to be enforced is a valid one it is for the defendants to establish legal grounds for refusing relief by way of specific performance. We have already held that none such has been made out by the defendants and we are of opinion, therefore, that there should be a decree for specific performance in favour of the plaintiff. In this view it is unnecessary to consider the question of damages. Two months' time will be granted for performance. The plaintiff will be entitled to his costs both here and in the Court below.

V. S. *Appeal allowed.*

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1. (1921) 34 Cal. L.J. 364.
2. A.I.R. 1931 Sind 197.
3. A.I.R. 1929 Lah. 679 at 680.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

The Commissioner of Income-tax .. *Applicant**

v.

Shahzadi Begum *alias* Luthfunnisa Begum and others .. *Respondents.*

Income-tax Act (XI of 1922), section 31—Applicability—Order rejecting appeal as time-barred—Appeal against that order to the Appellate Tribunal—If lies.

The order of the Appellate Assistant Commissioner rejecting an appeal as time-barred after refusing to excuse the delay in filing it is an order under section 31 of the Income-tax Act and as such an appeal against such an order would lie to the Appellate Tribunal.

There is no reason to restrict the meaning of the word " appeal " in section 31 to an appeal which complied with all the requirements of the law and was ripe for consideration on the merits of the order appealed against.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax Act, 1922 (Act XI of 1922) as amended by section 92 of the Income-tax Amendment Act (VII of 1939) in 66 R.A. No. 71 Madras of 1948-49 on its file.

C. S. Rama Rao Sahib for Applicant.

G. Ramakrishna Aiyar and *K. Srinivasan* for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—The question referred to us under section 66 (1) of the Indian Income-tax Act by the Income-tax Appellate Tribunal is :

" Whether on the facts and in the circumstances of the case the order of the Appellate Assistant Commissioner, rejecting the appeal on the ground that it was time barred was not an order under section 31 of the Indian Income-tax Act and against which no appeal lay to the Tribunal."

The following facts relevant for the consideration of the question are taken from the statement of the case by the Appellate Tribunal. The assessees are the joint receivers appointed by the High Court for the management of the estate of the late Md. Umar Sahib of Madras. The receivers were, however, discharged after the application for reference under section 66 (1) was filed before the Tribunal and in their place, the heirs of the deceased were brought on record as respondents. For the accounting year 1943 a return of the income was made treating the estate as one single unit. The heirs, however, raised the contention that the assessment should be made upon them individually in proportion to the shares of the income which they obtained from the estate to which they succeeded. While that assessment was pending enquiry before the Income-tax Officer, for the subsequent year 1944, a return was again submitted by the assessees for separate assessment. The claim of the assessees for separate assessment was rejected by the Income-tax Officer for the two years. Against the order of the Income-tax Officer, appeals were preferred to the Appellate Assistant Commissioner and they were pending. For the accounting year 1945 again a similar claim was made by the heirs in their return submitted to the Income-tax Officer, and following the previous decision, the Income-tax Officer again negatived the claim. Against this order also there was an appeal to the Appellate Assistant Commissioner, which was filed on the 28th September, 1946. The appeal was however out of time by 64 days. In a covering letter which they submitted to the Appellate Assistant Commissioner along with the memorandum of appeal, the assessees prayed for the condonation of the delay on the ground that the staff which received the order of the Income-tax Officer mislaid it and omitted to bring it to the notice of the assessees for the purpose of filing the appeal. The Appellate Assistant Commissioner was not satisfied with that explanation and therefore rejected the appeal on 11th October, 1946. An appeal was thereafter preferred to the Appellate Tribunal against the order of the

* Case Referred No. 7 of 1949. 26th September, 1951.

Appellate Assistant Commissioner rejecting the appeal. This appeal also was filed out of time but the Appellate Tribunal condoned the delay accepting the explanation offered by the assessees. When the appeal was taken up for hearing by the Tribunal, the departmental representative raised the preliminary objection that no appeal lay as the order of the Appellate Assistant Commissioner rejecting the appeal was an order under section 30 of the Income-tax Act which was not appealable and that therefore the Tribunal had no jurisdiction to hear and dispose of the appeal. The Tribunal did not accept the contention, as in their opinion, the order of the Appellate Assistant Commissioner rejecting the appeal as time-barred was a disposal of the appeal, and as the only section which empowered the Appellate Assistant Commissioner to dispose of an appeal was section 31, the order of the Appellate Assistant Commissioner should be treated a one made under section 31 of the Act. Therefore, the order, it was held by the Appellate Tribunal, was appealable. In the result the Tribunal allowed the appeal of the assessees and set aside the order of the Appellate Assistant Commissioner and remitted the case back for hearing. The question set out above was referred to this Court at the instance of the Income-tax Commissioner.

On behalf of the Commissioner it was contended by Mr. Rama Rao Sahib, the learned advocate, that the order of the Appellate Assistant Commissioner was not one coming within section 31 of the Act, and that, therefore, the appeal to the Appellate Tribunal was incompetent. This argument is founded on the assumption, that section 31 of the Act applies only to such appeals which are presented within the prescribed period or dealt with by the Assistant Commissioner after admitting appeal by condoning the delay, and that the section has no application to any orders passed by the Appellate Assistant Commissioner at a stage anterior to it. In support of this contention, learned counsel relied on certain decisions of the Bombay and Allahabad High Courts. On behalf of the assessees reliance was placed upon the view taken by the Patna High Court, which, it was claimed, was also supported by a decision of the Judicial Committee.

Before an examination of the decisions cited on either side it would be convenient to refer to the provisions of the Act relating to appeals and to examine the scheme underlying these provisions. Under the Income-tax Act of 1922, before its amendment in 1939 and the introduction of the present section 33, an appeal against the assessment order to the Assistant Commissioner was provided under section 30 of the Act. The first sub-section to that section contained a proviso that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23, or under that sub-section read with section 27. Sub-section (2) of section 30 provided that the appeal shall ordinarily be presented within thirty days of receipt of the notice of demand relating to the assessment and power was also conferred upon the Assistant Commissioner to admit an appeal after the expiration of the period, if he was satisfied that there was sufficient cause for not presenting the appeal within the prescribed period. Sub-section (3) required that the appeal should be in the prescribed form and should be verified in the prescribed manner. Section 31 laid down the procedure for disposing of the appeal and also the powers of the appellate authority in disposing of an appeal. A further appeal to the Commissioner was provided by section 32 in a limited class of cases. There was then no further appeal to Income-tax Appellate Tribunal as it was not constituted; and it was only under the present section 33 that such a provision was made. In respect of orders under section 31, it was open under section 66 to require the Commissioner to refer to the High Court a question of law arising out of such an order or decision, and if he refused to do so under sub-clause (3) of section 66, an application to the High Court could be made to require the Commissioner to state a case. This was altered in 1939 to some extent. The right of appeal under section 30 of the Act against the orders of the Income-tax Officer relating to assessment to the Assistant Commissioner is continued by section 30. The proviso to sub-section (1) in the old Act barring appeals against assessment orders under section 23 (4) has now

been omitted and other provisos have been added. Sub-clause (2) to section 30 requiring that the appeal should ordinarily be presented within 30 days of the receipt of demand levying the assessment and the power of the Appellate Assistant Commissioner to admit an appeal after the expiration of the period of 30 days if there was sufficient cause for not presenting it within that period, remains unaltered. Sub-clause (3) was also retained. The procedure to be followed and the powers to be exercised by the Assistant Commissioner acting as an appellate authority are retained under section 31 though amplified to some extent. A second appeal is now provided to an Appellate Tribunal under section 33 of the Act against orders passed by the Appellate Assistant Commissioner under section 31. As we are now concerned only with an assessment order, we are not referring to the other provisions in sections 30 and 31 of the Act. The power to be exercised and the procedure to be followed by the Appellate Tribunal is also stated in section 33. Under the present scheme, therefore, a further appeal to the Appellate Tribunal lies only if an order falls under section 31 of the Act or under section 28 and not otherwise. We are not in the present case concerned with section 28. The appeal therefore to the Appellate Tribunal can be justified only if it is established that the order of the Appellate Assistant Commissioner rejecting the appeal is really one which was and could have been passed under section 31 of the Act.

The point for determination is whether the narrow construction put upon section 31 by the Bombay and Allahabad High Courts should be preferred to the liberal construction placed upon that section by the Patna High Court. A form is prescribed by section 30 and rules were made under the rule-making power for presenting an appeal. After an appeal is so presented, the appellate authoity may have to consider certain questions of a preliminary nature, not touching the merits of the order appealed against. Such questions are, for example, whether the appeal was presented in time, and whether there was sufficient cause to condone the delay, whether an appeal conformed to the formalities prescribed by the rules or not, and whether an appeal was or was not barred by any of the provisions of the Act and so on. These questions, though in a sense they may relate to the appeal, do not really concern the merits of the appeal, *i.e.*, the question whether the order appealed against was correct or not. There is no definition of an apeal in the Income-tax Act. While construing the word " appeal " in the third column in Article 182 of the Limitation Act, Sir Dinshaw Mulla observed in *Nagendranath Dey* v. *Sureshchandra Dey*[1] :

"There is no definition of appeal in the Civil Procedure Code, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent."

There is no particular reason for not accepting and applying this definition to an appeal under the Income-tax Act. The appeal may be an irregular appeal or an incompetent appeal or even may be an appeal which was presented out of time. But still the Appellate Court has to apply its mind before it rejects the appeal on a preliminary ground that no case for condoning the delay was made out or that the formalities required by law have not been complied with or that the appeal was incompetent. In considering these questions the appellate Court is undoubtedly exercising an appellate power and not a power which is outside it. No doubt under section 30 (2) of the Act power is given to condone the delay if sufficient cause is made out. But suppose a sufficient cause is not made out, then what is the kind of order which the appellate Court is authorised to make and under which section of the Act. Which is the section of the Act that empowers the appellate Court to consider and weigh the reasons put forward in justification of the filing of the appeal out of time and to come to a decision and reject the appeal. The Act does not specifically empower the Appellate authority to reject an appeal which is out of

1. (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 at 287 (P.C.).

time or which did not comply with the formalities or even an appeal which was incompetent. Pushed to its logical conclusion, the argument on behalf of the Income-tax Commissioner would lead to the result that in such cases, the appellate Court would have no power to all to reject the appeal. This could not have been the result contemplated by the Legislature and that was for the reason that after the section conferring a right of appeal and empowering the appellate authority to excuse the delay if sufficient cause is made out and admit an appeal, there follows the section which defines the powers of the appellate Court and prescribes the procedure to be adopted in disposing of the appeal. Even in respect of the preliminary questions it cannot be doubted and indeed it was not disputed, that the appellate Court is bound to hear the appellant after fixing a date for hearing which section confers such a power except it be section 31. The Legislature, in our opinion, thought that all such matters are covered by section 31 which defines the procedure to be adopted and the power to be exercised by the Appellate Tribunal and therefore no other specific provision was made in the Act in that behalf.

This view is to a large extent supported by the observations of the Judicial Committee in *Income-tax Commissioner* v. *Khemchand Ramdas*[1]. The view taken before the decision of the Privy Council in some of the High Courts was that under the proviso to section 30 which is now omitted, an order by the Appellate Assistant Commissioner, that an appeal against an order of assessment under section 23 (4) was incompetent as such an appeal was barred by the proviso, and that a reference under section 66 in such a case was precluded as the order was not one under section 31. In the case before the Judicial Committee above referred to, the Income-tax Officer made an assessment first under section 23 (4) and revised it later in view of a later order of the Commissioner declaring that the registration of a firm was invalid and passed a fresh order of assessment under section 23 (4) and made the assessees liable to super-tax under section 55 of the Act. One of the questions considered was whether the later order was one against which an appeal to the Assistant Commissioner was competent. In dealing with this contention, their Lordships observed at page 251 :

"If it was made, as the Commissioner has found, in purported exercise of the powers given by section 23, sub-section (4), the assessee nevertheless had a right of appeal to the Assistant Commissioner under section 30 and the Commissioner was in error when he quashed the proceedings on that appeal."

For as was truly said by Sir Shadi Lal in *Duni Chand* v. *Commissioner of Income-tax*[2] :

"The mere fact that the assessment purports to have been made under that sub-section does not shut out the appeal ; it must be shown that the circumstances of the case bring it within the scope of that sub-section."

As a preliminary to the application of the old proviso to section 30 barring a right of appeal, it was always necessary when the assessee complained to see whether the circumstances of the case were such as would have justified action on the part of the Income-tax Officer of making an assessment under the best judgment rule in section 23 (4). If the circumstances did not warrant it, the assessment would be unsustainable. If on the contrary, the circumstances assumed to have existed by the Income-tax Officer, did in fact exist, the order would be correct and the appeal would be incompetent. It cannot be said therefore that because an appeal was incompetent, an order disposing of the appeal as being incompetent is not appealable. These are all no doubt questions of a preliminary nature to be determined by the appellate authority in the exercise of its appellate powers. The decision of Sir Shadi Lal which had the approval of the Judicial Committee was the foundation of the view taken by the Patna High Court, in the earliest of the cases in *Kunwarji Ananda* v. *Commissioner of Income-tax, Bihar and Orissa*[3]. In the light of the decision of the Judicial Committee the earlier decision of the Allahabad High Court in *Jotram Sher Singh* v. *Commissioner of Income-tax, United Provinces*[4], which

1. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236 (P.C.).
2. (1929) I.L.R. 10 Lah. 596 at 601.
3. (1931) I.L.R. 11 Pat. 187.
4. (1934) 2 I.T.R. 129.

was based upon the Full Bench decision of the Rangoon High Court in *Abdul Bari Chowdry* v. *Commissioner of Income-tax, Burma*[1], seems to us erroneous. The Rangoon Full Bench disagreed to a considerable extent from the view taken in *Duni Chand* v. *Commissioner of Income-tax*[2]. To accept the limited and narrow construction for which the counsel for the Commissioner of Income-tax contends that the "appeal" in section 31 must be understood as meaning only an appeal which was competent and was presented in time or which was admitted after the delay was condoned and which also complied with all the formalities, is to leave the appellate Court powerless to decide the preliminary points for there is no specific enumeration of the power in the scheme of the Act. It would also deprive the aggrieved party of a remedy and make him helpless even in cases where the order of the Appellate Assistant Commissioner was obviously wrong and unjust. There is no reason to restrict the meaning of the word "appeal" in section 31 to an appeal which complied with all the requirements of the law and was ripe for consideration on the merits of the order appealed against. The expression "hearing of the appeal" and "disposing of the appeal" in sub-clauses (1) and (2) of section 31 and the power to make further inquiry may all equally apply to the preliminary stages as well as the subsequent stages of the hearing of an appeal.

The argument however most strongly pressed was that in enumerating the powers in sub-section (3) to section 31 power to reject an appeal was not expressly mentioned, which, it was claimed was an indication that the preliminary stages of an appeal and the disposal and hearing of it were not within the purview of section 31. We are unable to agree with this view. If the appeal is dismissed as incompetent or is rejected as it was filed out of time and no sufficient cause was established, it results in an affirmation of the order appealed against. When pressed, learned counsel however was forced to concede that if an appeal, though out of time, was admitted by mistake and at the hearing an objection was taken by the respondent which was upheld, the order rejecting the appeal at that stage would fall under section 31. One of the decisions of the Allahabad High Court even held that once the delay was condoned and the appeal was admitted, but later on the objection of the respondent, it was found that the condonation of the delay at the earlier stage proceeded on a mistake, an order rejecting the appeal at that stage would be one under section 31. It is also stated that if a date for the hearing of the appeal was fixed and the appeal was heard, the order might possibly fall under section 31. If the argument in support of the Allahabad view were correct, where is the power under section 31 to reject an appeal even under those circumstances. It must be conceded that the order of rejection under such circumstances would amount to confirmation of the order of the Income-tax Officer. The difficulty arises according to the argument advanced on behalf of the Income-tax Commissioner only in cases where the delay was not condoned by the Appellate Assistant Commissioner and when he deals with the matter *ex parte*. In such a case, it is said that the order would be outside the purview of section 31. It is difficult to make a distinction in the manner suggested. It only shows and reinforces the argument that all the powers exercised and exercisable by the appellate authority are derived under section 31 and that the language of section 31 is wide enough to cover the two stages of the hearing of the appeal whether it related to questions of a preliminary nature or whether it related to the merits of the appeal. The decision of the Allahabad High Court in *Jot Ram Sher Singh* v. *Commissioner of Income-tax, United Provinces*[3], already referred to was followed by the same Court in *Shivnath Prasad* v. *Commissioner of Income-tax, Central and United Provinces*[4], in which the question was whether an order rejecting an appeal by the Assistant Commissioner as time-barred was within the purview of section 31, 32 or 33 of the Income-

1. (1931) I.L.R. 9 Rang. 281.
2. (1929) I.L.R. 10 Lah. 596.
3. (1934) 2 I.T.R. 129.
4. (1935) 3 I.T.R. 200.

tax Act as it stood before 1939, and the High Court could direct the Commissioner to state a case under section 66 of the Act. It was held that the order was not within section 31 or any other section. It was an appeal filed out of time and the delay in presenting was not condoned and the appeal was non-existent; the question of the power to reject an appeal under any particular section of the Act was not considered by the learned Judges. An order rejecting an appeal on the ground of limitation was not considered to be an order confirming an assessment within the meaning of section 31. According to the learned Judges an order confirming an assessment is an order which has reference to the assessment and which affirms it; in other words an express affirmation of the order of assessment should be made. All that the section says is that in disposing of an appeal, the Appellate Assistant Commissioner may in the case of an order of assessment confirm the order; if the appeal is rejected or if the appeal is dismissed it tantamounts to a confirmation of the order. It is not the form in which the judgment is pronounced that matters, but the substance and the consequence of the dismissal or rejection of the appeal. In a recent decision of the same Court in *Special Manager, Court of Wards* v. *Commissioner of Income-tax, U. P.*[1], there are observations doubting the correctness of the decision in *Shivnath Prasad* v. *Commissioner of Income-tax, C. P. and U. P.*[2], though obiter, for it was found even by the Appellate Tribunal that the case was not one in which the delay should be excused on the merits, as they were not satisfied with the sufficiency of the grounds for condoning the delay. After referring to a decision of the Patna High Court to the contrary, this is what the learned Judges state at page 212:

> "The other view at the same time may be possible that even though the period of limitation is prescribed under section 30 and the power to grant extension is also given in that section the power is really exercised under section 31 as the Appellate Assistant Commissioner when he decides not to extend the period of limitation may be said in a sense to have confirmed the assessment. This question may assume some importance in a case where the appeal was within time but the Appellate Assistant Commissioner made a mistake and refused to admit it on the ground that the appeal was barred by limitation or the question might well have to be seriously considered in a case where there was sufficient cause for condonation of the delay and the exercise of the discretion by the Appellate Assistant Commissioner was considered to be perverse. In the case before us, however, both the Appellate Assistant Commissioner as well as the Appellate Tribunal considered the case on the merits and both were of the opinion that there were no sufficient grounds for the condonation of the delay . . . . . . In the circumstances of the case, there is no point in having the question further considered by a larger Bench."

There are two decisions of the same Court in 1951. In *Mohd. Naim Md. Alam* v. *Commissioner of Income-tax, U.P.*[3], the first of the cases, the Appellate Assistant Commissioner admitted an appeal but subsequently dismissed it on the ground that the appeal was time-barred. This order was passed after issue of notice to the assessee fixing a date and place of hearing of the appeal and the order was treated as one falling under section 31 which was appealable. The reason given by the learned Judges was that after the admission of the appeal the only section that would apply at the time of the hearing was section 31. They however expressly refrained from expressing any opinion on the larger question for they observed at page 62:

> "We do not want to go into the larger question whether an order refusing to condone the delay under section 30 (2) and thereafter rejecting the memorandum of appeal is an order under section 30 (2) of the Indian Income-tax Act or, is an order under section 31 of the Act."

The second decision is reported at page 63 as the *Municipal Board, Agra* v. *Commissioner of Income-tax, U. P.*[4]. The distinction was drawn in that case between an appeal which was dismissed *in limine* on the ground of limitation in which case the order would be under section 30 (2) and an appeal which was admitted and after fixing a date and place of hearing was dismissed as time-barred in which case it would be an order under section 31 (1). On the facts it was a case where the appeal was dismissed *in limine*. Therefore it was held that there was no appeal. The distinction if we may say so with respect, between the two cases seems to be very thin.

1. (1950) I.T.R. 204.
2. (1935) 3 I.T.R. 209.
3. (1951) 19 I.T.R. 58.
4. (1951) 19 I.T.R. 63.

The Bombay High Court in *Commissioner of Income-tax* v. *Mysore Iron and Steel Works*[1], followed the Allahabad view. It was also a case where the Appellate Assistant Commissioner refused to condone the delay. The learned Judges refused to follow the Patna view and preferred the view taken by the Allahabad Court. With great respect we are unable to agree with the view taken by the learned Judges of the Bombay High Court. At page 480 the learned Chief Justice after examining the scheme of the Act, observes :

"Now, the scheme under sections 30 and 31 of the Act is fairly clear. An assessee has a statutory right to present an appeal within thirty days without any order being required from the Appellate Assistant Commissioner for admission of that appeal. But if the time prescribed expires, then that statutory right to present an appeal goes ; and an appeal can only be entertained provided it is admitted by the Appellate Assistant Commissioner after condoning the delay. Therefore before an appeal could be admitted in this case, an order from the Appellate Assistant Commissioner, was requisite that the delay had been condoned, and it was only on such an order being made that the appeal could be entertained by the Appellate Assistant Commissioner. Now section 31 deals only with such appeals which are presented within the prescribed period or admitted after the delay had been condoned, and the procedure laid down in section 31 with regard to the hearing of appeals only applies to such appeals. Therefore, in my opinion, when the Appellate Assistant Commissioner refused to condone the delay, there was no appeal before him which he could hear and dispose of as provided under section 31 of the Act."

This in substance is also the argument advanced on behalf of the Income-tax Commissioner by Mr. Rama Rao Sahib.

Considerable light is thrown on the question which we are considering in this reference by the decision of the Full Bench in *Kunwarji Ananda* v. *Commissioner of Income-tax, Bihar and Orissa*[2]. It was a case which arose under the old proviso to section 30 barring a right of appeal in respect of an assessment order under section 23 (4). The observations of the learned Judges are in consonance with the principles laid down by the Privy Council in *Income-tax Commissioner* v. *Khemchand Ramdas*[3], already referred to. Courtney Terrell, C.J., observed at page 202 :

"It is undoubtedly the duty of the Assistant Commissioner when the order of the Income-tax Officer comes before him on appeal to decide whether or not he is precluded by the Act from going into the amount or rate of the assessment or the liability of the assessee, and, if he is so precluded, he must reject the appeal. In so rejecting the appeal is, in my opinion, under section 31 'disposing of an appeal' and such disposal is 'a proceeding in connection with an assessment under this Act."

The observations of Fazl Ali, J., (as he then was) are more pertinent. At page 215 the learned Judge states :

"The Assistant Commissioner did not summarily dismiss the appeal but fixed a date and place for hearing the assessee and after dealing with the point as to whether the assessee was liable to be taxed under the Act or not, confirmed the assessment on the ground that the assessment had been rightly made under section 23 (4). The question is whether this order or decision was or was not one under section 31. The learned Assistant Government Advocate contends that once it is found that no appeal lay to the Assistant Commissioner, the order passed by that Officer cannot be regarded as one passed under section 31. Now section 31 provides that the Assistant Commissioner may in disposing of the appeal confirm, reduce, enhance or annul the assessment or may set it aside and direct the Income-tax Officer to make a fresh assessment after making such further inquiry as the Income-tax Officer thinks fit. In this case the Assistant Commissioner passed an order which is at least in form an order under section 31. In passing the order the Assistant Commissioner also purported to act as the ordinary appellate authority and as far as I am aware there is no section in the Income-tax Act except section 31 under which the order could have been passed. It appears to me therefore, that the moment such an order is produced before the Commissioner of Income-tax, the assessee is entitled to ask him, if he so wishes, to refer such questions of law as arise out of it to the High Court under section 66 (2) . . . . Under section 31, the Assistant Commissioner has the power to allow the appeal as well as to reject it and the mere fact that he rejects it on the ground that in his opinion no appeal lies will be no ground for treating the order as one not passed under section 31."

Again at page 219 after referring to a decision of the Calcutta High Court under Article 179 of the Limitation Act of 1877 which had to construe whether there has been an appeal as in *Nagendranath Dey* v. *Sureschandra Dey*[4], the learned Judge adopts the reasoning in *Wazir Mahton* v. *Lulit Sigh*[5], and states :

1. (1949) I.T.R. 478.
2. (1931) I.L.R. 11 Pat. 187.
3. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236.
4. (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 (P.C.).
5. (1882) I.L.R. 9 Cal. 100.

"That case, it is true, was decided with reference to a wholly different Statute but the reasoning which was adopted there is, in my opinion, also applicable to this case and I think that where an appeal has been actually preferred to the appellate authority and where it has been disposed of by such authority, the order passed in such a proceeding may, without straining the actual words of the section, be regarded as an order under section 31 or section 32 as the case may be."

The observations of Sir Shadi Lal in *Duni Chand* v. *The Commissioner of Income-tax*[1], which had the approval of the Privy Council were relied on. In a latter case of the same Court in *Maharani Gyan Manjari Kuari* v. *The Commissioner of Income-tax*[2], an appeal was rejected by the Appellate Assistant Commissioner on the ground that it was not in the prescribed form. It was held that the order of the Appellate Assistant Commissioner was within section 31 of the Act and that the appeal was competent. Manoharlal, J., who delivered the judgment of the Court quoted *in extenso* from the decision of the Full Bench in *Kunwarji Ananda* v. *Commissioner of Income-tax, Bihar and Orissa*[3], in support of his view. At page 65 occurs the following extract from Dalva J's judgment which gives the basis of the decision :

"Where, however, the Assistant Commissioner holds that an appeal is barred by the proviso (referring to the old proviso to section 30) it has been urged by the learned counsel for the Income-tax Department that there is no order passed under section 31 and that consequently the assessee is not entitled to resort to the provisions of sub-sections (2) and (3) of section 66 for coming up to the High Court on questions of law. It appears to me that this contention is unsound. If the order be not an order under section 31, there is no other section in the Act under which it can come. It is true that section 31 deals with the hearing of the appeals, but does this necessarily mean a hearing of the appeal on the merits."

The view taken by the Patna High Court, in our opinion, for the reasons already mentioned is correct. Under the Civil Procedure Code, it was held that if an appeal was rejected either on the ground of limitation or for a similar reason that the order of rejection was appealable as a decree—see *Ayyanna* v. *Nagabhooshanam*[4], *Zamindar of Tuni* v. *Bennayya*[5], *Saminatha Iyer* v. *Venkatasubba Aiyar*[6], in which *Gulab Rai* v. *Mangilal*[7], was followed—see also *Kanthimathi Ammal* v. *Ganesa Iyer*[8]. But a Full Bench of our Court In re *Kayambu Pillai*[9], held that an order dismissing an appeal for non-compliance of the order requiring security for costs and an order dismissing an appeal for non-payment of court-fee are not decrees and are not appealable as such. The decisions in *Ayyanna* v. *Nagabhooshanam*[4], *Zamindar of Tuni* v. *Bunnayya*[5], were distinguished. There is a recent decision of Subba Rao, J., in *Srinivasalu Naidu* v. *The Commissioner of Income-tax*[10], which at first sight seems to be against the view which we have taken. The question which the learned Judge had to deal related to the construction of section 33-A (2) of the Income-tax Act. The Commissioner is authorised by that section to exercise the power of revision but subject to certain restrictions provided in the section itself. The Commissioner has no power under that proviso to revise the order :

"(a) Where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal but has not been made, the time within which such appeal may be made has not expired, or, in the case of an appeal to the Appellate Tribunal, the assessee has not waived his right of appeal, or

(b) where an appeal against the order has been made to the Appellate Assistant Commissioner, the appeal is pending before the Appellate Assistant Commissioner, or

(c) the order has been made the subject of an appeal to the Appellate Tribunal."

In that case an appeal to the Appellate Tribunal under section 33 against an order of the Appellate Assistant Commissioner was dismissed as time-barred. Thereafter the assessee applied to the Commissioner under section 33-A (2) to revise the order of the Appellate Assistant Commissioner. He declined to entertain the appli-

1. (1929) I.L.R. 10 Lah. 596.
2. (1944) I.L.R. 22 Pat. 735 : (1944) I.T.R. 59.
3. (1931) I.L.R. 11 Pat. 187.
4. (1892) I.L.R. 16 Mad. 285.
5. (1898) 8 M.L.J. 304 : I.L.R. 22 Mad. 155.
6. (1903) 13 M.L.J. 300 ; I.L.R. 27 Mad. 21.
7. (1884) I.L.R. 7 All. 42.
8. (1935) 69 M.L.J. 781 : I.L.R. 59 Mad. 805.
9. (1941) 2 M.L.J. 500 : I.L.R. (1941) Mad. 954.
10. (1948) 2 M.L.J. 386: 1948 I.T.R. 341.

cation on the ground that the order of the Appellate Assistant Commissioner had already been made the subject of an appeal to the Appellate Tribunal. The assessee then applied to the High Court under section 45 of the Specific Relief Act for directing the Commissioner to hear and determine the question. The objection raised was that the order of the Appellate Assistant Commissioner was made the subject of an appeal to the Appellate Tribunal though it was dismissed as being out of time and therefore the Commissioner could not be compelled to exercise the power of revision under section 33-A (2). In the context in which the expression occurs it is clear that the bar to the exercise of the revisional jurisdiction was the actual pendency of an appeal before the Appellate Assistant Commissioner, or that there was a disposal on merits by the Appellate Tribunal and therefore it should not be again made the subject of revisional jurisdiction of the Commissioner. It was therefore rightly held by the learned Judge, if we may say so with respect, that a mere dismissal of an appeal *in limine* on the ground of limitation did not attract the bar to the exercise of the revision a jurisdiction and therefore a *mandamus* was issued. Reference was made in that judgment to the decision of Madhavan Nair, J., in *Byya Reddi* v. *Gopala, Rao*[1], and of the Judicial Committee in *Nagendranath Dey* v. *Sureshchandra Dey*[2]. The decision, in our opinion, does not support to any extent the contention of Mr. Rama Rao Sahib. In *Byya Reddi* v. *Gopala Rao*[1], no doubt the appeal memorandum was rejected as being out of time and the view that there was no appeal within the meaning of Article 182 (2) of the Limitation Act was based on the fact that under the Madras Amendment which introduced new sub-section (3) to rule 1 of Order 41, Civil Procedure Code, it was necessary to decide the application under section 5 of the Limitation Act to excuse the delay before the appeal is admitted. The view therefore taken by the learned Judge is that case can be justified on the ground. But that does not help the contention of Mr. Rama Rao Sahib.

We are therefore of opinion that the order of the Appellate Assistant Commissioner rejecting the appeal was one under section 31 of the Income-tax Act and was appealable to the Appellate Tribunal. The question referred to us must therefore be answered in the affirmative and in favour of the assessee. As the assessee has succeeded in this reference, he is entitled to his costs which we fix at Rs. 250. (To be shared by the respondents between them).

V.S. *Reference answered in favour of assessee.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Panchayat Board, Kudaravalli, Gudiwada Taluk, Krishna Dt., represented by its President, Sanka Gopala Rao and others .. *Petitioners**

v.

Inspector of Municipal Councils and Local Boards, Madras and another .. *Respondents.*

Madras Local Boards Act (V of 1920)—Section 45-A (1)—Order superseding a Panchayat Board not giving reasons—Legality.

In the case of an Inspector of Municipal Councils and Local Boards passing an order superseding a panchayat Board under section 45-A (1) of the Madras Local Boards Act, though he has to exercise his functions judicially, the section does not impose on him a duty to give reasons for his action. On the wording of the section as it stands it cannot be said that an order superseding a Panchayat Board is bad simply because it does not disclose the reasons for the order.

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1. (1933) 66 M.L.J. 486 : I.L.R. 57 Mad. 741.
2. (1932) 63 M.L.J. 329 : L.R. 59 I.A. 238 (P.C.).

*C.M.P. No. 269 of 1951. 22nd August, 1951.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Inspector of Municipal Councils and Local Boards, Madras, and to quash the proceedings in R. O. C. No. 55151 of 1950, H-3—dated 20th December, 1950.

D. Narasaraju and *K. B. Krishnamurthi* for Petitioners.

The Government Pleader (*P. Satyanarayana Raju*) and *A. Sambasiva Rao* for Respondents.

The Court made the following

ORDER.—This application is for quashing the order of the Inspector of Municipal Councils and Local Boards, dated 20th December, 1950, superseding under section 45-A (1) of the Madras Local Boards Act the Kudaravalli Panchayat Board for a period of one year. On 12th October, 1950, the Inspector of Municipal Councils and Local Boards issued a notice to the Panchayat Board calling upon them to show cause within 15 days from the date of the receipt of the notice why the Panchayat Board should not be superseded under section 45-A (1) of the Madras Local Boards Act. In that notice the Inspector stated the following reasons for the proposed action: (1) For the year 1949-50 the Panchayat Board realised a large amount from the proceeds of the grass sales but only credited a sum of Rs. 164; (2) No amenity worth the name has been provided by the Panchayat Board and that they have not kept the fresh water tank in a sanitary condition; (3) the Panchayat Board has not checked the President or reported to the higher authorities the following irregularities: (*a*) the President has been keeping large cash balance on hand but the board failed to pull up the president; and (*b*) the President failed to serve notice of meetings with agenda to the members. To this notice the Panchayat Board filed a statement explaining the charges made against the president and also the members of the Panchayat Board. The Inspector of Municipal Councils and Local Boards considered the reports of the subordinate officers and the explanation of the Panchayat Board together with the remarks made by the District Panchayat Officer and was satisfied that action should be taken against the Panchayat Board under section 45-A (1). On 20th December, 1950, the Inspector of Municipal Councils and Local Boards passed an order superseding the Panchayat Board.

The learned counsel for the petitioner raised before me three points: (1) the order of the Inspector was based upon non-existing facts; (2) the order was made *mala fide* having regard to extraneous circumstances and (3) the order does not disclose the reasons as a judicial order should do.

The petitioner has filed a long affidavit before me canvassing the various reasons disclosed in the notice issued by the Inspector for the action taken by him. After going through the affidavit in some detail, though there is the possibility of another tribunal coming to a different conclusion, I cannot say that there is no material on which the Inspector could have come to the conclusion which he did. Nor am I satisfied by the allegations made in the affidavit that the proceedings were started not in the interest of the Board but for other extraneous reasons. There is also no materials to hold that the Inspector acted *mala fide* in the exercise of his jurisdiction.

Mr. Narasaraju then argued that drastic power in the hands of an officer is susceptible of abuse if he is not bound to give reasons for his satisfaction. In support of his argument he relied upon my order in W. P. No. 171 of 1951. There I held that the Government in setting aside the orders of inferior tribunals under section 64-A of the Motor Vehicles Act should disclose the reasons in their order. But the Government in exercising the power under section 64-A of the Motor Vehicles Act is exercising revisional jurisdiction, whereas in the case of an Inspector though he has got to exercise his functions judicially the section does not impose

on him a duty to give reasons for his action. I agree with Mr. Narasaraju that in the interests of public institutions in this country, an officer, however competent and otherwise honest, cannot be entrusted with drastic powers without the elementary safeguard that he should give reasons for his action. But it is for the Legislature to amend the Act suitably having regard to the changed circumstances after this country had become independent. But on the section as it stands I am not prepared to extend the principle laid down by me in W. P. No. 171 of 1951 to an order under section 45-A (1) of the Madras Local Boards Act. This petition is dismissed with costs—one set—Advocate's fee Rs. 100.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

V. M. Krishnaswami Mudaliar .. *Petitioner.**

v.

Rahman Baig and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), Section 7—Applicability— Arrangement between landlord and tenant by which tenant was to spend the rent of a month in particular manner.

If there was an arrangement between the landlord and the tenant in and by which the rent of any particular month was to be appropriated or spent in a particular manner, it could not be said that the rent for the month was due within the meaning of section 7 of the Rent Control Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ of certiorari* calling for the records in C.M.A. No. 71 of 1949 on the file of the Subordinate Judge, Vellore, preferred against the order of the Rent Controller, Vellore, dated 17th July, 1949, in H.R.C. No. 78 of 1949 and quash the order made therein.

N. K. Mohanarangam Pillai for Petitioner.

V. Ramaswami Ayyar for Respondent.

The Court made the following

ORDER.—This is an application for issuing a *writ of certiorari* and for quashing the order of the Subordinate Judge of Vellore made in appeal against the Order of the Rent Controller, Vellore.

The petitioner is the owner of the building. He rented it out to the respondent on a monthly rental of Rs. 16-8-0 in the year 1944, and he had taken an advance of Rs. 33. For the month of March, 1949, the tenant did not pay the rent before the last day of April, but on 31st May, 1949, he sent a sum of Rs. 33 towards the rent for those two months. The petitioner filed the application before the Rent Controller for evicting the respondent on the ground amongst others that he did not pay the rent for the month of March before the end of April. Among other contentions the respondent raised the plea that the petitioner consented to certain alterations to the house to be made by the respondent by spending the money from and out of the rent payable by him, and that pursuant to that arrangement he was taking steps for getting the repairs done. Later on, having come to know that the petitioner was taking steps to evict him, the respondent sent the money before the end of May. The learned Subordinate Judge on the material placed before him found that because of that arrangement the respondent kept the rent for one month and that when he found a change in the attitude of the landlord he remitted that amount. If there was an arrangement between the landlord and the tenant in and by which the rent of any particular month was to be appropriated

*C.M.P. No. 7915 of 1950. 18th July, 1951.

or spent in a particular manner, it cannot be said that the rent for the month was due within the meaning of section 7. I cannot therefore say that there is an error of law apparent on the record or that the Subordinate Judge acted without jurisdiction.

The application is therefore dismissed but in the circumstances of the case without costs.

K.C. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE SOMASUNDARAM.

Vokkaligara Yengtappa .. *Appellant.**

Criminal Trial—Evidence—Statement of accused recorded in police case diary—If admissible even in favour of accused—Criminal Procedure Code (*V of* 1898), *sections* 162 *and* 172 *and Evidence Act* (*I of* 1872), *sections* 25 *to* 27—*Effect.*

Under section 172 of the Criminal Procedure Code, a Court may use the Police diaries of cases not as evidence in the case but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries or to see them merely because they are referred to by the Court; but if they are used by the Police Officer who made them to refresh his memory or if the Court uses them for the purpose of contradicting a witness the provisions of the Indian Evidence Act, section 161 or section 145, as the case may be, shall apply. A statement by an accused person recorded in a case diary is inadmissible in evidence under section 162, Criminal Procedure Code, even if there is something in such a statement in favour of an accused. It is extremely difficult to utilise material in a case diary even in favour of an accused person as the law stands.

Appeal against the Order of the Court of Session, Coorg division, in C.C. No. 9 of 1949, on 24th March, 1950.

S. Govind Swaminathan for Appellant.

R. Santhanam for the Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court delivered the following Judgments :—

Mack, J.—Appellant, a youth aged 20 has been found guilty under section 302, Indian Penal Code of the murder of his cousin Eranna aged about 12 by putting arsenic poison into some cooked curry with the intention of doing away with Eranna's family, particularly his father P.W. 8. Eranna alone died. P.W. 8 and others, who partook of this curry, after much purging and vomitting recovered. Appellant has been sentenced to transportation for life. Chennamma A-2, an old woman, the mother of the second wife of the appellant's father Chennappa was also charged with this murder along with the appellant but acquitted.

The family back-ground and the motive alleged, though seemingly involved, is briefly this. Appellant's father Chennappa had two wives. He was the son by the first wife, who died. Then Chennappa married the daughter of A-2. The deceased boy's father Narasagowda, (P.W. 8) Chennappa and Griappa (P.W. 12) were brothers. Estrangement between P.W. 8 and Chennappa originated some years ago in A-2 objecting to her son Manjappa marrying Boramma (P.W. 16) the daughter of P.W. 8. Incensed by Manjappa marrying this girl in defiance of her wishes, A-2 had nothing further to do with him. Her family owned property and panchayatadars decided that she and Manjappa should enjoy it in separate portions. Manjappa died in 1948 leaving a small daughter Puttamma. Revenue registration in the village was effected of Manjappa's family property in this child's name with her mother P.W. 16 and her father's mother A-2 as joint enjoyers. P.W. 16 appealed to the District Commissioner of Coorg, who eliminated A-2 who then

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*C.A. No. 339 of 1950. 22nd October, 1951.

filed a suit in the Court of the District Munsif, Virajpet, to assert her claims. This was dismissed shortly before this alleged offence. In this dispute P.W. 8 naturally supported the claim of his grand-daughter, whereas his brother Chennappa supported his mother-in-law. According to the evidence of P.W. 16, A-1 left his father's house after a quarrel with his step-mother but there was a reconciliation. There is some evidence to show that A-2 at one time thought of arranging a marriage between A-1 and the child Puttamma, which would consolidate the property in one family again. However this may be for some time before the offence, A-1 as is not disputed, was living quite amicably with his father and step-mother.

The brothers P.W. 8 and Chennappa lived in strictly separate portions of their family house in Kannangala on very strained terms. It is in evidence that there was a common loft over the whole of the house to which there was only access originally from a ladder in P.W. 8's kitchen. In view of strained feelings, Chennappa provided a separate ladder for his family to reach this common loft by a ladder from one of his rooms. It was however possible for any one in Chennappa's house to enter his brother's kitchen through the loft and *vice versa*. The only occupants of Chennappa's portion of the house were Chennappa himself, his second wife (A-2's daughter) and his son A-1. On the date of the poisoning which was 31st July, 1949, they had locked up their part of the house and gone some days previously to the house of A-2 who lived in a separate house of her own in a village Mythadi, 3 or 4 miles away to assist her in her cultivation.

The prosecution case is that sometime after 9 A.M. that morning A-1 came to this house, made his way through the loft into P.W. 8's kitchen and poured out of a bottle a mixture of arsenic poison into a chatti of cooked fish and potato curry which was hanging on the wall of the kitchen near a pot of cooked rice after P.W. 8 and all the inmate had locked up their part of the house and gone to the fields.

The inmates of the house were P.W. 8, his second wife (P.W. 9) by whom he had a baby son and three sons including the deceased Eranna by his deceased first wife. The other two sons had gone out to work that day and have not appeared before the Court. P.W. 9 had cooked rice and this curry that morning of which she, P.W. 8 and Eranna partook a little and then P.W. 8 went to the field of P.W. 4 to help in some ploughing. P.W. 9 and Eranna taking with them the little child, went to their fields for transplanting. P.W. 9 was joined there by another woman P.W. 15 who is the mother of P.W. 14. P.W. 8 later joined them after finishing his ploughing. Another witness (P.W. 10) a friend on some business, who came to see P.W. 8 joined them in transplantation. They saw A-1 going in the direction of his house carrying an umbrella and a bag. P.W. 9 had left some eggs in the common hall and thinking that A-1 might help himself to them, sent Eranna to put them away in a safe place. According to this witness Eranna came back and said A-1 was in his house. After their field work, P.W.s 8 and 9 returned home accompanied by P.W. 10 who had his mid-day meal with them. They were followed a little later by Eranna and all ate of this rice and curry which P.W. 9 had cooked early that morning. After their meal, P.W. 8 on his way to his fields began to vomit and purge. P.W. 9, Eranna and P.W. 10 were similarly affected. P.W. 9 called out to her brother-in-law P.W. 12 who lived near by. He sent his son P.W. 11 to fetch P.W. 8 whom he found also in great distress and making his way home. Eranna died that night. P.W. 10 who says he vomitted ten times and purged five times later went to the hospital where he stayed for 4 days.

On the following day at 1-30 P.M. P.W. 8 made a complaint Exhibit P-1 at the Virajpet police station to the Inspector himself P.W. 1 who happened to be there. This briefly sets out the family enmity and all that happened the preceding day. It concludes with a suspicion that as his brother Chennappa and Chennamma A-2 were on terms of enmity with him on account of the civil suit, they must have administered poison through Kajji by which name A-1 is

called. Exhibit P-1 mentions that when they were transplanting they saw A-1 going towards their house and that P.W. 9 then sent Eranna to the house who returned saying A-1 was there.

There can be no doubt that a large quantity of arsenic had been put into this curry while the family had gone to the fields after locking up their house. A cock which had eaten up some vomit was found dead and the Inspector sent up for chemical analysis its viscera and a portion of the curry found in an earthern dish. The Chemical Examiner whose report, Exhibit P-15, was not received till several weeks later on 27th October, 1949, found no arsenic in the cock but $2\frac{3}{8}$ grains of arsenic in the curry remnants. In the liver and kidney of Eranna the Chemical Examiner found $\frac{1}{4}$ grain of arsenic. The Inspector arrested A-1 on the evening of 3rd August, 1949, and on a search of Chennappa's house the following day, he seized three bottles which he sent to the Chemical Examiner. In one of them, $\frac{3}{4}$ grain of arsenic was detected. The bottle containing this liquid has not been apparently sent back by the Chemical Examiner and it has not been exhibited. Far more significant is the arrest of the old woman A-2 according to the Inspector after he examined A-1. There is no reason whatsoever for rejecting his evidence that A-2 took him to her plantain garden and took out concealed under the roots of a tree, a bottle M.O. 4 which according to the Chemical Examiner's report, Exhibit P-15, was found to contain no less than 15 grains of white arsenic. This is far and away the most important discovery in the case, the large quantity of arsenic found in this bottle being disclosed long after the rest of the investigation was completed. The Circle Inspector says he received the Chemical Examiner's report on 27th October, 1949 and that same day laid the final charge-sheet against both the accused.

The main complication in this case is a confession recorded from appellant by the Subedar Magistrate Sri M. A. Uttayya (P.W. 13) on 9th August, 1949, on a police requisition. In this confession, Exhibit P-34, A-1 confessed that he brought the bottle containing tree killing poison from Mytadi that morning, and described how he unlocked his portion of the house with keys he took from his father's pocket without his knowledge, got into P.W. 8's kitchen through the loft and put half the portion of the tree killing poison into the cooked curry in this chatti. He then said he did some work in the cattle shed and went to the house of P.W. 14 where he stayed that night. Next morning he heard that Eranna was dead, and taking the poison bottle with him from the poultry pen in which he had hidden it, he returned to Mythadi and gave it to his grandmother asking her to keep it safe. He informed her and his father of Eranna's death. The most difficult feature of this confession is this youth's assumption of full responsibility for the poisoning. The confession concludes with these words:

"I did this act on my own accord. Neither father nor grandmother were responsible for what I did."

Both in the committing Magistrate's Court and in the Sessions Court, A-1 went back completely on this confession, and wholly denied having entered his house at all that morning and having put any poison into this curry or that he took back any bottle to A-2. A-2 consistently denied that A-1 gave her any bottle at all or that she produced it before the police. The learned Sessions Judge found the retracted confession to be voluntary and true and in agreement with the assessors, found A-1 alone guilty of murder, acquitting A-2 against whom he considered that, although there was serious suspicion the evidence to be not conclusive. When he came however to sentence the learned Sessions Judge took appellant's youth into consideration and also held that the evidence showed that he was a victim in the hands of A-2 if not of his father Chennappa and accordingly passed on him to the lesser sentence.

There can be little doubt that A-2's acquittal was the result of A-1 taking full responsibility for the poisoning in the confession made before the Magistrate.

There are some unsatisfactory features attaching to this confession. In the first place, it appears to have been recorded by the Magistrate on the very day A-1 was first produced before him. Five simple questions were put to the accused, answered on a printed form in use in Coorg for the recording of confessions under section 164, Criminal Procedure Code. They may be strictly in sufficient compliance with section 164, Criminal Procedure Code, but are not in compliance with rule 85 of the Madras Criminal Rules of Practice, which has suggested several other useful questions, which may be put to an accused to enable the Magistrate to determine whether the confession was voluntary or not. We would draw the attention of the learned Sessions Judge of Coorg and the Coorg authorities to the desirability of a printed form more in accordance with rule 85 of the Madras Criminal Rules of Practice. In these questions, there has been a strict compliance with section 164, Criminal Procedure Code and the accused was made to understand that any confession may be used in evidence against him and that he was not bound to make any confession. We are however really disturbed by two circumstances surrounding the confession. The first is that the Magistrate did not give A-1 some time for consideration after giving him a warning and take such precautions as were possible in view of his Court being a few yards from the Sub-jail entrance to keep the accused away from any possible external influence. The second circumstance is that the Magistrate closed all the doors of the Court-room after the accused was produced before him. He explained in his evidence that he did so in order "to bring courage to the accused." On the other hand, action of this kind to an unsophisticated mind may have savoured of further confinement and intimidation. The learned Magistrate may have acted with the best of intentions to obviate any criticism sometimes levelled at confessions that the police officer in the back ground through a door with intimidating gestures kept the confessor in the straight and narrow path of police requirements. We have very carefully considered the confession and while agreeing with the Sessions Judge, that much of it was voluntarily made and is true, we are unable to accept his full assumption of guilt as being at the time he was examined by the Magistrate freely and voluntarily made. We do not know what influences this young man was subjected to between the date of his arrest, *viz.*, the 3rd of August and the date of his production before the Magistrate on the 9th of August when his confession was recorded.

Now, the conduct of A-1 militates against his being the sole culprit in the case and against his knowledge that what he was inserting into the curry contained deadly poison in sufficient quantity really to kill more than one person. In fact had he emptied out the contents of the whole bottle, M.O. 4 into this curry, every body who had partaken of it, may well have died. But we find A-1 staying on in the village that night in the house of P.W. 14 after working that day at transplantation with P.W. 14 and some others in the field of P.W. 17. P.W. 15, the mother of P.W. 14, says she told him to go and see P.W. 8 and P.W. 9 who, she heard, were vomitting and that the appellant went out and came back saying he had gone only to the cattle shed. However this may be, there can be no doubt that the appellant stayed in P.W. 14's house that night and that he also went along with P.W. 14 the following morning and saw Eranna's dead body. According to the Inspector, when A-2 produced M.O. 4 the statement she made before the Panchayatdars embodied in the Panchayatnama Exhibit P-6 is that A-1 took it from the right pocket of his trousers and asked her to keep it in safe custody on the morning of 1st August, 1949. This is a statement made by an accused person to the police during investigation and is strictly and unfortunately inadmissible in evidence although it explains the production of property. In *Pakala Narayanaswami* v. *The King-Emperor*[1], their Lordships of the Privy Council approved of the view taken by a Full Bench of this Court in In re *Syama Mahapatro*[2], that the words "statement

1. (1939) 1 M.L.J. 756: L.R. 66 I.A. 66: I.L.R. 18 Pat. 234 (P.C.).

2. (1932) 62 M.L.J. 743: I.L.R. 55 Mad. 903 (F.B.).

made by any person" in section 162, Criminal Procedure Code, included a statement made by an accused person, and resolved a difference of opinion on this point held by the Indian Courts, the representative judgment taking the opposite view being that of Rankin, J., in *Azimuddy* v. *Emperor*[1]. This statement by A-2 when she produced M.O. 4 is of course not a confession and can in no sense be admissible as information leading to discovery under section 27 of the Evidence Act. There can however be no doubt that it was A-2 who produced this bottle M.O. 4 found later to contain 15 grains of arsenic buried under the roots of a plantain tree.

This bottle M.O. 4 is, as we have said, perhaps the most significant production in the case. We are satisfied that the portion of the judicial confession made by A-1 that he took this bottle and gave it to A-2 after pouring half of its contents into the curry is true. We are unable to reconcile his subsequent conduct with knowledge that this bottle contained a deadly poison. Had this been the case, it is most unlikely that he would have stayed in the village that night keeping in his possession this bottle with this poison without making any attempt to destroy it or throw the contents away. Further, if he knew that what he put into the curry was so potent a poison, it is most unlikely that he would have stayed in the village that night at all. There are therefore inherent probabilities, which favour the view that this young man had no knowledge of the real contents of the bottle and if this were the case, although what he put into the curry was in fact a deadly poison, he cannot be convicted of murder, the requisite intention to constitute which would not be proved.

We are in agreement with the learned Sessions Judge's view that A-1 was a tool in the hands of A-2 or also possibly his father Chennappa. In our opinion Chennappa should have been either examined as a witness or he should have been put into the dock. One of the bottles found in his house contained $\frac{3}{4}$ grain of arsenic and no investigation after the receipt of the Chemical Examiner's report appears to have been pursued as regards this discovery. It is in evidence that arsenic is present in large quantities in chemical preparation for the killing of trees in plantations in Coorg without the necessity of felling them, and it may be that arsenic in this way was quite easily procurable in these areas. If A-1 was a mere tool, it may well be that he had no knowledge that what he was pouring into the curry was a deadly poison. He may well have been under some other impression.

Under section 172 of the Criminal Procedure Code, a Court may use the police diaries of cases not as evidence in the case but to aid it in such inquiry or trial. The manner in which a case diary can be utilised to aid a Court is nowhere defined. Neither the accused nor his agents shall be entitled to call for such diaries or to see them merely because they are referred to by the Court; but if they are used by the police officer who made them to refresh his memory or if the Court uses them for the purpose of contradicting a witness the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be shall apply. A statement made by an accused person recorded in a case diary is inadmissible in evidence under section 162, Criminal Procedure Code, even and most unfortunately if there is something in such a statement in favour of an accused; for instance, if an accused person produces an incriminating item of property connected with the case, explaining how he got it and exculpating himself, there is no legal way of that statement being used in favour of an accused even by a defending advocate. When we expressed our doubt during the hearing of the appeal, as to whether the accused although we were satisfied that he put the poison into this curry had the guilty knowledge that it was poison, the learned Assistant Public Prosecutor very fairly invited our attention to the statement of the accused as recorded in the case diary made when he was first examined. Nothing there can be used as legal or admissible evidence *against* him. All that we are prepared to say here is something

1. (1926) I.L.R. 54 Cal. 237.

in favour of the appellant, that in his original confession to the police, far from assuming full responsibility for the poisoning and while admitting that he put the contents of the bottle into the curry, he said he was acting on the instructions of A-2. A defending advocate has under the rules no access to the statement of accused persons in a case diary and only to the statement of witnesses actually examined in Court for user for the purpose of contradiction under section 162, Criminal Procedure Code. At the actual trial, both A-1 and A-2 put forward a common defence completely denying all the evidence against them. We have made use of the case diary in this manner in favour of the accused as it strongly re-inforces the grave doubts that we have had on the merits of the admissible evidence as to the intention of A-1 and his knowledge at the time he put this poison into the curry. Had Chennamma also been convicted of this murder, it would have been legally impossible for us to have utilised the case diary in the explicit manner that we have done as evidence, however much the statement of the accused recorded there may have influenced our decision. It is most regrettable in the present state of the law that even a Public Prosecutor although he may know that there is something in a statement made by an accused when examined at the commencement of great help to him, is precluded from bringing it openly to Court notice by way of evidence. But this is the present state of the law under section 162, Criminal Procedure Code and sections 25 to 27 of the Evidence Act and until the law is changed, it is extremely difficult to utilise material in a case diary even in favour of an accused person.

We do not think that the appellant can be convicted of murder. We are however satisfied that he did put this poison into the curry giving him the benefit of a reasonable doubt as regards knowledge that it was a considerable quantity of arsenic. We agree with the learned Sessions Judge that he was a mere tool and that the principal culprit has escaped for lack of a sufficiency of legal evidence. We think that the proper section under which the appellant should be convicted is section 328, Indian Penal Code, it being a reasonable inference that a person who puts into the food of another secretly any unwholesome drug intended to cause or know it to be likely to cause some bodily pain, disease or infirmity, that is, hurt within the meaning of section 319, Indian Penal Code. This section was used to convict a wife who administered aconite powder to her husband in In re *Kuruba Chinna Hanumakka*[1]. Section 328, Indian Penal Code, is, we consider, the appropriate section under which this young appellant can, in the circumstances, be fairly convicted, tool that he was as the learned Sessions Judge rightly in our opinion found him to be. The appellant has been continuously in jail since 24th March, 1950, the date of his conviction, the case having undergone a regrettable delay before in coming up for hearing owing to Coorg having comparatively recently come under the jurisdiction of this Court. We find the appellant guilty under section 328, Indian Penal Code and sentence him to 20 months' rigorous imprisonment which would approximately be the period he would have undergone by the time he is released.

Somasundaram, J.—I agree with the judgment of my learned brother. So far as sections 25 to 27 of the Indian Evidence Act are concerned, I have already stated in another case, that they only prohibit the use of the confession against the accused and that there is no prohibition of their use in favour of the accused. But as regards section 162, Criminal Procedure Code, it prohibits the use of the statement made by any person (which includes the statement of the accused) for any purpose. There is therefore a prohibition to use the statement of the accused if made in the course of investigation even if it is in favour of the accused. This section needs to be amended so as to enable the statements of the accused to be used if they are in their favour, particularly if they happen to be in explanation of the recovery of incriminating articles from their possession.

K.S. ——— *Conviction and sentence varied.*

1. (1943) 1 M.L.J. 51 : I.L.R. (1943) Mad. 679.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMASUNDARAM.

Thamsi Goundan .. *Petitioner**

v.

Kanni Ammal .. *Respondent.*

Constitution of India, Article 14—*Criminal Procedure Code* (*V of* 1898), *section* 488—*Whether violation of Article* 14.

Section 488 of the Cr. P. Code cannot be said to contravene Article 14 of the Constitution. It cannot be said that the classification in favour of women, more particularly wives and that too deserted by their husbands. is arbitrary and that it does not bear a reasonable and just relation to the things in respect to which the classification is made. Section 488 is intended to prevent starvation of wives deserted by their husbands. It applies to all women in similar circumstances. Legislation therefore in favour of this class of people cannot be said to be arbitrary.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Additional First Class Magistrate's Court, Vellore, in M.C. No. 7 of 1949.

M. Natesan for Petitioner.

G. Vasantha Pai and *A. Balarama Sarma* for Respondent.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This petition is by the husband against an order of maintenance passed by the Additional First-Class Magistrate, Vellore, under section 488, Criminal Procedure Code, in favour of his wife. The petitioner has been ordered to pay Rs. 15 a month. There is a clear finding by the Magistrate that the petitioner has neglected and refused to maintain the respondent herein. After going through the records I am satisfied that the lower Court was justified in arriving at that conclusion. On the merits, therefore, there is no case for the petitioner herein.

The question that is raised by the learned counsel for the petitioner is that section 488, Criminal Procedure Code, is *ultra vires* of the Constitution because the provision is only in favour of women without a similar provision in favour of men. In short his argument is that in the absence of a provision that the husband must in similar circumstances also be awarded maintenance from the wife, the provision is *ultra vires*. He says that it offends Article 14 of the Constitution. I must at the outset say that a mere untenable argument could not have been advanced by anyone appearing for the petitioner. On the face if it, it is ridiculous to suggest that husband must have a similar provision in his favour. What is meant by Article 14 of the Constitution has been stated by their Lordships of the Supreme Court in *Chiranjit Lal Chowdhury* v. *The Union of India*[1]. His Lordship, Mr. Justice Fazl Ali dealing with this Article quotes with approval from Professor Willis's Constitutional Law as follows :

"It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed' . . . . It does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis."

Then His Lordship says as follows :

"I wish to lay particular emphasis on the principle enunciated by him that any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some *difference* (Italics is mine) and must bear a reasonable and just relation to the things in respect of which it is proposed."

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* Cr. R. C. No. 634 of 1950. (Cr. R. P. No. 583 of 1950). 21st September, 1951.

1. (1951) S.C.J. 29.

In the same judgment, His Lordship Mr. Justice Mukherjee, dealing with this Article states at page 53 as follows :

"As has been said by the Supreme Court of America, 'equal protection of laws is a pledge of the protection of equal laws' and this means 'subjection to equal laws applying alike to all in the same situation. In other words, there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the *same* (Italics is mine) .... There can certainly be a law applying to one person or to one group of persons and it cannot be held to be unconstitutional if it is not discriminatory in its character. It would be bad law 'if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations and visits a penalty upon them, which is not imposed upon others guilty of like delinquency.' The Legislature undoubtedly has a wide field of choice in determining and classifying the subjects of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid."

The question is whether judged by this test, section 488, Criminal Procedure Code, can be said to have contravened the provision embodied in Article 14 of the Constitution. Can it be said that this classification in favour of women, more particularly wives and that too deserted by their husbands is arbitrary, and that it does not bear a reasonable and just relation to the things in respect to which the classification is made? The difference between men and women forms the basis of the classification. Women as a whole suffer from several disabilities from which men do not suffer. They have no right at least under Hindu law to participate along with their brothers in the inheritance to the property of their parents. Even in England only after the passing of the Married Women's Property Act, their right to own property was recognised. Instances can be multiplied without number to show how women have not equal rights with men. That as a class they are weaker than men cannot also be disputed. In fact they are even called by the appellation "Weaker sex". The very provision in clause 3 of Article 15 that special provision may be made for women, suggests the existence of disparity. Section 488 is intended to prevent starvation of wives deserted by their husbands. It applies to all women in similar circumstances. Legislation therefore in favour of this class of people cannot be said to be arbitrary. The provision therefore is not *ultra vires* of the Constitution. The petition is dismissed.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR.

P. T. Vadivel Goundar .. *Petitioner.**

Madras Prohibition Act (X of 1937), section 4 (1) (a)—Statement by accused to Prohibition Inspector—Whether admissible in evidence—Brandy bottles in vehicle exclusively in the possession of accused—Whether accused guilty of possession of liquor.

The Prohibition Sub-Inspector is not a police officer within the meaning of sections 25 and 26 of the Evidence Act and a statement made to him by the accused is not inadmissible in evidence.

A head of a household or the owner of a vehicle is liable for liquor bottles, etc., found inside the house or vehicle exclusively in his possession, unless he proves that he was not responsible for their presence there and that somebody else introduced them there.

The petitioner was the owner of the van, which was exclusively his and brandy bottles were found in a bag kept by his side and close to where he alone sat. He gave a statement to the Prohibition Inspector that he was taking those brandy bottles for being given as medicine to his wife during her expected confinement.

Held, the statement was admissible in evidence and that even apart from the statement the evidence was sufficient to prove the possession by the petitioner of the brandy bottles and he was therefore guilty of an offence under section 4 (1) (a) of the Madras Prohibition Act.

Petition under sections 435 and 439, Criminal Procedure Code (1898), praying that the High Court will be pleased to revise the order of the Court of Sessions, Madurai Division, in Criminal Appeal No. 37 of 1950 preferred against the order

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* Crl. R. C. No. 936 of 1950.
(Crl. R. P. No. 870 of 1950). 22nd August, 1951.

of the Court of the Additional First-Class Magistrate II of Madurai, in C.C. No. 413 of 1949.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* for Petitioner.

The Assistant Public Prosecutor (*A. C. Muthanna*) for the State.

The Court made the following

Order—This is a petition to revise the judgment of the Sessions Judge, Mathurai, dated 8th April, 1950, in C.A. No. 37 of 1950, confirming the conviction of the petitioner, Vadivel Goundar, a man of Travancore, under section 4 (1) (*a*) of the Madras Prohibition Act, but setting aside the sentence of simple imprisonment for one month and the order of confiscation of his motor van in which he was carrying the bag containing the two bottles of brandy.

The facts are briefly these. The petitioner, Vadivel Goundar, is a man of Kottayam, in Travancore-Cochin State, and owns some estates there. He was caught hold of on Gudalur-Cumbum road at 9 P.M. on 28th November, 1949, in Indian Union territory, by the Prohibition Inspector of Police, P.W. 1, and his staff, and two bottles of brandy were recovered from a bag kept on the rear seat near him by the petitioner who gave a statement to the Prohibition Inspector stating that he was taking those brandy bottles for being given as medicine to his wife during her expected confinement. The question, however, is whether that statement is admissible under sections 25 and 26 of the Indian Evidence Act. Both the lower Courts held that it was admissible and convicted the petitioner. The learned Sessions Judge held, however, that the circumstances were such that imprisonment was not justified, and that the confiscation of the petitioner's van was not also justified as it could not be said to have been used for carrying these two small bottles of brandy which simply happened to be carried in it by the petitioner.

Though several contentions were raised before the learned Sessions Judge, and were considered by him and negatived, in this Court, Mr. Jayarama Aiyar, for the petitioner, has raised only one contention before me during the arguments, dropping all the rest. That contention is that a Prohibition Officer styling himself *Inspector of Police* will be "a police officer" within the meaning of sections 25 and 26 of the Evidence Act, and, so, the confessional statement made to him by the petitioner will be inadmissible in evidence and that if it is inadmissible there will be no proof that these two brandy bottles were found in the possession of the petitioner, as there were also some other people travelling in the van then. I cannot agree with either head of the argument. I do not consider that an Inspector of Police, Prohibition, will be "a police officer" within the meaning of sections 25 and 26 of the Evidence Act, as the law stands now in this State, though he has practically all the powers of a police officer, and, if the position were not directly covered by authority, the point is quite arguable. Rajamannar, J., (as he then was) has held in *Venkata Reddi* v. *Emperor*[1], that a Prohibition Sub-Inspector cannot be deemed to be a police officer within the meaning of section 25 of the Evidence Act and that a confessional statement made to him is not inadmissible in evidence. I will follow that view till the Legislature enacts otherwise, or the Supreme Court or Full Bench, in similar cases, holds otherwise. As the learned Public Prosecutor urged, the only view possible, under the above ruling, in this case, where the officer to whom the confession was made was *not a police officer at any time* but was only an Excise Officer originally and later on became a Prohibition Inspector, is that the confession is admissible. The mere *title of Inspector of Police, Prohibition, Sub-Inspector of Police, Prohibition*, assumed by P.Ws. 1 and 3, or given to them, is, in my opinion, *irrelevant*, as, in these days of democracy, every one wants a more *dignified title*, *process-servers* aspiring to be called *bailiffs*, *clerks* aspiring to be called *assistants*, *peons* aspiring to be called *messengers*, etc. In fact, nothing much turns on a name, and in view of the above ruling directly covering the point, and in view of the admission of

1. (1947) 2 M.L.J. 218.

Mr. Jayarama Aiyar that the powers of arrest, etc., have not been conferred on Prohibition Inspectors and Sub-Inspectors subsequent to that ruling and making a difference to the view taken therein, the confession is admissible. This is not also a suitable case for reference to a Full Bench on the point as possession of the liquor by the petitioner is proved even otherwise. I hold that the confession in question is admissible. Mr. Jayarama Aiyar at first thought that P.W. 1 was an Inspector of Police "translated" into Inspector of Police, Prohibition, but he had to admit later on that he was wrong, as P.W. 1 was never in the police at any time.

Even apart from the confessional statement, as already said, I hold that the evidence on record is quite enough to prove the possession of these brandy bottles by the petitioner. The petitioner was the owner of the van, which was exclusively his, and the brandy bottles were found in a bag kept by his side and close to where he alone sat. Just as the head of a house-hold, or the owner of a vehicle, is held liable for liquor bottles, etc., found inside the house or vehicle exclusively in his possession, unless he proves that he was not responsible for their presence there and that somebody else introduced them there, the petitioner will be held liable for the possession of these brandy bottles found in his van, and by his side, unless he proves otherwise. He never tried to prove anything otherwise except his statement to P.W. 1 (the genuineness of which was proved and has not been disputed before me, only the admissibility being questioned) that he was carrying them for the use of his wife during confinement, and his statement in court that no brandy was found at all by P.W. 1 in the van during the search, which latter statement is proved to be false by the evidence of P.Ws. 1 to 3. I confirm the petitioner's conviction as the evidence on record is quite sufficient to warrant it. Mr. Jayarama Aiyar pleaded for a lesser fine. I agree. I see no reason to disbelieve the petitioner's statement that he was carrying these two small half bottles of brandy only for the use of his wife during confinement. A practice of giving brandy to women during delivery seems to have been followed in Travancore in pre-prohibition days. In that view, the sentence of a fine of Rs. 500, especially on a Travancorean unaccustomed to prohibition in those days, and accustomed to take brandy and every other kind of liquor freely in those days, for a first offence, is too heavy. After hearing the Public Prosecutor also on the point, I reduce the fine to Rs. 50. The petitioner is said to have already paid the fine. The excess fine, if paid, will be refunded to him.

V.P.S. *Fine reduced.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO, MR. JUSTICE VISWANATHA SASTRI AND MR. JUSTICE RAGHAVA RAO.

Periannan and others .. *Appellants**

v.

Airavadeeswarar Soundaranayagi Amman Kovil of O'Siruvayal by its trustee, M. A. R. Periannan Chettiar and others .. *Respondents.*

Madras Estates Land Act (I of 1908), sections 3 (10) and 185—"Private land"—Determination—Tests to be applied.

Satyanarayana Rao and Viswanatha Sastri, JJ.—The following propositions are established by the decisions :—

(1) If the land is known to be ryoti at its inception the only mode by which it could be converted into private land is by proof of continuous cultivation for a period of 12 years prior to the commencement of the Estates Land Act.

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*S. As. Nos. 1735 and 1865 to 1878 of 1944 and C. R. Ps. Nos. 1518 to 1546 of 1944. 2nd December, 1949.

(2) Even if the nature of the land is not known, continuous cultivation for the required period of 12 years before the commencement of the Act would conclusively establish that the land is private land.

(3) If there is no proof of cultivation for a continuous period of 12 years before the commencement of the Act, the land may be proved to be private lands by other methods, provided the land was not shown to be once ryoti.

(4) Cultivation of the lands or leasing of the lands under short terms may be one mode of proof.

(5) An intention to cultivate or resume for cultivation, is also a test to decide that the land is private land and such intention may be established by any other means, not necessarily by cultivation and by cultivation alone.

(6) The essence of private land is continuous course of conduct on the part of the landholder asserting and acting on the footing that he is the absolute owner thereof and recognition and acceptance by the tenants that the landholder has absolute right in the land.

(7) Mere proof that the landholder is the owner of both the warams is not sufficient to prove that the land is private land.

(Case-law discussed and conflict of decisions considered.)

Concurrent findings of the Courts below that the lands are "private lands" of the (temple) landholder affirmed.

Per Raghava Rao, J.—(1) Domain land which is one category of private land is land about the dwelling house of the landholder and in his immediate occupancy.

(2) There must be proof that at some time or other and for some time or other there was direct cultivation by the landholder before cultivable land in an estate can be claimed to be 'home-farm' land and hence 'private land', within the definition of 'private land' in the statute.

(3) The evidence may be direct and positive or indirect and circumstantial.

(4) The mere existence in the landholder of both the warams in a land in an inam estate does not *per se* make it private land.

(5) Where there is any letting of any private land, as there may well be, the letting must be on terms and conditions consistent with an intention on the part of the landholder to resume direct cultivation or personal use.

(6) Local custom may well define and demarcate land in an estate in accordance with customary notions of people of the locality although in a manner different sometimes to what the statutory definition of private land may justify.

(7) Otherwise, any evidence admissible under section 185 of the Madras Estates Land Act must be such as satisfies the requirements of the definition of 'private land.'

(8) Cultivable land in an estate must be presumed to be ryoti, unless the contrary is shown, and the contrary is not shown by the circumstance of the existence of both warams in the landholder.

Appeals against the decrees of the Court of the Subordinate Judges, Sivaganga, dated 28th March, 1944, in A.S. Nos. 1 to 13 of 1944 and 37 and 38 of 1943 respectively preferred against the decrees of the Court of the District Munsiff of Sivaganga in O.S. Nos. 41, 42 of 1941 and 34 to 43, 46, 45 and 47 of 1942 respectively and petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decrees of the Court of the Subordinate Judge of Sivaganga dated 26th January, 1944, in Appeals Nos. 50, 52, 53, 55 and 57 to 81 of 1943 respectively preferred against the decrees of the Court of the District Munsiff of Sivaganga in O.S. Nos. 303, 305, 396, 308 and 310 to 334 of 1942 respectively.

These Second Appeals and the Civil Revision Petitions coming on for hearing on Thursday, the 1st day of September, 1949, the Court (Satyanarayana Rao and Raghava Rao, JJ.) made the following order of reference :

A. Sundaram Iyer for Appellants.

V. Ramaswami Iyer, M. Natesan, R. M. Halasyam and *K. Umamaheswaram* for Respondents.

The Order of the Court was made by

Satyanarayana Rao, J.—Having regard to the important questions raised in these appeals and in view of the conflict of judicial opinion on the question of the test to determine, what constitutes "Private land" under section 3 (10), sub-clause

(*b*) (i) of the Madras Estates Land Act, we think that these cases should be heard by a Bench of three Judges.

The matter will be placed before the learned Chief Justice for constituting a Bench of three Judges to hear and dispose of these appeals and Civil Revision Petitions.

In pursuance of the aforesaid order of reference, these second appeals and the Civil Revision Petitions coming on for final hearing, before the Full Bench.

The Court delivered the following Judgments :—

Satyanarayana Rao, J.—These second appeals and the Civil Revision Petitions arise out of a batch of suits relating to the village of Manamelpatti, a Dharmasanam Village, in the Ramnad District. The suits out of which these second appeals arise were instituted by the trustees of Airabhandeswarar Soundaranayagi Amman Temple for ejectment of the defendants from the lands in their respective possession and for recovery of rent for faslis 1349 and 1350 and for future profits. The village comprises 80 pangus out of which the plaint temple in this batch owns 23½ pangus purchased from the original owners and one pangu taken on othi from the owner. The plaintiffs in the batch of suits out of which the Civil Revision Petitions arise are the managers of the Devasthanam of Nagara Vairavanpatti Valaroleeswaraswami Nagara Vairavaswami Devasthanam. This temple owns 54 and ⅘th pangus or shares in the village and suits were instituted for recovery of the balance of amounts due as *iru bogam* for faslis 1349 and 1350. In both the batches of suits the plaintiffs claimed that they were the owners of melwaram and kudiwaram interest in the lands which were being enjoyed as "pannai" lands or "private lands"; that they were leasing the lands from time to time changing tenants and were also collecting "*Swami bogam*" in recognition of their full proprietary rights in the lands. They claimed that the tenants had no occupancy rights in the lands; and in the second appeals batch a relief for ejectment of the tenants is also claimed. The defence of the defendants-tenants in both the batches is common. They claimed that the temples owned only the melwaram interest and that they, the tenants, are the owners of the kudiwaram which they have been enjoying hereditarily paying half waram in respect of the nanjas and a fixed money rent for the punja or dry lands according to the '*tharam*' (classification) of the lands. They denied that they ever paid "*Swami bogam*" to the temple. In all the suits there is the common plea that the village is an "estate", under section 3 (2) (*d*) of the Madras Estates Land Act, as amended by the Madras Estates Land (Amendment) Act, 1936 (Act XVIII of 1936), that they had therefore acquired occupancy rights under the Act; that the lands were ryoti and that, therefore, the Civil Court had no jurisdiction to try these suits.

Appropriate issues covering the contentions of the parties were raised in the two sets of suits and they were disposed of by the same District Munsiff in the Court of First Instance by similar judgments though not by a common judgment and the same procedure was adopted by the learned Subordinate Judge in appeals. The plaintiffs raised an alternative contention that on the footing that the villge is an "estate", the suits lands are private lands or pannai lands of the temples and therefore the defendants acquired no occupancy rights in the lands under the statute and that Civil Court alone had jurisdiction to entertain and try the suits.

The main questions that had to be considered by the Courts below were whether the village was or was not an estate under the Madras Estates Land Act, and, if so, whether the lands were private lands as claimed by the plaintiffs or ryoti lands as claimed by the tenants. The further question that even apart from the Estates Land Act whether the defendants had acquired occupancy rights by prescription was also raised and considered. The jurisdiction of the Civil Court to entertain the suits depended upon the decision of the question whether the village was or was not an estate. There were also some other questions of subordinate

importance in these suits which were considered and disposed of by the trial Court but they are no longer in issue in these proceedings now before us. They may, therefore, be left out of consideration.

On the main question the concurrent findings of the Courts below were that the village was an "estate" under section 3 (2) (*d*) of the Madras Estates Land Act as amended in 1936, that the plaint temples owned the melwaram and the kudiwaram interests in the lands; that the lands were private lands as defined by the Madras Estates Land Act, that the defendants had acquired no occupancy rights in the lands either under the Act or by prescripion and that the suits were properly laid in the Civil Court which had undoubted jurisdiction to try the suits. In the second appeals batch, the trial Court granted a decree in ejectment, decreed arrears of rent for the two faslis and also decreed future mesne profits until delivery of possession. In the other batch rent was decreed as claimed by the plaintiff.

There were appeals by the defendants to the Subordinate Judge of Sivaganga who agreed with the findings of the District Munsiff in all the suits; but he refused the plaintiff relief for ejectment in the second appeals batch on the ground that the tenancy which subsisted between the plaintiff and the defendants was not terminated by a proper notice to quit. He therefore modified the decrees in ejectment granted by the trial Court by disallowing relief for delivery of possession but confirmed it in other respects.

The learned Subordinate Judge however while confirming in other respects the decrees of the District Munsiff in this batch overlooked the fact that in view of his refusal to confirm the decree for possession he could not confirm the decree for future profits and this relief should have been deleted from the decree. It is now conceded on behalf of the respondents that this is a mistake and should be rectified. In the rent batch the learned Subordinate Judge confirmed the decrees of the District Munsiff *in toto*. These second appeals and the revision petitions were preferred by the unsuccessful tenants.

When these second appeals and the revision petitions came before me and my learned brother, Raghava Rao, J., in the first instance we directed that these cases should be heard by a Bench of three Judges in view of the conflict of judicial opinion on the question of the test to be applied to determine what constitutes private lands under section 3 (10) of the Madras Estates Land Act. They have accordingly been posted for hearing before us.

The questions raised in both sets of cases being common and as the lands in dispute are situated in the same village of Manamelpatti we have heard the cases together.

The finding of the Courts below that the temples owned the melwaram and kudiwaram interests in the lands and that the defendants had not acquired permanent rights of occupancy in the lands apart from the Act have not been disputed before us on behalf of the tenants. The dispute is confined therefore to two questions and two questions alone, the first, whether the village is an estate under the Madras Estates Land Act, and secondly, whether the concurrent finding of the Courts below that the lands are private lands of the temple is correct or not.

The first question therefore for consideration is whether the village of Manamelpatti is an "estate" or not. Both the learned District Munsiff and the learned Subordinate Judge were of the opinion that it was an estate under section 3 (2) (*d*) of the Act, notwithstanding the fact that the grant to the village was not confirmed by the British Government in the view that the grant must be deemed to have been "recognized" by the Government as it was entered in the Government register and as Government never disputed the title of the temple to the suit lands and also collected road cess under the Local Boards Act from the plaint temples.

In dealing with this question reference is made in this Judgment to the exhibits as they are marked in the second appeal batch. The same documents have

also been filed and exhibited in the rent batch but they were given different exhibit marks.

The grant is not forthcoming though it appears from Ex. P-26 an extract from the register of Manibams forwarded by the District Collector, Madura, to the Board of Revenue in 1815 that there was a grant which was registered in the Collector's Office. The earliest document on record which throws any light on the nature of the grant is this extract from the Register of Manibams. It does not purport to be a register of lands held exempt from payment of revenue as required to be maintained in each District by section 15 of Regulation 31 of 1802. At the time of the Permanent Settlement, 1802, *Lakraji* lands were excluded from the settlement by section 4 of the Regulation 25 of 1802 known as the Permanent Settlement Regulation. On the same day on which that Regulation was passed by the Governor-in-Council namely the 13th July, 1802, there were other Regulations which were also passed and one of them is Regulation 31 of 1802. Under this Regulation power was reserved by Government to deal on a future date with the alienated lands or *Lakraji* lands which have been excluded from Permanent Settlement. For that purpose the Regulation enacted various provisions, one of which section 15, required that in each Zilla or district a register should be kept of the lands held exempt from the pyment of the revenue and the register, it is directed by that section, should he denominated "register of lands exempt from payment of revenue under grants not being *badshahi* or royal". This Exhibit P-26 is not a register maintained under that section as was wrongly assumed by the learned Subordinate Judge. The extract shows that the village Manamelpatti was granted for subsistence to one Ramaswami Ayyar and others on 3rd Margali of the year Kalayukthi, 1720. The year 1720 is not the A.D. year but the year of Salayavahana Saka which commenced in 78 A.D. The learned Subordinate Judge thought that the reference is to the A.D. year 1720 but it does not correspond to the year Kalayukthi. The reference must be to the Kalayukthi of the year 1798 A.D. There is an earlier Kalayukthi in the A.D. year 1738. The grant is hereditary. Column 4 of the register gives the estimated annual value of the village as 85-22-70. It is not known whether the reference is to pagodas or some other coin or grain measure. Whatever it be, column 10 of the register reveals that the annual rent payable for the village was 80—0—43. This means, whatever the unit may be, that Ramaswami Ayyar the grantee for whose subsistence the grant was made was getting only an income of 85 and odd units and was liable to pay *as rent* and not as *revenue* for the village 80 and odd units, leaving to him the insignificant balance of about 5 units. The present extent of the lands in acres as now admitted before us is about 140 acres wet and 86 acres dry making a total of 226 acres. From the entries in this register it will be a legitimate inference to draw that this Ramaswami Ayyar and others were holding the lands on condition of paying 80 units of rent to the grantor. This register was prepared nearly 13 years after the date of the Permanent Settlement. The village was once part of the Ramnad Zamindary but now it is part of the Sivaganga Estate. There does not seem to be any grant of inams as is evident from the entries in this register except it be that five units over and above the rent were treated as inam. There are, however, two important documents which throw some light as regards the tenure on which the village was held by the grantees. They are Exhibits P-23 and P-24 of the year 1882. Exhibit P-23 is a copy of the plaint in Original Suit No. 25 of 1882 on the file of the Sub-Court, Madura East. That was a suit by the Zamindar of Sivaganga Estate and the receiver appointed—for the estate as plaintiffs against the representative of the grantee for recovery of a sum of Rs. 968-7-11, representing profits for three faslis. The allegation in the plaint was that the village was *Ayan* village before the Permanent Settlement, that at the time of the Faisala in F. 1211 (*istimirar faisal*), it was assigned as *Dharmasanam* by his predecessor-in-title over which the grantees were paying annually at the rate of Rs. 229-2-0 as *poruppu*, while the zamindar had to pay to the Government under the Permanent Settlement for their ⅔ths share a sum of

Rs. 559-7-7 per year, that this grant by his predecessor at a lower rate which is far less than the rate fixed by the fysal arrangement did not bind the plaintiffs and that, therefore, they were entitled to recover the difference of Rs. 260-5-7 per year for the three faslis with interest thereon. Exhibit P-24 is the Judgment in that case which shows that the defence of the defendants was that the village was a *Dharmasanam* from before the faisal and that the plaintiffs had no right to question the act of the Isthimirar Zamindar, that is the Zamindar to whom the Zamin was granted under the Permanent Settlement and that the suit was barred by limitation. The finding of the Court was that the grant was not subsequent to the Permanent Settlement but was prior to it and that even if it was granted subsequent to the Permanent Settlement, the grant was binding on the plaintiffs as it was the self-acquired property of the grantor who could make a grant at a low fixed rent. From this it is clear that the grant was a pre-settlement grant but the income was taken into consideration and was included in the assets of the Zamindari at the time of the Permanent Settlement and the peishkush was assessed on that basis. By converting it into *Dharmasanam* village the rent was reduced to Rs. 299 and odd which is payable to the Zamindar, the grantor. It is fairly clear from the evidence now adduced in the case that this *poruppu* is being paid by the two temples in some proportion. The village therefore was not a *Lakraji* village at the time of the Permanent Settlement and was not treated as inam grant which was excluded from the assets of the Zamindari in 1802. It was treated as an under-tenure held by the grantee and his descendants under the Zamindar on payment of the *poruppu* of Rs. 299 and odd every year. It is for this reason I think that the Government abstained from dealing with this village at the time of the inam enquiry of 1860. The grant was not the subject-matter of the investigation at the time of those proceedings and the grant was not confirmed or recognised and no title deed was granted to the then holders of the village. The Government must be deemed to have recognised that the reversion had vested in the Zamindari. The learned Subordinate Judge adverted to the question whether the village is held as permanent under-tenure within the meaning of section 3 (2) (*e*) of the Madras Estates Land Act; but in his opinion there was no evidence to establish that the income of the village was included in the assets of the Sivaganga Zamindari at the time of the permanent settlement and he also opined that it was *Lakraji* land which must have been therefore excluded at the time of the Permanent Settlement from the computation of the assets. The village at the time of the grant was part of the Sivaganga Zamindari which was permanently settled in 1802. The grantee and his descendants are liable to pay to the grantor and his descendants the *poruppu* of Rs. 299 and odd annually. The village was included in the assets at the time of the Permanent Settlement and was not excluded. It was not treated as an alienated land or *Lakraji* land within the meaning of section 4 of the Permanent Settlement Regulation. The grant therefore consists of a village which is now part of the permanently settled estate of Sivaganga falling under clause (*a*) of section 3 (2) of the Act. It is held on a permanent under-tenure. Therefore as the grant was not a grant of an inam but the grant of an under-tenure it would certainly fall under section 3 (2) (*e*) of the Estates Land Act and will be an "estate" within the meaning of that clause. It is sufficient under this clause that the grantee holds the village on a permanent under-tenure even though the grantee at the time of the grant might have owned the kudiwaram interest in the lands of the village. Exhibit P-26 shows that what was payable to the Zamindar in respect of the village was treated as rent. If the grant consisted of less than a village and the grantor remitted a portion of the rent payable in respect of the land it may be a case which would fall within section 26 of the Act and the successor of the grantor would not be bound by the grant at a lower rate of rent except in cases falling under section 26 (1); but if a *village* is granted at a lower rate of rent payable to the grantor the case would be governed by section 3 (2) (*e*) and it would be a permanent under-tenure within the meaning of that clause. I am therefore clearly of the opinion that the village is an estate, not falling under section 3 (2) (*d*) but under section 3 (2) (*e*). In this

view it is unnecessary to consider the question whether there is and if so what constitutes 'recognition' of a grant under section 3 (2) (*d*) of the Act.

The next question is whether the lands involved in the suits are the 'private' lands of the plaintiffs (temples) or "ryoti" lands as defined by the Estates Land Act. The question essentially is one of fact to be decided on the evidence in the light of the principles laid down by the Estates Land Act as interpreted by the various decisions. If the lower Courts had applied the correct test and came to the conclusion that on the evidence the land is private land, it would not be open to us either in second appeal or in civil revision petition to interfere with such a finding of fact. It is however contended on behalf of the appellants that the Courts below did not apply the correct test to determine the nature of the land and that, therefore, the finding is vitiated and should not be accepted either in second appeals or in the civil revision petitions. As the jurisdiction of the Court to entertain the suits depends upon the decision of this question and if by an erroneous decision the Court assumed jurisdiction to decide the disputes it would be a ground for interference even under section 115 of the Code of Civil Procedure. No objection was therefore taken on behalf of the respondents that in the Civil Revision Petitions it is not competent for us to go into the correctness of the findings of the Courts below. Indeed in the light of the decisions in *Atchayya* v. *Sri Seetharamachandra Rao*[1], *Balakrishna Udayar* v. *Vasudeva Ayyar*[2], *Joychand Lal Babu* v. *Kamalaksha Chaudhury*[3], such a contention would be untenable. This aspect of the matter was considered by Viswanatha Sastri, J., in *Pentakota Naryudu* v. *Venkata Ramanamurthi*[4], and if I may say so with respect, he held correctly that the jurisdiction of this Court in a matter of that kind to interfere is not taken away by section 115 of the Code of Civil Procedure, if a proper case for interference is made out.

It has now been found by the courts concurrently that the temples owned both the warams and this finding has not been challenged before us. The learned Subordinate Judge agreeing with the learned District Munsiff has found that in the present case the temples purchased the entire ownership in the lands, that the tenants had executed leases dated from 1886 for short periods admitting the right of the temple to both the warams and also containing surrender clauses agreeing to surrender the land on the expiration of the period of the tenancy. They also paid what is called "*Swami bogam*" in recognition of the absolute ownership of the temple to the lands. Sometimes there was also change of tenancy though the tenants have also continued in some cases for a longer period in possession of the lands and the tenants had never asserted the kudiwaram interest in the lands till very recently, that is, some time from or after 1930. There is, however, no evidence that the plaintiffs ever cultivated the lands. The leases did not contain the expression 'Pannai' or any similar terms indicating that the lands are the private lands. On these facts and in view of the opinion of the author of the Ramnad Manual of the year 1890 that in that part of the country the loose expression '*Iru Bogam*' or both the warams indicated that the land was owned as pannai or private land, particularly in the case of *dharmasanams*, the learned Subordinate Judge held that the lands were proved to be private lands.

I shall deal with the evidence in detail later but on behalf of the appellants it was urged that even if the facts as found by the learned Judge were correct the inference that they are private lands is not warranted as according to the learned Advocate for the appellants the test to determine whether the land is private land or not is to see whether the Zamindar had cultivated the lands himself or by hired labour at some time or other and whether there was indication that the

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1. (1912) 24 M.L.J. 112 : I.L.R. 39 Mad. 1195 (F.B.).
2. (1917) 33 M.L.J. 69 : L.R. 44 I.A. 261 : I.L.R. 40 Mad. 793 (P.C.).
3. (1949) 2 M.L.J. 6 : L.R. 76 I.A. 131 (P.C.).
4. (1949) 2 M.L.J. 623.

landlord intended to retain the lands as resumable or cultivable for himself even though he might have leased them from time to time for a season. As this test is absent in this case, it is contended, that we should not accept the finding of the Courts below that the lands are private lands. The point therefore for consideration is whether this view is correct.

Before referring to the sections of the Act and the decisions bearing upon the question, it will be useful to have a correct picture of what was considered to be private land before the Estates Land Act of 1908 was passed and what the origin and the incidents of the private land were before 1908.

Both under the Hindu Kings and later during the time of the Moghul administration the status of a cultivating tenant in a village was defined by usage. The cultivating tenant always rendered to the State a portion of the produce of the land varying with the nature of the crop which is called "melwaram" while the share left to the cultivator was known as "kudiwaram". The words "melwaram" and "kudiwaram" were in vogue in the Tamil country. In the Circars the share payable to the Government was known as "*Ambaram*" or "*Raja Bhagam*" and what was left to the cultivator was *Palu*. In some of the dowls or annual accounts by which settlement was made, reference was made in the documents to *Sirkar Hissab* or the share of the Government (sometimes the Zamindar also was referred to as Sirkar) and the ryot's *hissab* or the share of the ryot. Sometimes the share of the ryot is $\frac{1}{2}$ or $\frac{8}{10}$ varying according to the nature of the crops raised on the lands. By common understanding and usage the cultivator was allowed to remain in the land without disturbance so long as he continued to pay the share due to the State. The cultivating tenant was treated as a co-owner with the melwaramdars, whoever he may be, and not as a mere lessee. The Board of Revenue was charged with the duty of investigating and reporting upon the nature of the rights of ryots in this presidency about the year 1817 or 1818 and the proceedings of the Board of Revenue dated 5th January, 1818, quoted *in extenso* in Diwan Bahadur Srinivasa Raghava Ayyangar's Fifty Years Progress in Madras Presidency contains an exhaustive survey of the relations between the landholders and the ryots under the customary law of this country. Those proceedings were referred to by Subramania Ayyar, J., in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*[1] and *Sivaprakasa Pandara Sannadhi* v. *Veeram Reddi*[2]. The collection from the ryots of the share of the revenue was entrusted both by the Hindu Kings and later by the Muhammadan rulers to officers variously described as Chowdrie, Crorie, Zamindars. This procedure was not peculiar to this presidency but it was also common in Bengal. These officers were appointed very often by sanads which defined their duties. They had also other functions to discharge and very often were entrusted with the duty of looking after the peace of the country. These officers by whatever description known were remunerated by various methods. They were paid a portion of the melwaram, very often about $\frac{1}{10}$ and were also allowed to collect *russooms* or fees. To make up the deficiency special grants of lands were very often made to them which were denominated in Bengal, *Naunkar* (subsistence) and *Soverum* in the Sircars. With a view to make their presence necessary everywhere in the district in their charge these lands were not granted at one place but were distributed very often to each village to make the supervision effective. These lands formed the property and the absolute property of those persons who later came to be called the Zamindars and they could let them out to tenants or cultivate them personally by themselves or through their servants. But if let to tenants, the tenants had no security of tenure in the sense in which it was understood under the customary law regarding other lands, that is to say, the tenant could not say as in the case of other lands that so long as he paid the rent due to the Zamindar he should not be disturbed from possession of the property. This usage which applied to

1. (1897) I.L.R. 20 Mad. 299.
2. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).

other lands did not apply to the lands so granted. Reference may be made in this connection to the Fifth report of the Select Committee on the affairs of the East India Company, 1812, Firmingoes Edn., Vol. 1, pages 25, 149, and 151 and also to Mr. Grant's Political Survey of Northern Sirkars, 1786, which is printed as Appendix to Vol. III at page 22. Mr. Grant says that "*Nancar*" is a Persian term. The Deccan *Soverum* was derived from a Turkish word with the common Telinga termination 'um' signifying in both cases subsistence in bread or a livelihood being to arise from small allotments of land freed from any public encumbrances and conveniently dispersed throughout the district so as to make his presence necessary everywhere, give him local attachment and greater effect to general superintendence in attending to his own private interest. Baden Powell on Land Systems in British India, Vol. I, pages 514 and 515 refers to the emoluments received by the Zamindar and points out three sources from which the Zamindar derived his private lands. First, *Nijjot*, the Hindu equivalent of the Persian term '*Khudkasht*' the same as '*Sir*' of other parts, that is, the lands of his family which he cultivates with his own labour and personal superintendence from which the State might or might not take revenue; secondly, lands which the Zamindar reclaimed from waste for his own benefit in which there were no pre-existing ryots and which were cultivated by contract with tenants. Such kind of land was known under the name of *Khamar*, the Oriya or Bengali word, used for thrashing floor, and indicating lands the produce of which is divided on the thrashing floor between the cultivator or the soil owner. These lands as pointed out by the learned author had necessarily to be subject to the sharing system as they are waste lands newly brought into cultivation and are subject to depredations by deer, pigs, and wild beasts, from the neighbouring jungles. The loss, if any, would be borne, equally under this system of sharing the produce by both the Zamindar and the tenant. Yet a third category of land is included in it which is *Nankar* which I have attempted to explain already. If these lands are granted free of revenue the Zamindar absorbs them into his own property. At page 515 the learned author states:

> "This custom of "Nankar" spread wide, and in the Northern Sirkars of Madras was found enjoyed under the local name of "*Saveram*."

From this short summary it would be evident that private lands were not always cultivated by the Zamindar himself. He let them out on contract of tenancy under the sharing system to persons who had no security of tenure and the lands were not around his house or residence but were purposely distributed throughout the district so as to secure effective supervision by him of the entire district. These lands were not subject to the usage of the tenant acquiring a right to occupy it so long as he paid the rent due to the landolder as per custom. Various descriptions of these lands were adopted both in Bengal and in this Presidency and in other Provinces having regard to the purposes for which the lands were granted. They really constituted emoluments or compensation to the Zamindar for the discharge of his duties which were defined and enumerated in the Sanad appointing him as Zamindar.

The Permanent Settlement of Madras practically followed and applied the principles of Permanent Settlement in Bengal contained in the Decennial Settlement Regulations, 1793, (Regulation 8 of 1793) and as appears from the Fifth Report. A copy of this regulation and the other regulations bearing upon the question were sent to Madras to enable the Madras Government to formulate the principles upon which the Permanent Settlement in Madras should be effected. These principles were embodied in the instructions issued to the Collectors on the 15th of October, 1799, by the Special Commission embodying the principles on which the income for purposes of settlement of the zamindary should be ascertained and the addition and subtractions to be made from that income to arrive at the final figures.

Paragraph 25 of the instructions relates to private lands and is modelled on section 37 of the Bengal Decennial Settlement Regulations, 1793. It states

"all private lands at present appropriated by the Zamindars and other landholders to the subsistence of themselves and families as well as all lands held by private servants and dependents will be considered as forming part of the Sirkar land, they are responsible for the public *zama*"

meaning thereby that the private lands along with other lands in the estate should be liable for payment of the public *zama* or peishkush fixed upon the estate. But these lands it will be noted were Sirkar lands appropriated by the Zamindar for their subsistence. It is not clear from the instructions whether in the collections made by the Zamindar which formed the basis of the settlement the income received by the Zamindar from private lands was or was not included. Whatever that may be, private lands were treated as part of permanent settlement as is clear from instruction No. 25 (*vide* also section 2 of Regulation 25 of 1802).

The earliest of the decisions before the Estates Land Act which throws some light to what constituted private lands or *pannai* land is the decision in *Nagayasami Kamaya Naik* v. *Yiramasami Kone*[1]. That case arose under section 12 of the Rent Recovery Act (VIII of 1865) which enabled a tenant ejected by a landholder without due authority to institute a suit before the Collector to obtain reinstatement with damages. The defendant in that suit was the Zamindar of Saptur, in the Ramnad District, who ejected the tenant who was the plaintiff in the action from lands which the defendant claimed to be his *pannai* or private lands. The defendant contended that the tenant voluntarily relinquished the lands and that in any event the Collector had no power of interference under section 12 of the Act in respect of the *pannai* lands, as in such a case the Zamindar would be the tenant of the lands and the plaintiff would be his under-tenant. The Zamindar also raised an alternative contention that *pannai* lands were not part of the Zamindari and therefore section 12 had no application. The suit was dismissed by the Deputy Collector as he was of the opinion that the relations between the plaintiff and the defendant was that of a sub-tenant. This decision was reversed by the Civil Judge on appeal. The Civil Judge in his judgment considered the nature of the *pannai* land. According to him:

"They are lands to which the proprietor had an exclusive right, that is to say, a right to receive the kudiwaram produce, and the right to receive the melwaram; lands regarding which landholders can arrange their own terms of rent as they can with respect to the waste or unoccupied lands alluded to in para 4 of the preceding section. Sometimes these lands are cultivated under the Zamindar's own ploughs, and sometimes they are let out for cultivation by others."

He found that the lands formed part of the Estate and that under section 12 of the Act the tenant was entitled to relief as claimed by him. This decision was affirmed by the High Court. Kindersley, J., observed in the course of the Judgment that the tenure of the tenant was something more than the tenure of an ordinary ryot; and the Zamindar cannot be said to be a tenant of his own lands. Even if the lands had not the incidents of being originally in the hands of the tenant it would not prevent the lessee when such a land was let from being a tenant of the Zamindar. The contrast, therefore is between the lands which were originally in the hands of the tenants and lands to which the proprietor had an exclusive right, a right to receive the kudiwaram produce and right to receive the melwaram. This is the distinction recognised as early as 1872 between the two categories of lands in Zamindari. As pointed out by the Civil Judge it may be that sometimes the *pannai* lands were cultivated under the Zamindar's own ploughs or sometimes they may be let out for cultivation by others. But this essence of the matter seems to be the distinction between the absolute property of the proprietor and lands in which the proprietor has got only the right to receive the melwaram.

Besides waste lands, porombokes, *grama nathams*, that there are two broad categories of lands in a village is also made clear by the very illuminating and exhaustive judgment of Subramania Ayyar, J., in the well known Cheekati Case, *Cheekati Zamindar* v. *Ramasooru Dhora*[2]. He there pointed out that the presumption

1. (1872) 7 M.H.C.R. 53. 2. (1899) I.L.R. 23 Mad. 318.

of tenancies from year to year obtaining under the English law has no application to conditions in this Presidency where the ryots hold the land under no derivative title but hold them as co-owners with the landholder. The payment made by the ryots to the Zamindar, in the absence of a contract, is regulated by custom in the last resort, as laid down by section 11 of the Rent Recovery Act. The ryots are entitled to hold the land for an unlimited time so long as they wished to retain it, but, of course, subject to the discharge of the obligations by them incident to the tenure. This applied according to the learned Judge not only to lands in the hands of the ryots but even to lands relinquished by former occupants or which were lying waste from time immemorial. If a ryot takes up the land again his tenure is treated exactly on the same footing as land into the possession of which it was not shown that he was inducted by the Zamindar. He pointed out the distinction between home-farm lands and the ryoti lands. The treatment accorded by the Zamindar to the two categories of lands is entirely different. The learned Judge cited from a *Nuzvid case*[1]; the evidence of the *karnam* who deposed to the distinction observed in the treatment accorded to the two categories of lands. The ryoti land in the Kistna District is known as *seri* which is some other districts is used in an opposite sense meaning private land. For ryoti lands *seri* pattas are granted for long periods. If a tenant dies the names of his heirs are substituted. If the lands are transferred pattas are granted to the transferees. The lands are alienable by sale and mortgage but in respect of home-farm lands the pattas are different. They are usually for one year with 'quit' clauses to vacate the land at the end of the year. Usually *khats* are taken in respect of the private lands and the home-farm lands are leased out to the highest bidder. The rent in the case of *seri* land will never vary except when there is conversion from dry into wet and even that with the consent of the tenant. In the case of home-farm lands the transfer of the holding or succession is not recognised. The description given by the *karnam* of the Nuzvid estate in the earlier case is as stated by the learned Judge whose knowledge of the land tenures in this Presidency was intimate and unique is a fair description of what goes on in most zamindaris in this Presidency and shows very clearly that

> "the prevalent permanent form of agricultural holding in zamindari tracts extends not only to lands held by ryots immemorially, but also to what they take up under Zamindars, provided the lands so taken up do not form part of the home-farm lands of the Zamindars."

According to the learned Judge, lands which are home-farm lands of the Zamindar may be under his direct cultivation or they may be let to tenants but the treatment accorded as evidenced by the entries in the accounts and in the engagements entered into with the tenants as well as in the incidents is entirely different from that accorded to a ryoti land.

The position in Bengal regarding the nature of the private lands seems to be also similar. The expressions there in vogue to describe private lands are usually, *Khamar*, *Nij*, *Nij-jote*. *Nij-jote* is from *Neech* (under) and *jote* (to plough) that is land reserved by the Zamindar and set apart for his own cultivation. According to the other authorities the expression is derived from *nij*—own, and means the land in the Zamindar's own cultivation. The terms denote the ownership of the land as private land, as distinguished from those let out to the tenants. *Khamar* lands have always been recognised as being in a special and exclusive sense the private property of the Zamindar as distinguished from all the rest of the cultivated or cultivable area which may be called ryoti land, and in respect of which the Zamindar's rights were merely to receive a share of the produce or an equivalent in money. Under the Rules of the Decennial Settlement, *Khamar* was understood to signify lands appropriated to the subsistence of the Zamindar and their families. Under the Permanent Settlement Regulation no land was recognised as '*Khamar*' which was not such on the 12th of August, 1765, the date of the grant of the *Dewani* and

1. (1912) 23 M.L.J. 624 : I.L.R. 36 Mad. 168.

there is no law recognising the creation of *Khamar* subsequent to that date (*vide*. Guha's Land Systems in Bengal and Bihar, 1915, at page 432).

Before the introduction of the Estates Land Act, 1908, under the common law of the country, therefore, private land was the absolute property of the Zamindar. he being the owner of the melwaram and kudiwaram which he could cultivate directly or let out to tenants on his own terms and the rights of the Zamindar and his tenant to private lands were regulated by contract and by contract alone and not by custom. In ryoti lands the Zamindar had only the right to receive the melwaram which is governed either by the contract or by custom as recognised under section 11 of the Rent Recovery Act. He could not ordinarily enhance the rent and the rent had to be determined when there is a dispute in accordance with the principles laid down by section 11 of the Rent Recovery Act. He has no right to eject the tenant though the tenant was at liberty to relinquish the land. But notwithstanding the relinquishment the character or nature of the land remained unaltered. There was the duty to exchange the pattas and muchilikas and the mode of enforcement of pattas and muchilikas was also prescribed by the Statute. Cultivation therefore by the Zamindar of private lands was not treated and recognised as the sole or exclusive test by which the character of private land could be determined.

In order to see whether any change was introduced in this behalf by the Estates Land Act of 1908, it is necessary to examine the provisions relating to the private land. Section 3 (10) of the Act contains the definition of private land. " Private land " means the domain or home-farm land of the landholder by whatever designation known, such as *kambattam, khas, sir* or *pannai*. '*Khas*' and '*sir*' are not so far as I am aware in vogue in this Presidency to denote private land. The Act was somewhat modelled on the Bengal Tenancy Act and some of the expressions were borrowed from the corresponding section of the Bengal Tenancy Act. Even there the word '*khas*' does not occur in the section. Section 3 (16) contains the definition of ' ryoti land ' which excludes private lands and also tank beds, threshing floors and other communal lands and lands granted on service tenure. Section 8 (3) provides that the merger of the occupancy rights under sub-sections (1) and (2) of that section shall not have the effect of converting ryoti land into private land. Section 19 excludes from the purview of the Act the relations between a landholder and his tenants of his private land which implies that private land could be let to tenants. Section 134 extends the provisions of the Act relating to the recovery of rent by distraint and sale of moveable property, to the recovery of rent by the landholder from a tenant of his private land in the estate provided pattas and muchilikas have been exchanged between them, which is also a clear indication that not only the landlord is entitled to let the private land to tenants and need not necessarily keep it always under his cultivation but that even pattas and muchilikas as defined by the Act could be exchanged in respect of such lands to enable the landholder to enforce payment of rent by distraint and sale of moveable property. Of course, the sale of the holding is not possible in such a case as the tenant had no interest at all in the lands as in the case of a ryoti land. Lastly, there is Chapter XII relating to private lands of the landholder. Section 181 (before amendment in 1934) excluded the operation of sections 6, 8, 10, 11, 12 and 46 of the Act to private lands and stated that :

> " Nothing contained in these sections would confer a right of occupancy on the tenants of private lands."

The landholder's right to convert private land into ryoti is recognised by the proviso to the section. Provision is made in sections 182, 183 and 184 for recording private lands and section 185 provides rules for the determination of the landholder's private land. This section was subsequently altered in 1934 and 1936 but the unamended section was as follows :

"When in any suit or proceeding it becomes necessary to determine whether any land is the landholder's private land, regard shall be had to local custom and to the question whether the land was before the first day of July, 1898, specifically let as private land and to any other evidence that may be produced, but the land shall be presumed not to be private land until the contrary is shown: Provided that all land which is proved to have been cultivated as private land by the landholder himself, by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act shall be deemed to be the landholder's private land."

The Act, therefore, recognises two categories of lands in the estate. Ryoti land in which the tenant who was then in possession or was let into possession subsequently automatically acquired a right of occupancy in the land. Under section 8 acquisition of occupancy right by the landholder by the modes indicated in that section has not the effect of converting what was once ryoti into private land. The tenant of a private land has no heritable or transferable right as in the case of ryoti land under section 10 and he has also no right to use the land in his lease in any manner he pleased. Nor has he any right to the trees in the holding. This is the effect of excluding the applicability of sections 6, 8, 10, 11 and 12 by section 181 to private land. Section 46 which is also excluded provided for the acquisition of occupancy right by non-occupancy ryot as defined under the Act but this distinction between occupancy and non-occupancy right in ryoti land which was old waste and ryoti land which was not old waste has been abolished by the Amending Act, 1934. There is no mode recognised by the Act by which a tenant of a private land could acquire occupancy right except under a grant by the landholder. Their relations are entirely governed by the contract between them.

After the Act the question of determining whether the land in suit is private land or ryoti land came up for consideration in several decisions before the Act was amended in 1934 and 1936. The definition of "Private land" did not give any clear indication of the essence of private land. It merely stated that private land means the domain or home-farm land of the landholder—whatever be the description by which the land was known, whether it was styled '*kambattam, khas, sir* or *pannai*'. The Act did not define anywhere the words 'domain' or 'home-farm' land. When we turn to section 185 which contains rules for determination of the landholder's private land some light is thrown on the question. Under the proviso to that section there is one definite and conclusive test to determine the landholder's private land; and that test is the proof that the land was cultivated as private land by the landholder, himself by his own servants or by hired labour with his own or hired stock for a period of twelve years immediately before the commencement of the Act. It requires therefore proof of cultivation of the land. If that is proved then the land is *deemed* to be private land whether in fact it was private or not. Even if it was once known to be ryoti according to this test of continuous cultivation for twelve years it is open to the landholder to convert what was once ryoti into private land. Even if it was ryoti land at some time, if he proved continuous cultivation within the meaning of the proviso, that is also a mode by which the land could be established to be private land. The proviso applied to cases where the origin of the land or the nature of the land was known to be ryoti and to cases where the origin was not known.

But what if the landholder is unable to prove continuous cultivation and the nature of the land that it was ryoti or private is not known? In such an event resort must be had to the body of the section (185). Three tests are provided under this part of the section. One is local custom, the second is whether the land was before 1st July, 1898, specifically let as private land and the third is any other evidence that may be produced. Here again, the three rules are not definite in themselves and create difficulty in gathering the intention of the Legislature. By local custom, as I understand it—and the Legislature must have had in mind—is meant the usage in the village of the estate whereunder the lands which were dealt with in a particular manner were recognised by the community or by the tenants as lands in which they could acquire no occupancy rights by usage or custom and which are in the absolute disposal of the landholder. The treatment

by the Zamindar in his estate accounts giving separate patta numbers, exchanging pattas, and muchilikas or obtaining *khats* for short periods with surrender clauses and leasing it to tenants at varying rents and changing tenants from time to time may be a usage which distinguishes ryoti land from private land as pointed out by Subramania Ayyar, J., in the *Cheekati case*[1]. In some cases it may be that in respect of private lands the Zamindar always leased out the land on sharing system while all the other ryoti lands were let out for definite money rents. All this applies of course when we start with no knowledge that the land was once ryoti. The section next refers to specifically letting of private land before the first day of July, 1898, that is, the date on which the first Estates Land Bill was introduced. What is meant by specifically letting as private land is by no means clear. Is it meant that in the leases the landholder should describe the land as private land and let it as such? Or, placing the emphasis on the word 'let' that the letting must be on terms which differed entirely from the terms of letting of ryoti land? Perhaps it is meant to include both. Thirdly, it refers to any other evidence that may be produced. What exactly is the nature of the other evidence that is contemplated by the section is also difficult to understand. It may be proved that the landholder was cultivating the lands himself or was leasing it to tenants according to his convenience; or it may be proved that the tenants themselves had made admissions in the leases and *khats* that the Zamindar, the landholder, is the absolute proprietor of the land in question. It may be that in recognition of his ownership of the kudiwaram interest he was levying from the tenants more rent which is described by various terms such as *swami bhogam*, etc., or over and above the melwaram that is payable to him. It is significant that while under the proviso direct cultivation by the landholder is insisted upon as the sole and exclusive test to determine that the land is private land in none of the three categories of evidence contemplated by the body of the section this test was specifically adopted.

There was some conflict of opinion both under the corresponding provision of the Bengal Tenancy Act and in Madras as to whether leases subsequent to 1st July, 1898, could at all be considered to determine the question whether the land is private land or not. Sadasiva Aiyar, J., in *Lakshmayya* v. *Sri Raja Varadaraja Appa Rao Bahadur*[2], was of the opinion that under section 185 of the Act leases granted on the 1st of July, 1898, are wholly shut out as evidence either for the purpose of proving the character of the tenure of the land or even to show that the land was treated in the same manner after July, 1898. (Sundara Ayyar, J., was of a different view.) This was also the view of Wallis and Ayling, JJ., in *Chintam Reddi Sanyasi* v. *Sri Rajasagi Appala Narasimha Raja Garu*[3] and of Venkatasubba Rao, J., in *Veerabhadrayya* v *Zamindars of North Vallur*[4]. But this view was not shared in by Abdur Rahim and Oldfield, JJ., in *Appa Rao* v. *Kaveri*[5] who ruled that an admission of the landholder's title contained in a document executed by a tenant after 1st July, 1898, is admissible to prove the character of the land and it was not excluded by the provisions of section 185. They followed the view of Sundara Ayyar, J., in *Lakshmayya* v. *Sri Raja Varadaraja Appa Rao Bahadur*[2] and dissented from the view of Sadasiva Ayyar, J. The question in my opinion has now been set at rest by the Privy Council in *Bindheshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*[6], a decision under section 120 of the Bengal Tenancy Act, the language of which is in *pari materia*. It was there held that admissions in the kabuliat regarding the character of the land after 2nd March, 1883, which is the date fixed under the Bengal Act, were admissible evidence regarding the character of the land. I shall have occasion to deal with this decision more elaborately later

1. (1899) I.L.R. 23 Mad. 318.
2. (1912) 23 M.L.J. 624: I.L.R. 36 Mad. 168 at 185.
3. (1914) M.W.N. 766.
4. (1926) 52 M.L.J. 38: I.L.R. 50 Mad. 201 at 214.
5. (1917) 7 L.W. 271.
6. (1926) 51 M.L.J. 587: L.R. 53 I.A. 164: I.L.R. 5 Pat. 634 (P.C.).

but it is sufficient now to refer only to this point which was settled by the Judicial Committee (*see also* the observation of Gentle, C.J., in *Bhandaru Jogi* v. *Raja Chintalapati Seetharamamurthi*[1]).

The policy underlying the Act is that the Zamindar is not entitled to increase the extent of his private land by encroaching upon the ryoti land and converting it into private land. He cannot obviously do so after the coming into force of the Estates Land Act in 1908. On the question whether he could do so retrospectively there was a difference of opinion in this Court between Sir John Wallis, C.J. and Seshagiri Ayyar, J., in the *Chellapalli case*[2]. The only extent to which under the Act retrospective conversion was permitted is under the proviso to section 185 by the landholder proving that he had continuously cultivated the land himself or through his servants for a period of 12 years before the commencement of the Act. Under section 8 (3) the mere merger did not bring about a conversion of ryoti land into private land. If the merger was followed however by continuous cultivation for a period of 12 years before the commencement of the Act, it would be open to the landholder to claim that the land is private land notwithstanding that it was once ryoti. This was the view of Seshagiri Ayyar, J., in the *Chellapalli case*[2]. The Privy Council did not resolve this conflict when the decision in the *Chellapalli case*[2] was taken up in appeal in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somaya*[3]. Since the decision in the *Chellapalli case*[2], the view of Seshagiri Ayyar, J., was followed in *Sreemantha Raja Yerlagadda Mallikarjuna Prasada Naidu* v. *Subbiah*[4], by Abdur Rahim and Burns, JJ., and by Sadasiva Ayyar, J., in the *Zamindar of Nuzvid* v. *Lakshminarayana*[5]. The opinion of Sir John Wallis, C.J., was followed by Krishnan and Venkatasubba Rao, JJ., in *Veerabadrayya* v *Zamindars of North Vallur*[6].

In this state of conflict the question came up for consideration before a Full Bench in *Bhandaru Jogi* v. *Raja Chintalapati Seetharamamurthi*[1], which upheld the view of Seshagiri Ayyar, J., in *Chellapalli case*[2]. The effect of the Full Bench decision then is that even if the land was shown to be ryoti land at some remote past, it is not open to the landholder by proving either letting it to tenants as his absolute property or by any other means to show that he has since converted the land into private land after acquiring the Kudivaram interest in such land except by establishing that for a continuous period of 12 years prior to the commencement of the Act, he cultivated the land himself. In other words, the landholder is not permitted to increase the extent of his private land even prior to the Act except by showing continuous direct cultivation for a period of 12 years. The test of cultivation is the sole and exclusive test in the case where the land is known to be ryoti. Even if the land is not known to be ryoti and its character is unknown if the landlord is able to establish his continuous cultivation for a period of 12 years before the commencement of the Act, the conclusion may be reached that the land is private land. So far, the position is perfectly clear and is well-settled.

If the character of the land is not known, what are the essential characteristics of private land and what is the nature of proof required to establish that the land is private land when the landlord is not able to prove continuous cultivation for a period of 12 years? Is it necessary even in such a case to prove that the landholder cultivated the land personally though not continuously and that he always retained his intention to resume cultivation or is it enough to show that by usage and treatment, the land was recognised as private land? Some of the observations in the

1. (1947) 2 M.L.J. 263 : I.L.R. (1948) Mad. 223 at 246 and 247 (F.B.).
2. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
3. (1918) 36 M.L.J. 257 ; L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).
4. (1919) 39 M.L.J. 277.
5. (1921) 42 M.L.J. 161 : I.L.R. 45 Mad. 39.
6. (1926) 52 M.L.J. 38 : I.L.R. 50 Mad. 201 at 214.

judgments of this Court lend support to the view that without proof of cultivation at some time and without proof that the landholder intended to resume cultivation even though he had let the lands now and then, it is impossible to establish that the land is private land. This is the position that is taken up by the learned advocate for the appellant in these cases and has given room for attacking the finding of the Courts below that the land has been proved to be private land.

An examination of the decisions which I propose to do presently, would establish that the test of cultivation and intention to resume cultivation is not the only mode by which the land could be proved to be private land. The essence of private land as understood before the Estates Land Act and under the provisions of the Act in my opinion as I have indicated already is that the land is the absolute property of the Zamindar in which the tenant is not entitled to acquire occupancy right except by a grant and not by mere letting into possession. By the Amending Act, 1934, the proviso to section 185 was transferred to the definition in section 3 (10) of the Act and is divided into two parts clause (*a*) and clause (*b*); and it was further altered by Act XVIII of 1936 and as the section now stands, clause (*a*) applies to private lands in estates specified in sub-sections (*a*) and (*b*), (*c*) or (*e*) of clause (2) of section 3 and clause (*b*) applies to estates within the meaning of sub-clause (*d*) of clause (2) of section 3. As we have held that the suit village is an estate under section 3 (2) (*e*) the definition in clause (*a*) of section 3 (10) is applicable to the present case. The amendments of 1934 and 1936 have also altered section 185 and here again the division is between the rules applicable to estates under (*a*), (*b*), (*c*) or (*e*) of clause (2) of section 3 and estates in sub-clause (*d*) of clause (2) of section 3. There is no substantial variation in section 185 which contains rules of evidence, except that the old proviso is omitted and is transferred to clause (10) of section 3 as sub-clause (*a*). By continuous cultivation for a period of 12 years under the present definition the land is not *deemed* but is treated as private land. That is also a change effected by the amendments. The omission, therefore, of the old proviso in section 185 is also an indication in my opinion that the test of cultivation is not required where the origin of the land is not known. When the proviso formed part of section 185 the argument was advanced in the *Chellapalli case*[1], that the existence of the proviso was an indication that cultivation though not continuously for 12 years at some time or other is indicated but there was no room for such a suggestion or contention as the proviso is now altogether omitted from section 185. In none of the clauses in section 185 is cultivation insisted on to prove the character of the land. It is therefore difficult to see on what basis the test of cultivation in cases falling under the first part of the definition is insisted on. The attempt in some of the decisions is to deduce the test from the use of the expressions *Kambattam*, *Khas*, *sir* and *pannai* in the definition and also from the words domain or home-farm land. The words 'domain' and 'home-farm' lands are not defined in the Act. Wallis, C.J., in the *Chellapalli case*[1], adopts the dictionary meaning of the word as given by Webster citing Shemtore. According to Webster it means "the land about the mansion home of a lord and in his immediate occupancy". Seshagiri Ayyar, J., in the same case quotes from the Encyclopædia Brittanica, Vol. III: 'Domain' is synonymous to 'Demesne' and is explained in the Encyclopædia Brittanica as follows:

"Demesne—(Demeine, Demain, Domain, etc.) that portion of the land of a manor not granted out in the freehold tenancy, but (*a*) retained by the lord of the manor for his own use and occupation, or (*b*) let out as tenemental land to his retainers or 'villani'. The demesne land, originally held at the will of the landlord, in course of time came to acquire fixity of tenure, and developed into the modern copyho'd. It is from demesne as used in sense (*a*) that the modern restricted use of the word comes, *i.e.*, 'land immediately surrounding the mansion or dwelling house, the park or chase'."

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1. (1914) 27 M.L.J. 718: I.L.R. 39 Mad. 341.

The modern restricted use of the word as given in the Encyclopædia was accepted by Seshagiri Ayyar, J., and he concludes that the private land is confined to the lands surrounding the mansion or dwelling house of the Zamindar. As observed by Viswanatha Sastri, J., in a recent case *Pentakota Narayudu* v. *Venkata Ramanamurthi*[1], to adopt the dictionary meaning of these English words

> "as confined to 'land immediately surrounding the mansion or dwelling house, the park or chase of a lord' which would be the dictionary meaning of these English words, is to import feudal ideas of mediæval England into a system of land tenure in this country without adequate justification. The English draftsman of the Bill which afterwards became the Madras Estates Land Act as well as the English Revenue Member of the Executive Council of the day who piloted the Bill through the Legislature employed the expressions 'domain' and 'home-farm' as the nearest English equivalents of the Tamil and Telugu words '*pannai*', '*kambattam*', '*seri*', etc. It is all very well when talking of the demesne lands of an English Duke or Marquis to use the term as denoting land appurtenant to the mansion of the lord of the manor. The manorial system was not prevalent in this country. Zamindars lived in cities and forts for reasons of security and their private lands were not confined to the vacant spaces surrounding their palaces or residences. It is a far-fetched construction to impute to the Madras Legislature an intention to incorporate the English conception of 'demesne land' as a test for differentiating the public domain from private land in a zamindari."

I respectfuly agree with this criticism of the learned Judge and I do not interpret the words in the Act in that restricted sense. In fact, in the arguments before us no attempt was made to restrict it in the manner in which it was done in the *Chellapalli case*[2]. In referring to the origin of these private lands I have attempted to show that the granters of private lands took pains to see that the lands were dispersed throughout the district in order to secure effective superintendence by these Zamindars over the various places in the district. There is no reason, therefore, to restrict the private lands to lands surrounding the residence of the landholder. One's experience of these zamindaris shows that these private lands are distributed and are to be found in each village comprised in an estate. If there were 150 villages private lands were very often to be found in most of the villages or at least in a major number of the villages. This is what obtains in the Northern Sirkars and also in the Southern Districts. The framers of the Act could not have been ignorant of this simple fact when the definition was framed. In fact even Mr. Forbes who piloted the bill in the Legislature did not explain the term in the manner in which it is now sought to be construed. As even in the arguments before us this restricted meaning of the term is not insisted upon, it is not necessary to pursue it further. Even the word 'home-farm' is not defined in the Act and in some of the decisions from this expression it was concluded that it must be the land which at some time or other was under the direct cultivation of the landholder or at any rate even if it were let to a tenant he intended to resume cultivation. This conception of home-farm land is negatived and there are clear indications in the Act itself to show that that was not the intention of the Legislature in using these expressions. Section 19 and section 134 of the Act clearly contemplate leasing of the land to tenants by the landholder of his private land and even exchange of pattas and muchilikas are permitted which negatives the idea of cultivation by himself. Further, the very classification of the lands into two categories, lands in which occupancy rights could be acquired under the statute and lands in which occupancy rights could not be so acquired is a clear indication that the test to determine is not cultivation but the nature of the land at its inception and also the subsequent treatment accorded to it by the landlord and by the tenants of the village. The decision in *Nagayasami Kamaya Naik* v. *Tiramasami Kone*[3] and the *Chukati case*[4] clearly bring about the essential distinction between the two categories of land and it is that that has to be established by the evidence. Of

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1. (1949) 2 M.L.J. 623.
2. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
3. (1872) 7 M.H.C.R. 53.
4. (1899) I.L.R. 23 Mad. 318.

course, it does not shut out proof of cultivation and ordinarily cultivation may be a proper and even a good test but it cannot be the sole and exclusive test to determine the nature of the land.

The attempt on the part of the learned advocate for the appellant is to deduce from the use of the expressions *kambattam*, *khas*, *sir* or *pannai* in the definition that in order to constitute the land in an estate a private land, it should be the land which the landholder himself cultivated and cultivation at some time or other must be proved. This it is claimed is derived from the meaning of the expressions used. The definition says that private land means 'the domain or home-farm land of the landholder by whatever designation known, such as *kambattam*, etc.' It does not say that the land would be private land if it is *kambattam*, *khas*, *sir* or *pannai* or if it *is known* to be such. These words are not explanatory of home-farm land as is evident from the expression by 'whatever designation known,' all that is stated is that the land goes by the name of those expressions *kambattam*, etc. Under the corresponding section of the Bengal Act, section 120 in clause (*a*) it is stated that private land is

> "land which is proved to have been cultivated as '*kamar*, *zirat*, etc.', by the proprietor himself with his own stock or by his own servants or hired labour for 12 continuous years immediately before the commencement of the Act. This definition insists cultivation as *kamar*, etc. and corresponds to the second part of the definition in the Madras Act which requires continuous cultivation for a period of 12 years immediately before the commencement of this Act."

The first part therefore does not mean that it should have been cultivated as *kambattam*, *khas*, *sir* or *pannai*. Under the second part of section 120 (*b*) of the Bengal Act, private land is cultivated land which is recognised by village usage as proprietors, *kammar*, *zirat*, *sir*, etc. The expression by whatever designation known in the definition in section 3 (10) must have reference to a recognition in the village as *kambattam*, etc. The attempt on the part of the learned advocate is to make those words and their import as defined by Wilson in his Glossary, the essence of the definition and deduce therefrom that proof of cultivation of the lands is the sole test for determining private land. I am not prepared to read the section in the manner suggested by the learned advocate for the appellant and whatever may be the meaning to be attached to these expressions, at present the definition has not made the meaning of those words the essential part of the definition. '*Kambattam*' according to Wilson's Glossary at page 254 is used in two senses. One is cultivation which a cultivator carries on with his own stock, but by the labour of another; the other is the land which a Zamindar, Jagirdar or Inamdar keeps in his own hands, cultivating it by labourers, in distinction to that which he lets out in farm. *Khas* applies according to that Glossary to lands held by Zamindars and cultivated by themselves for their own benefit. '*Sir*' is the name applied to lands in a village which are cultivated by the hereditary proprietors or village Zamindars themselves as their own especial share, either by their own labourers and at their own cost, or by tenants at will, not being let in lease or farm; these lands were sometimes allowed to be held at a favourable assessment, or were unassessed so as to provide *Nankar*, or subsistence for the proprietor. The term is also sometimes applied to lands cultivated on account of the State, or to those in which the revenue is paid by the cultivators without any intermediate agent. '*Pannai*' at page 398 means 'a field, a rice-field, cultivated ground, tillage, husbandry.' The two expressions '*khas*' and '*sir*' are not in vogue in this Presidency so far as my knowledge goes. '*Pannai*', as defined by Wilson does not import personal cultivation by the Zamindar. The only two words that are used in this Presidency are therefore *kambattam* and *pannai*. The word '*kambattam*' is used in a general sense also to denote a man's personal cultivation. It is difficult to infer from the meaning of these words as given by Wilson in 1855 that the words have the same meaning and must be understood in the same sense even at the present day or at any rate in 1908

when the Estates Land Act used that expression. As regards 'pannai' as pointed out by the Civil Judge in *Nagayasami Kamaya Naik* v. *Yiramasami Kons*[1], already referred to, it is used to denote land in which the tenants acquired no occupancy rights. It is therefore not possible to infer from these expressions particularly from the meaning as given by Wilson in 1855 that these words have the same meaning and have the common feature of personal cultivation of the lands by the landholder. (*See also* the meaning of the words as given by Baden Powell cited above.) When in the second part of the definition the Legislature definitely insisted upon the test of continuous cultivation, to determine whether a given land is private land or not, it is difficult to see if the intention of the Legislature even in the first part was to insist upon test of cultivation why it did not expressly say so. The reason is according to me that these lands in estates have acquired a different character by reason of a continuous course of treatment and could easily be ascertained by reference to the documents such as village accounts, pattas and muchilikas and the other mode or manner in which the landholder enjoyed these lands whether the lands were or were not private lands. The same idea is contained in the Bengal Act. In the village the tenants know with certainty which lands are private lands and which lands are ryoti lands in which they acquire occupancy rights. It is therefore difficult to infer from the first part of the definition that cultivation is the test and is the exclusive test and the sole test for determining the nature of the land. Further, this view receives support from section 185 which deals with evidence. If what is to be established under the definition is cultivation, it is difficult to understand why the Legislature permitted specific letting before 1898 as a test or as admissible evidence to prove the character of the land. The idea of letting is diametrically opposed to the idea of cultivation. Again local custom which is permissible under the first clause of section 185 is also unnecessary and could not afford evidence of proof of cultivation. If according to the usage in the village the land was recognised as private land that is also a factor which goes to establish according to the section that the land is private land. The only clause under which cultivation may be proved is under clause (3) of section 185 which contemplates any other evidence that may be produced. Reading therefore the definition with section 185, it is impossible to infer from the definition of the first part that the Legislature intended to lay down the test of cultivation as the sole and exclusive mode of determining the character or nature of the land.

This leads me to a consideration of the decisions reported and unreported which have been placed before us in the course of the arguments by either side. The decision in *Lakshmayya* v. *Sri Raja Varadaraja Appa Rao Bahadur*[2], is a decision relating to the Nuzvid Estate of which the Gannavaram estate was a part. The suit was instituted by the Zamindar to eject the defendants from certain lands in a village which he claimed to be *soverum* or private lands in which he possessed both the kudiwaram and the melwaram rights. The defendants, the tenants, denied the right of the plaintiff to kudiwaram and claimed occupancy rights in the lands and contended also that the civil Court had no jurisdiction to entertain the suits as the lands were not private lands but were ryoti. The tenants were successful in the first Court, but on appeal the District Judge reversed that decision holding hat the lands were the private lands of the Zamindar in which he owned both the warams. He relied upon the use of the word '*soverum*' in the accounts and in some of the muchilikas which according to him indicated that the Zamindar was the owner of both the warams. There was also other evidence which established that the Zamindar treated the lands on a different basis from '*seri*' or ryoti lands in his estate. In the survey of 1870 the two classes of lands were differently numbered and in the accounts the Zamindar was shown as owner of the lands and not the cultivating tenants. The pattas of 1897 contained express admissions by the tenants that the lands were '*soverum*' lands and that they had no *jeroyati* or occupancy rights. The Zamindar also paid the water rates himself while in the case of '*seri*' lands or ryoti

1. (1872) 7 M.H.C.R. 53.

2. (1912) 23 M.L.J. 624 : I.L.R. 36 Mad. 1680.

lands, the water cess was collected by the Government directly from the ryots. There was an assertion by the Zamindar in 1892 that the lands were private lands and the ryots admitted the full proprietary right of the Zamindar in the lands. From this evidence the District Judge concluded that the lands were private lands. There were second appeals by the ryots against the decision of the District Judge. The main argument on their behalf was that the interpretation of the word '*soverum*' given to it by the District Judge that it comprises both the warams was not correct and this argument found favour with the learned Judges, Sundaram Ayyar and Sadasiva Ayyar, JJ., who heard the appeals. '*Soverum*' denoted either the ownership of both the warams or of melwaram alone and so the use of the word in the documents was inconclusive to establish the ownership of both the warams by the Zamindar. The learned Judges, however, were of opinion that this error on the part of the District Judge did not vitiate the finding as there was undoubted evidence afforded by the treatment of the lands by the Zamindar and the admission of the tenants that they had no occupancy rights in the land. On the basis of this evidence, the finding of the learned District Judge was upheld by the High Court and the appeals were dismissed. Sundara Ayyar, J., at page 172 adverted to the origin of private lands and observed :

> "Sometimes the Zamindar was a descendant of a royal family that enjoyed demesne or private lands and remained in possession of them after the family ceased to exercise sovereign powers, but continued to have zamindari rights under the Muhammadan rulers. The holder was allowed to retain these private lands as compensation for services rendered by him to the State and partly also in consideration of his being responsible for the collection and payment of the State revenue. The private land in his own occupation was itself exempt from the payment of any revenue."

This description of the origin of private lands agrees with what was stated in the Fifth report and by Baden Powell. The learned Judge treats private land as equivalent to "demesne" lands and what is more significant is that the inference of the lands being private was drawn from the treatment and the conduct of the parties in respect of the land extending over a long period of years. The treatment referred to is the mode of dealing with the lands as separate from ryoti lands in the survey and also in the village accounts. Admissions by the ryots before 1898 were also taken into consideration to determine the character of the land. There is no proof in that case that the lands were ever cultivated by the Zamindar nor was there any specific reference to an intention to resume cultivation at any future date. The case definitely falls under the first part of section 3 (10) and is clear authority for the view that there may be other modes of proof other than cultivation by which an inference that the lands were private may be drawn. This decision it must be mentioned was never questioned or disputed in this Court and is good law. The decision was pronounced by two eminent Judges who had considerable experience and intimate knowledge of land tenures of this presidency and is entitled in my opinion to the greatest weight. The decision in *Artharama Babu* v. *Arthapadhi*[1] is also a claim by a purchaser from a Zamindar of lands which were claimed to be private lands. All that is stated in the course of the judgment at page 250 is that the burden of proving that the lands are home-farm lands is on the Zamindar or his representatives. This is clearly laid down by section 185 of the Estates Land Act : and then it is added that

> "the question of possession, that is, whether the Zamindar had been in direct possession through his private servants is the most important fact to be considered in such cases."

This decision is not an authority for holding that cultivation is the test.

There are two decisions in *Chintam Reddi Sanyasi* v. *Sri Rajasagi Appala Narasimha Raja Guru*[2] and *Markapulli Reddiar* v. *Thandava Kons*[3], which have been referred to but they do not throw any light on the question under consideration.

I now come to the decision in *Zamindar of Chellapalli* v. *Somaya*[4], on which strong reliance was placed by the learned advocate for the appellants and which is the

1. (1912) 25 M.L.J. 248.
2. (1914) M.W.N. 766.
3. (1914) M.W.N. 798.
4. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.

basis in the later decisions for holding that the test of cultivation or at any rate an intention to resume cultivation at a future date should be applied. In that case the lands were definitely proved to be ryoti lands to start with. The Zamindar was not able to prove continuous cultivation for a period of twelve years before the commencement of the Act. He relied upon the treatment of these lands in his accounts and also admissions in muchalika executed by tenants in proof of the conversion of the lands from ryoti into private. Both the learned Judges agreed on the question that even assuming that retrospective conversion was permissible under the Act such conversion could be proved by other means than that of cultivation for a continuous period of 12 years prior to the commencement of the Act. Both the learned Judges agreed on the finding of fact that the Zamindar failed to prove conversion even by such evidence. Seshagiri Ayyar, J., took the view that retrospective conversion was not permissible except to the extent to which it was recognised by the proviso to old section 185 which is now the second part of the definition in section 3 (10). Wallis, C.J., differed from that view. In the result both the learned Judges agreed in holding that the lands were not shown to be private lands. The discussion by Wallis, C.J., of the question whether actual conversion from ryoti into private land, has been established by the evidence commences at page 345. He starts the discussion by formulating the question that it is necessary in order to prove actual conversion from ryoti into private land, there should be very clear and satisfactory evidence; and then he proceeds to examine whether the evidence adduced in the case was sufficient for the purpose. The learned Judge adverts to the attempt of the Zamindars after *Chockalingam Pillai's case*[1], to introduce in pattas and muchalikas clauses negativing the existence of occupancy rights and to achieve this object they very often introduce the description of the lands as *kambattam* or home-farm land even though the lands were never cultivated by the Zamindar and he had no intention of so cultivating it. He also pointed out that the Zamindar in that case increased the extent of his private land from what it was in 1836, namely, 102 acres to about 800 acres by the date of suit which is definite evidence that the Zamindar was endeavouring his level best to withdraw public land and convert it into private land so as to prevent acquisition of occupancy rights by the ryots. It was found that the lands were always cultivated by the tenants. The learned Judge observed at page 346 that it was necessary for the Zamindar to establish that the lands were at some time domain or home-farm lands and the acquisition of kudiwaram right by the Zamindar at a subsequent date would not by itself have the effect of converting what was once ryoti into private land. In that connection he observed at the bottom of page 346:

"It does not seem to me that calling the lands *kambattam* and letting them on terms which negative occupancy right with a view to prevent the assertion of such right is sufficient to convert them into private lands within the meaning of the definition."

In other words, the sentence in the context means that if the Zamindar once knew the nature of the land to be ryoti, by mere introduction of the description of the lands as *kambattam* in pattas and muchalikas which in the very nature of things must be a colourable description would not convert the land into private land. It must be remembered that even according to the proviso to section 185 the only test that is permissible to prove conversion of what was once ryoti into private land is the test of cultivation. Having this in mind I should think the learned Judge observed at page 347:

"The Subordinate Judge has found and I agree with him that the suit lands were never cultivated by the Zamindar as part of his home-farm lands, and it seems to me that his treatment of them as *kambattam* was merely colourable for the purpose of defeating the occupancy rights of the tenants. In some parts of India lands of this kind are known as *sir* lands, and this is one of the terms mentioned in the definition. In *Budley* v. *Bukhtee*[2], it was held that *sir* land is land which a Zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied here, and that, as the plaintiff has failed to satisfy it, the appeal fails and must be dismissed with costs."

1. (1871) 6 M.H.C.R. 164. 2. (1871) 3 N.W.P.H.C.R. 203.

This paragraph is the foundation for the argument of the learned advocate for the appellants in the present case and is also responsible for some of the observation in the later cases for concluding that the test to determine the character of the land and the sole test is proof of cultivation by the Zamindar himself and proo that he intends to retain or resume for cultivation by himself even when from time to time he demises it for a season. The learned Judge was called upon to decide the question as to what should be established in order to prove conversion of the land into private land. He was not called upon to decide upon the language o section 3 (10) the essentials as to what constitutes domain or home-farm lands Reference to colourable description in the pattas and muchalikas of the land a *kambattam* is a clear indication that what the learned Judge had in mind was wha was definitely known to be ryoti land and not a case where the character of the land is unknown and for the first time the Court is called upon to determine it nature on the evidence adduced. In the last sentence in the paragraph extracted above, the learned Judge is careful enough to say that 'this test,' that is, the tes of cultivation and the intention to retain may well be applied here, that is in the present case, in which the question of conversion and conversion alone is unde consideration. In my opinion this passage cannot be treated as an authority fo the interpretation by the learned Judge of section 3 (10). Seshagiri Ayyar, J. after referring to 'domain' or 'home-farm' land at page 350 refers to the proviso and observes :

"The object of the proviso is to enable the landlord to say that although the land was seri he has by his own servants, or by hired labour cultivated the land for 12 years preceding the Ac and that consequently it should be regarded as his home-farm land. An irrebuttable presumptio should be drawn from such a conduct. If one remembers that a home-farm land is that which ha been ordinarily cultivated personally by the landlord at the outset, the meaning of such a reservatio in favour of the landholder will be apparent. This conclusion carries out the scheme of the Legis lature which seems to be opposed to the augmentation of the private land of landholders, excep in the special instance mentioned in the proviso to section 185."

The learned Judge here uses very guarded language and says that home-farm lanc is that which has been *ordinarily* cultivated personally by the landlord at the outset thereby implying that it need not necessarily be always under cultivation and tha at the time of the determination of the question there should have been proof tha there was cultivation and the reservation in the proviso to old section 185 wa intended to benefit the landholder to the extent of the cultivation which he conti nuously carried on at or about the time of the commencement of the Act. It i somewhat curious that the decision in *Budley* v. *Bukhtee*[1] which is referred to b Sir John Wallis, in his judgment is also a case of attempted conversion of land in th occupation of cultivating tenant into '*sir*' or '*pannai*' land. The appellant wh was the tenant in that case asserted that the land in his holding was held by hin for over 12 years as an ordinary cultivator. The lands were however entered later in the revenue papers as '*sir*' land. He therefore applied to the Settlemen Officer for the correction of the record and for registering him as a tenant witl rights of occupancy. This application was opposed by the Zamindar who claimed that the land was his '*sir*' and had actually been cultivated by him until the preceding year when it was let by his son to the appellant. The Settlement Office after enquiry found that the case of the tenant was true, that the land was cultivated for more than 12 years by him and that while under his occupation the Zaminda had recorded the land as '*sir*' although it was never cultivated by him. He therefor directed that the appellant should be recorded as tenant with rights of occupancy The Zamindar instituted a subsequent suit contesting the correctness of the decisio of the Settlement Officer and claiming that the land was his '*sir*' land. Th Zamindar failed before the Munsiff but was successful before the Subordinate Judg who reversed the decision of the Munsiff dismissing the suit and upholding th contention of the Zamindar as the land was registered in the Revenue papers a '*sir*' for more than 12 years. There was a further appeal to the High Court whic

1. (1871) 3 N.W.P.H.C.R. 203.

pointed out that the proposition applied by the Subordinate Judge was wholly unsound and that the "mere entry of land as *sir* will not make it a *seer* land." Were this so, it would be in the power of every Zamindar to convert the whole of the land of the village into *seer* by simply recording it as such. *Sir* land, as we understand it, is land, which at some time or other has been cultivated by the Zamindar himself, and which although he may from time to time for a season demise to shikmees he designs to retain as resumable for cultivation by himself or his family whenever his requirements or conveniences may induce him to resume it. The Settlement Officer had ruled that *seer* land was land which had been cultivated by the Proprietor and the Subordinate Judge was in error when he denounced this ruling as erroneous. Just as there was colourable description of the lands in the decision in the *Chellapalli case*[1], in the pattas, negativing occupancy rights of the tenants, in this case also the Zamindar got the entries in the revenue records as *seer* land which, of course, would not have the legal effect of changing the character of the land. The test of cultivation, therefore, was applied in both cases to establish conversion of ryoti land into private. The two decisions are not certainly authorities for interpreting the language of the definition. There was an appeal in the *Chellapalli case*[1], to the Privy Council and the decision of the Judicial Committee is *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somaya*[2]. Their Lordships of the Judicial Committee accepted the concurrent findings of fact as to the lands being ryoti which is the opinion of both the Judges, Sir John Wallis, C.J. and Seshagiri Ayyar, J., though they differed on the question of law. The Zamindar as pointed out by the Privy Council attempted to prove that by custom the lands were his private lands but failed in his attempt. Their Lordships of the Judicial Committee quoted the passage from the judgment of the Chief Justice just cited above and observed at page 405

> "that the test is obviously suggested by section 185 of the Act and was rightly applied by the Chief Justice."

Upon this observation of the Privy Council the argument was based that the sole test of cultivation as the essence of the definition of private land in section 3 (10) was accepted by the Privy Council and therefore must be taken as final. In my opinion this proceeds on a total misapprehension of the remarks of the Judicial Committee. The test suggested by section 185 must necessarily refer to the proviso to section 185 where alone 'cultivation' is referred to. In the three categories of evidence referred to in the body of the section no reference is made to cultivation. Their Lordships, therefore, must have meant when they approved the test laid down by Sir John Wallis, C.J., that in order to establish conversion

> "you must prove cultivation or intention to retain as resumable for cultivation these lands."

They were not considering the definition of private land in section 3 (10). It is a clear case in which to start with the land was known to be ryoti land and section 185 had no application except the proviso which relates to cultivation for a period of 12 years in which case the land according to the old section was deemed to be private land even though it is known to be ryoti land at its inception. *Sreemantha Raja Yerlagadda Mallikarjuna Prasada Naidu* v. *Subbiah*[3], is a case in which the question of conversion of ryoti land into private land arose for consideration. Both the learned Judges Abdur Rahim and Burn, JJ., accepted the view of the Seshagiri Ayyar, J., that retrospective conversion was not permissible except to the extent recognised by the proviso to section 185. There was no proof of direct cultivation in that case. Abdur Rahim, J., at page 281 states the effect of the decision as follows :

> "The question what is home-farm land and what is ryoti land within the meaning of this Act has been discussed in a number of cases of this Court and the general conclusion arrived at is that ryoti land is land which is in the occupation of the cultivating ryot in contrast with the home-farm land which the Zamindar is entitled to deal with in any way he chooses by contract without being hampered by the provisions of the Estates Land Act."

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1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1918) 36 M.L.J. 257 ; L.R. 46 I.A. 44 ; I.L.R. 42 Mad. 400 (P.C.).
3. (1919) 39 M.L.J. 277.

And then the learned Judge refers to the decision in *Zamindar of Chellapalli* v. *Somayya*[1], which was confirmed by the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somaya*[2] and the test laid therein. The main object of section 185 was considered as laying down rules of evidence showing whether the land in question is ryoti or private and that by mere letting out on lease the land which was once ryoti was not enough to convert the land into home-farm land. Burn, J., examined the scheme of the Act and at page 291 observed:

"The scheme of the Act appears to me to be to divide all cultivable land into two categories (1) private land—the entire interest in such land is vested in the landholder. The temporary rights of cultivators of such land are based on contract. They cannot acquire occupancy rights except by the deliberate action of the landholder. (2) Ryoti land—in all such land two separate interests exist—the melwaram and kudiwaram interest—the former is vested in the landholder and the latter in the ryot.

It seems to me that one main object of the tenancy law is to preserve these two interests and keep them separate. The kudiwaram interest may be in abeyance but it can never be destroyed. The landholder cannot prevent the acquisition of the right by a ryot. This is so even where a decree had been obtained before the passing of the Act . . . . . . A landholder can hold the kudiwaram interest in one case only, *i.e.*, where he possessed it before he became the landholder—(*vide* Exception to section 6) and even then the two interests remain separate."

The learned Judge construes the decision in *Zamindar of Chellapalli* v. *Somayya*[1] and *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somaya*[2] as laying down the test to be applied in deciding whether conversion has really taken place or not (*vide* page 293, bottom). Even if there was letting, if there is intention on the part of the lessor to resume direct cultivation the land may be presumed to be private land.

The decision in *Veerabhadrayya* v. *Zamindars of North Vallur*[3] is no longer good law in view of the decision of the Full Bench in *Bandara Jogi* v. *Rajah Chintalapati Seetharamamurthi*[4]. The learned Judges were of opinion that retrospective conversion of ryoti land into private land was permissible under the Act even apart from proof of cultivation for a continuous period of 12 years before the commencement of the Act. The only importance of this decision is in dealing with evidence to determine the nature of the land. Venkatasubba Rao, J., points out the distinction between the two species of lands (1) Immemorial kamatam; (2) lands relinquished by ryots and absorbed into Zamindar's kamatam lands. He adverts to the distinction that is kept in the records maintained by the estate between the two categories of lands and the lands in dispute in that case were lands falling under the second category that is lands which were originally ryoti but subsequently added to the Zamindar's private land. On the evidence the conclusion of the learned Judge was that the Zamindar had establishad conversion and with this conclusion Krishnan, J., also agreed. There was a specific finding in that case that the Zamindar failed to establish direct cultivation by himself and the question was decided mainly on the documentary evidence in the case. Here again even for inferring conversion the test of direct cultivation was not insisted on.

There is the decision of a single Judge of this Court by Madhavan Nair, J. (as he then was) reported in *Chinnarigadu* v. *Rangayya*[5] which deals with a case of private land. In that case the land was not known to be ryoti land to start with and the question had to be decided on the evidence whether the land was private land or not. The lands in the village were known as '*khas*', '*Khas Bhaghayat*' which indicated that the lands were cultivated by the Zamindars themselves. The learned Judge considers the question as one which falls to be decided under section 185 of the Estates Land Act, the burden of proof undoubtedly being on the plaintiff, the Zamindar. The evidence in the case showed that from 1877 onwards the land

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1. (1914) 27 M.L.J. 718: I.L.R. 39 Mad. 341.
2. (1918) 36 M.L.J. 257: L.R. 46 I.A. 44: I.L.R. 42 Mad. 400 (P.C.).
3. (1926) 52 M.L.J. 38: I.L.R. 50 Mad. 201.
4. (1947) 2 M.L.J. 263: I.L.R. (1948) Mad. 223 (F.B.).
5. A.I.R. 1935 Mad. 789.

was let to tenants and it was not known how it was dealt with prior to that date. There were leases from 1877 to 1891 which contained a description of the land in various ways as *kambatam*, *samastanam khanigi* and also contained surrender clauses. The pattas issued to the tenants were described as *sagupadi* pattas, in contra-distinction to pattas given to tenants who possessed occupancy rights in the lands. There was a change of tenancy and the rates of rent also varied from time to time. Sometimes rent was collected in kind and sometimes according to the varied cash rate in the village. The ryots were allowed in some cases to continue in possession of the lands from year to year. On this evidence it was held that the finding of the Courts below that the land was private land was justified. Reference was made in the judgment to the *Chellapalli case*[1] and to the test of cultivation by the Zamindar that was laid down in that case. The evidence of direct cultivation was of course lacking in the case but all the same having regard to the dealing by the Zamindar of the lands in a manner as he liked, it was held that that was sufficient proof that the land was private land. No doubt in that case it was not contended that the test of cultivation alone is the determining factor but *Chellapalli case*[1], was distinguished on the ground that it related to a land which was originally ryoti and the Zamindar attempted to prove that there was conversion. This decision in my opinion establishes that apart from the test of cultivation there may be other modes by which the character of the land may be determined; and in doing so the evidence referred to in section 185 as permissible evidence may be taken into consideration. The treatment of the land by the Zamindar under leases, the terms of which were determined by him at his pleasure and the recognition by the tenants that they had no occupancy rights in the lands were considered as sufficient to warrant the inference that the land was private land. Ryoti lands were treated in a different manner from the private lands.

Kondayya Rao v. *Naganna*[2] a decision of Wadsworth, J., related to conversion of private land into ryoti under a document by which conversion was brought about. The learned Judge defines at page 781 'home-farm' land as land regarding which the landholder at least retains an expectation that he will at some not too distant a date use it for his own cultivation and enjoyment. This test, it is claimed, follows from the decision in the *Chellapalli case*[1]. The learned Judge, however, in laying down this test does not insist upon proof of direct cultivation at some time or other to establish that a land is home-farm land. A mere intention or an expectation to cultivate it even if it be at a distant date was enough according to the learned Judge to constitute the lands home-farm lands. This decision was carried in appeal under clause 15 of the Letters Patent in *Kondayya* v. *Naganna*[3], which was heard by Sir Lionel Leach, C.J., Venkataramana Rao and Krishnaswami Ayyangar, JJ. The majority of the Judges, Krishnaswami Ayyangar, J., dissenting, confirmed the decision of Wadsworth, J., that the land was converted effectively into ryoti land, as the landholder sold the kudiwaram right under the document but retained only the melwaram right and they also further held that some of the terms in the sale deed which were inconsistent with the land being ryoti would not alter the nature and effect of the conversion of the land into ryoti. The only importance of this decision in my opinion, so far as it throws any light on the present discussion, is stated at page 726 by the learned Chief Justice that the essential characteristic of ryoti tenure is the permanent vesting in the tenant of the kudiwaram interest and the permanent retention by the landholder of the melwaram right. It would follow from this definition of the nature of ryoti tenure that if there is no such permanent vesting of the kudiwaram right in his tenant in a particular piece of land and both the rights were retained by the landholder it would be private land if otherwise the land is not shown to be ryoti land to start with. Krishnaswami Ayyangar, J., who dissented from the majority view

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1939) 2 M.L.J. 778.
3. (1941) 1 M.L.J. 336 : I.L.R. (1941) Mad. 720 (F.B.).

differed from them and held that a mere conveyance of the kudiwaram interest did not amount in that particular case to a creation of a ryoti tenure in the land conveyed. This decision really lays down the test for determining what constitutes in law a conversion of private land into ryoti which is really the converse of the conversion of ryoti land into private.

The next decision which is of importance is the unreported judgment of Krishnaswami Ayyangar and Somayya, JJ., in C.M.A. No. 311 of 1943. The lands in that case were in an inam village which became an estate under the Estates Land Act (Amendment Act XVIII of 1936) ; and the sole question for decision was whether the lands in suit were or not private or home-farm land of the landholder.

It would not be out of place at this stage to advert briefly to the position of the inamdar who owned the kudiwaram in an inam village prior to the Estates Land Act, 1908, and thereafter. Before the Act of 1908, the only question in an inam village was whether the inamdar owned or not the kudiwaram interest in the lands, In many villages the distinction between what was known as private land in permanently settled estates did not obtain. The tenant in the land could acquire occupancy rights either by grant or by prescription. Section 3 (2) (*d*) of the Estates Land Act, 1908, converted some of the inam villages into estates by enacting that if melwaram in a village was granted in inam to a person who did not own the kudiwaram right thereof and if the grant was either made or confirmed or recognised by the Government it was an estate. If the inamdar owned the kudiwaram in the village on the date of the grant the grantee of the melwaram would not be a holder of an estate. In respect of inam villages which became estates under this definition the Legislature consciously or unconsciously applied the broad division of the land into private land and ryoti land and an exception was however recognised under section 8 that if before or after the commencement of the Act, the inamdar acquired the kudiwaram interest in any land comprised in an estate falling within clause (*d*) of sub-section (2) of section 3 such lands ceased to be part of the estate. It followed therefore that under the old Act even after the date of the grant if the inamdar acquired kudiwaram interest in any particular land whether the acquisition was before the Act or after the Act it did not matter, the land ceased to be part of the estate and therefore ceased to be part of the ryoti land. In such cases it was not necessary for the inamdar to show that in respect of such lands the test in section 3 (10) of the lands being private is fulfilled in order to prevent the acquisition of occupancy rights in such lands by a tenant who is let into possession after the Act, When we come to the Act of 1936, the situation however was completely altered and inam villages were made estates irrespective of the question whether the grant was of melwaram alone or not and also irrespective of the question whether the grantee owned the kudiwaram interest at the date of the grant or not. Under the definition of private land in estates falling under section 3 (2) (*d*) of the Act, a special definition of private land was embodied in clause (*b*) of section 3 (10) ; the inamdar or landholder could prove that the land is private land within the meaning of the definition if he proved continuous cultivation for a period of 12 years either before 1st July, 1908 or before the 1st November, 1933, but in either case he must further prove that he had since retained his kudiwaram interest without converting it into ryoti land. The first clause section 3 (10) (*b*) is the same as the first part of clause (*a*) of section 3 (10). Under sub-clause (*b*) (iv) a further exception was recognised in the case of lands in which the landholder had acquired the entire kudiwaram interest in a land before the 1st November, 1933, for valuable consideration ; but if the purchase was at a sale for arrears of rent, it is further necessary for the landholder to establish that there was continuous cultivation for a period of 12 years since the acquisition of the land and that he had not converted the land into ryoti. Section 8 (5) recognises a limited right of letting of land in respect of which there is a prior adjudication that the tenant had no occupancy rights which adjudication was before the 1st November, 1933, to let the land for a period of 12 years, from the commencement of the Amending Act, 1936, on his

own terms. The rules of evidence in section 185 were also altered as a consequence of the alteration of the definition in section 3 (10); in the second proviso to that section two sub-clauses were added. Under the first sub-clause, the expression in a lease or patta of the land executed or issued on or after 1st July, 1918, implying that a tenant has no right of occupancy shall not be admissible in evidence for the purpose of proving that the land concerned was private land at the commencement of the tenancy; and under the second clause such expressions would not by themselves be sufficient for proving the land concerned as private if contained in leases executed or issued before the 1st July, 1918.

In C. M. A. No. 311 of 1943 the learned Judges had to consider whether the lands in suit were home-farm or private land within the meaning of the first clause in section 3 (10) (*b*), *i.e.*, 'domain' or 'home-farm' land of the landholder by whatever designation known such as, *kambattam*, *khas*, *sir* or *pannai*: and it is the same word for word as the first part of the clause (*a*). There was proof that the landholder was the owner of both the warams but he was not able to establish direct cultivation. The learned Judges held that mere proof that the landholder was the owner of both the warams would not be sufficient to constitute the land private land. The question had to be decided on the documentary evidence in the case and the other facts established by documents and leases produced in the case. It was argued in that case on behalf of the tenants that the test of actual and direct cultivation by the landholder even though he might let it on leases for some season, or an intention of cultivating it himself should be proved to satisfy the requirements of the definition relying upon the decision in the *Chellapalli case*[1]. This decision it was held by the learned Judges and the tests propounded therein apply only to cases where the land was admittedly ryoti land to start with and was inapplicable to cases where the character of the land in its origin was unknown. The definition is not confined to lands which are known as *khas* or *sir* and they are given only as examples. If the lands are known by these expressions they would be domain or home-farm land. But even in the case where these expressions are not shown to have been applied to the lands in dispute it did not follow that by that reason alone they are not domain or home-farm lands. If the land is continuously cultivated for a period of 12 years it is unnecessary to go to clause (1) to determine the character of the land. The very fact that the definition recognises and includes in it lands which are shown to have been cultivated as private lands is a clear indication that there may be other lands which need not satisfy the test of cultivation. The leases in the case established that there was a change in the personnel of the tenants from time to time, the rent was varying and that the tenants had a right only to enjoy the produce from fruit-bearing trees other than *iluppai* trees but had no right to cut them, that the *iluppai* trees exclusively belonged to the landholder and that the lands were leased out by public auction to the highest bidder. The cumulative effect according to the learned Judges of all these circumstances is to establish that the lands are home-farm or private lands. There were also other circumstances showing that the landholder treated himself as the absolute owner of both the warams and the tenants themselves recognised such ownership in unambiguous terms. This case, therefore, is an authority on the construction of the definition of private land and establishes that apart from proof of actual cultivation or an intention to resume cultivation at a distant date, there may be other tests by which the nature and the character of the land could be determined and that the decision in the *Chellapalli case*[1], and the tests propounded therein are not the sole and exclusive tests in order to determine whether a land is private or home-farm land or not. The learned Judges held that on the evidence it was established that the lands were private lands. This decision more or less is analogous to the decision in *Lakshmayya* v. *Sri Raja Varadaraja Appa Rao Bahadur*[2], on facts though no reference was made to it.

1. (1914) 27 M.L.J. 718: I.L.R. 39 Mad. 341.
2. (1912) 23 M.L.J. 624: I.L.R. 36 Mad. 168.

I now come to the decision in *Jagadeesam* v. *Kuppammal*[1], on which strong reliance was placed by the learned Advocate for the appellant and which was also considered in some of the unreported decisions of this Court. The case related to lands in a village which is part of the Tanjore Palace Estate. It is an inam village which was an estate under section 3 (2) (*d*) of the old Act or in any event under Madras Act XVIII of 1936 and the question was whether the lands were private lands or ryoti lands. The Tanjore Palace Estate was by treaty ceded in 1799 to the East India Company by the then Raja, under which the company acquired a right to collect revenue of the lands in the Tanjore country. This was continued till 1855 when the Raja died and the villages lapsed to the East India Company. On representations made by the senior widow of the last Raja on 21st August, 1862, after she was unsuccessful in the litigation which was finally disposed of by the Privy Countil, the estate was made over to the senior widow. There was again litigation in 1866 between the Ranees when a receiver was appointed by the Court to manage the estate. The village in suit was ultimately allotted to one Subhanandaji Bhonsle Sahib ; but the properties were subject to a charge and the plaintiff therein purchased them in auction on 2nd September, 1940, in execution of the charge decree. The village of *Kaduveli* which was the subject-matter of the suit was the village proper and had a hamlet called Ponavasal. The earliest document in the case indicated that the lands in the village of *Kaduveli* and its hamlet Ponavasal were ryoti lands in which the ryots had occupancy rights. During the management by the Government in 1860-61, the accounts showed that from the total beriz the melwaram and service manyam melwaram are deducted and the balance was treated as *miras thunduwaram*. The lands during the period of management of the receivers were leased to tenants but from a document Exhibit P-16 of the year 1873 it appears that the cultivators received an advance for purchasing seeds for wet lands and that the village was "*in amani*" which term according to the ordinary meaning denotes that the lands were under direct cultivation, though the learned Judge, Wadsworth, O.C.J., expressed a different opinion. There was no other evidence of any direct cultivation of the lands. The effect of confiscation by the Crown of the lands did not affect the rights of the mirasi proprietors. The learned Officiating Chief Justice accepted the interpretation put upon the word "Domain" by Wallis, C.J., and Seshagiri Ayyar, J., in the *Chellapalli case*[2], as meaning "land immediately surrounding the mansion or dwelling house, the park or chase," and would connote land appurtenant to the mansion of the lord of the manor, kept by the landlord for his personal use and cultivated under his personal supervision as distinct from lands let to tenants to be farmed without any control from the lord of the manor other than such control as is incident to the lease. The learned Judge further observes :

> "It seems to us that the sub-clause (*b*) (1) of the definition is intended to cover those lands which come obviously within what would ordinarily be recognised as the domain or home-farm, that is to say, lands appurtenant to the landholder's residence and kept for his enjoyment and use".

I have already shown that this narrow definition of "domain" or "home-farm" land does not fit in with the nature of private land as understood both in Bengal and in this Presidency. Reference was made in the course of the Judgment to the unreported decision of Krishnaswami Ayyangar and Somayya, JJ., but the learned Judge differed from the view expressed in that case that the decision in the *Chellapalli case*[2] and *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[3], were confined to lands which were originally ryoti but which were claimed to have been converted into private land. Apparently from the trend of the reasoning of the learned Judge at page 703, the learned Judge was not inclined to accept this distinction made in the unreported decision. In the opinion of the learned Officiating Chief Justice, Krishnaswami Ayyangar, and Somayya, JJ., dealt with the definition of

1. (1946) 1 M.L.J. 23 : I.L.R. 1946 Mad. 687.
2. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
3. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).

private land in a way which was inconsistent and which was irreconcilable with the decision of the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[1] He was however inclined to accept the correctness of the decision in the unreported case on the broad facts and remarked :

"but with some of the observations contained in that judgment we must express our respectful disagreement."

The learned Judge does not specify the observations to which exception was taken and from which he expressed his respectful disagreement. It is therefore difficult to see on what ground the *ratio decidendi* of the unreported decision was not accepted by the learned Judge. At page 705 of the report the learned Judge discusses the nature of home-farm land, but from an examination of the discussion by the learned Judge it is by no means clear what exactly is the test which the learned Judge lays down to determine whether a particular land is home-farm land or not. He observed at page 705 :

"The home-farm land is land which the landlord farms himself as distinct from land which he lets out to tenants to be farmed. This first clause therefore is meant to include and signify those lands which are in the ordinary sense of the word home-farm lands. The other clauses of the definition appear to deal with those lands which would not necessarily be regarded as home-farm lands in the ordinary usage of the term, for instance lands which are at a distance from the domain or home-farm but have been cultivated personally by the landlord for the required period of years, or lands in which the entire tenant's right has been purchased by the landlord from the tenant when the land has never been treated as ryoti land since the purchase ; and with reference to those lands there is a proviso that lands purchased at a sale for arrears of revenue shall not be regarded as private lands unless cultivated directly by the landlord for the required period. It seems to us that the definition read as a whole indicates clearly that the ordinary test for 'private' land is the test of retention by the landholder for his personal use and cultivation by him under his personal supervision. No doubt such lands may be let on short leases for the convenience of the landholder without losing their distinctive character but it does seem to us to be inconsistent with the scheme of the Madras Estates Land Act as amended to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the warams in the lands and has been letting them out on short term leases. There must in our opinion be something in the evidence either by way of proof of direct cultivation or by some clear indications of an intent to regard these lands as retained for the personal use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights.

It seems to us that there are no materials in the present case to show that these lands have been so cultivated or retained by the landholder. It is said that they are situated within a mile or two of one of the palaces in the estate ; but they were not in origin home-farm lands, before the seizure of the estate from the Raja, and seeing that the estate has been under successive receivers almost continuously since the re-grant there is no evidence that the grantee treated these lands as lands kept for his personal use and occupation or cultivated them under his personal supervision. Seeing that the lands cannot come under any other clause of the definition than clause (*b*) (1) of sub-section (10) of section 3 and having regard to the fact that the presumption is in favour of the ryoti character of the lands, we must hold that the plaintiff has failed to prove that the lands are private lands".

In this passage he seems to hold and lay down varying tests. In the first place lands which are far away from the residence of the landholder would not be private lands. He emphasises the distance and adverts to the circumstances that the lands were a mile or two away from the palace in the estate. Secondly, that home-farm lands are lands kept for the landholder's enjoyment and use ; and the test of retention by the landholder of the land for his personal use and cultivation by him under his personal supervision is also emphasised. But at the same time the learned Judge concedes the right of the landholder to lease out the lands on short term leases, for the convenience of the landholder without losing their distinctive character. Thirdly at another place, the learned Judge emphasises the test of cultivation, and fourthly again emphasises an intenton to regard the lands as retained for his personal use and that there should also be an origin for home-farm lands. If the test is one of intention and if the right to lease the lands is conceded, a landholder who owns both the warams and has always left the lands on short term leases at varying or fixed rates of rent and also had taken something from the tenant in recognition of his ownership of kudiwaram, it is difficult to see why in such a case

1. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).

an intention to retain the lands for personal use cannot be inferred. The retention of the kudiwaram itself without parting with it in my opinion is clear indication of an intention to resume cultivation even if it be at some distant future date. To restrict the definition to lands "appurtenant to the mansion of the manor"[1] is to overlook the essence of the nature of private lands as the history of these lands shows. Sections 19 and 134 of the Act clearly contemplates the leasing of the land to tenants and even the exchange of pattas and muchilikas which is clear indication that the lands need not be shown to have been cultivated at any time. Above all, in the concluding portion of the judgment he emphasises the fact that the lands in suit were not in origin home-farm lands before the seizure of the estate from the Raja. In other words, it means that the lands were shown to be once ryoti and therefore by any possible means they could not be converted into private land except by direct cultivation for a continuous period of 12 years. If this was what was meant in the judgment one need not quarrel with any or all of the observations of the learned Judge. The lands in the case, like the lands in the *Chellapalli case*[1] were at their inception ryoti lands and the confiscation did not even affect the rights of the tenants, as held by the learned Judge. If that is so, by any amount of dealing with the property under the leases conversion into private land could not be affected. The actual decision in the case may be right on facts but the narrow and restricted definition of private and home-farm lands which the learned Judges have indicated cannot be accepted as laying down the correct test. In my opinion the test was correctly laid down in the unreported decision in C.M.A. No. 311 of 1943.

After this decision in *Jagadisam* v. *Kuppammal*[2], there are some unreported decisions of this Court to which our attention was drawn. In Second Appeal No. 847 of 1946, Rajagopalan, J., had to consider the test to be applied under section 3 (10) (*b*) (iv) of the Act to establish retention of the kudiwaram interest in the land after acquisition of the kudiwaram. It was also contended in that case on the strength of the decision in *Jagadeesam* v. *Kuppammal*[2], that the test of cultivation and retention by the landholder for his personal use and cultivation should be established to prove the retention of kudiwaram within the meaning of that sub-clause. The learned Judge held that the decision in *Jagadeesam* v. *Kuppammal*[2] had no application and that the case before him was really covered by the decision in *Rajayya* v. *Lakshmamma*[3]. The lease for short periods according to the learned Judge with varying terms would really indicate a definite intention on the part of the landholder to retain his kudiwaram interest, not that he intended to part with it in favour of the lessee. The fact that the lessee was the same is not enough to prove an intention to part with the kudiwaram interest. In my view the intention to retain the kudiwaram interest and the intention to retain for cultivation are not different intentions. If a person retains the kudiwaram interest, for what purpose does he retain it? Only for the purpose of leasing it on his own terms and if necessary to resume cultivation. The test applied by Rajagopalan, J., to establish retention of the kudiwaram interest may equally be applied to deduce an intention to resume cultivation of the kudiwaram interest owned by the landholder. The learned Chief Justice and Rajagopalan, J., in Appeal No. 53 of 1946 considered whether on the broad facts of that case the land was private land or not. One peculiar feature in the case before the learned Judges was that practically the whole extent of the estate was claimed as the private land of the landholder. The landholder however was unable to prove continuous cultivation but he was able to establish by evidence that he was keeping a large establishment of farm-servants in the village, livestock, agricultural implements and was carrying on personal cultivation of lands which were not taken up by the tenants. It was

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1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 687.
2. (1946) 1 M.L.J. 23 ; I.L.R. (1946) Mad. 341.
3. (1945) 2 M.L.J. 148 ; I.L.R. (1946) Mad. 181.

found that the lands were 1,500 acres in extent and were more or less around the house of the landholder. From these facts, it was inferred that the lands were private lands. The decision in *Jagadeesam* v. *Kuppammal*[1], was referred to in the course of the judgment and the passage from that decision already extracted in this judgment was also cited. The decision proceeded on the facts established in the case and it does not take us beyond the decisions already referred to. Recently the question was examined by Subba Rao and Chandra Reddi, JJ., in Appeal Nos. 176 to 178 and 493 of 1946. The learned Judges accept the test laid down in *Jagadeesam* v. *Kuppammal*[1].

The legal position is summarised as follows :

"The legal position having regard to the provisions of the Act and the decisions dealing with them in so far as it is relevant for the purposes of this case may briefly be stated thus. Private land as defined under the Madras Estates Land Act comprises two categories, private lands, technically so called and lands deemed to be private lands. In regard to private lands strictly so called, it must be a domain or home-farm land as understood in law. The mere fact that particular lands are described in popular parlance as *pannai, kambattam, sir, khas*, is not decisive of the question unless the lands so called partake of the characteristics of domain or home-farm lands. The test to ascertain whether a land is domain or home-farm is that accepted by the Judicial Committee in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[2], is land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even if from time to time he demises for a season. Whenever a question therefore arises whether a land is private land technically so called as defined in sub-clause (1) of clause (*b*) to section 3 (10) the presumption is that it is not a private land. The recitals in the leases, pattas, etc., after 1918 must be excluded and the recitals in similar documents prior to 1918 in themselves are not sufficient evidence. There must be in addition direct evidence that these lands were either domain or home-farm lands in the sense that they were in their origin lands directly cultivated by the landlord or reserved by him for his direct cultivation. We are not concerned in this case with the question whether ryoti lands could be converted into private lands."

Reference may now be made to the judgment of my learned brother Viswanath Sastri, J., in *Pentkakata Narayudu* v. *Venkata Ramanamurthi*[3]. It arose out of a suit for rent which was instituted in a Civil Court by the landholder. The tenants pleaded that the lands were ryoti lands and that the Civil Court had no jurisdiction to try the suit. The question for determination was whether the lands were or were not private lands. The Courts below upheld the contention of the landholder that the lands were private lands and decreed the suits for rents. In the revision petition before the learned Judge this finding was canvassed on the ground that the Court below gave themselves jurisdiction by a wrong decision that the lands were private lands and that they did not apply the correct test to determine the question whether the lands were private or not. The lands were admittedly situated in a permanently-settled estate and the question was whether they satisfied the definition of private land in the first part of section 3 (10) (*a*) of the Estates Land Act. The test adopted in the *Chellapalli case*[4] and by Wadsworth, O.C.J., in *Jagadeesam* v. *Kuppammal*[1], that domain lands are confined to lands appurtenant to the landholder's residence and kept for his enjoyment and use was rightly rejected by the learned Judge as inapplicable to conditions of land tenure in this Presidency and as being opposed to the conception of private lands having regard to its history and nature. The learned Judge makes reference to the decision in *Lakshmayya* v. *Sri Raja Varadaraja Appa Rao Bahadur*[5], and accepts the decision as correct. The learned Judge examined elaborately the provisions of the Act and the decisions bearing upon the question and came to the conclusion that evidence of direct cultivation was not necessary and was not the only mode by which the land could be proved to be private land. Having regard to the course of the dealing by the Zamindar of the lands from 1877 to 1939 which established that the Zamindar treated the lands as private lands and that the tenants acquiesced in the position that they had no occupancy rights in the land, the learned Judge came to the conclusion that the lands in question were private lands. For the reasons given

1. (1946) 1 M.L.J. 23 : I.L.R. (1946) Mad. 687.
2. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).
3. (1949) 2 M.L.J. 623.
4. (1914) 27 M.L.J. 778 : I.L.R. 39 Mad. 341.
5. (1912) 23 M.L.J. 624 : I.L.R. 36 Mad. 168.

by the learned Judge in his jugdment I respectfully agree with his conclusions and also adopt the test applied by him to determine the character of the land as warranted by the provisions of the Act and the nature and character of private land as understood before and after the Estates Land Act.

This view of the decisions shows the conflict of judicial opinion and that the principle of *stare decisis* has no application. It is in view of the conflict that these cases were referred to a Full Bench to resolve the conflict.

Lastly, I have to refer to the decision of the Privy Council in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*[1], which in my opinion is decisive on the question which we have to decide. It is a decision under section 120 of the Bengal Tenancy Act and the judgment of the High Court is reported in *Maharaja Kesho Prasad Singh* v. *Parameshwari Prasad Singh*[2]. Before dealing with this case it will be convenient to refer to the language of section 120 of the Bengal Tenancy Act.

" Section 120 (1) :

The Revenue Officer shall record as a proprietor's private land—

(a) Land which is proved to have been cultivated as *Khamar* (*zirat, sir*) *nil, nijjot* (*or kamat*) by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act, and,

(b) cultivated land which is recognised by village usage as proprietor's *Khamar* (*zirat, sir*) *nil, nijjot* (*or kamat*).

(2) In determining whether any other land ought to be recorded as a priopprietor's private land the officer shall have regard to local custom, and to the question whether the land was, before the second day of March 1883, specifically let as proprietor's private lnad, and to any other evidence that may be produced, but shall presume that land is not a proprietor's private land until the contrary is shown ".

The rest of the clauses of the section are not important. Clause (*a*) corresponds to the second part of section 3 (10) (*a*), clause (*b*) corresponds to the first part. Clause (2) corresponds to section 185. In the case in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*[1], a suit was instituted by the Maharaj of Dumraon for possession of the lands by ejecting the defendants. The defence was that the defendants had occupancy rights in the lands and therefore they could not be ejected. The Subordinate Judge found that the lands were not *zirait* lands and that the defendants had rights of occupancy and made a decree dismissing the suit. The plaintiff appealed to the High Court of Patna which reversed the decree of the Subordinate Judge and granted a decree in ejectment to the plaintiff with mesne profits holding that the land was private land. The history of the lands was that they were in the bed of the river Ganga until shortly before 1843, when they emerged from the Ganges and part of it became fit for cultivation. In 1843, the Government who were interested in carrying on a stud farm obtained possession of the land from the Maharaja of Dumraon and cultivated the lands by themselves for a period of 30 years. The fact that the Government held the land under the Maharaja is made clear in the judgment of the High Court in *Maharaja Kesho Prasad Singh* v. *Parameshwari Prasad Singh*[2]. In 1873 the Government surrendered the land to the Maharaja of Dumraon and vacated possession without claiming any interest in the lands. Thereafter the Maharaja let the lands to a Mr. Fox for a term of years which was extended in 1883 by nine years under a *kabuliat* executed by Mr. Fox on the 21st June, 1883. In that *kabuliat* Mr. Fox admitted that under no circumstances could he claim occupancy rights in the lands and that after the expiration of the term the Maharaja was at liberty to keep the said lands as his private lands or to lease them to others. In 1891 the Maharaja granted ocupancy rights to Mr. Fox in consideration of the valuable services rendered by him to the Maharaja. Under the Bengal Tenancy Act occupancy right is a statutory right and is not conferred by gift by the landholder. Mr. Fox defaulted in payment of rent as a conse-

1. (1927) 52 M.L.J. 565 : L.R. 54 I.A. 129 : I.L.R. 5 Pat. 634 (P.C.).

2. (1923) I.L.R. 2 Pat. 414.

quence of which in a suit instituted for recovery of arrears, a decree was obtained and the right, title and interest of Mr. Fox was sold in execution on 2nd March, 1896, which was purchased by the Maharajah himself. Mr. Fox's rights in the land terminated by this sale. On 2nd March, 1896, the Maharajah let the lands to two persons for a term of five years who did not however acquire any occupancy rights in the land. In 1902, the Maharani who succeeded to the estate let the lands to the father of the defendants for a term of seven years from fasli 1309 to 1315 which was followed by an exchange of patta and *kabuliat* between the parties. Under these documents lands were admitted to be *zirait* lands and that the lessees had no occupancy rights and that after the expiry of the term the Maharani should be entitled to keep the lands for herself in her possession or let them out to tenants as she pleased. The father of the defendants continued in possession until his death and thereafter the defendant continued in possession. In 1908 the estate was in the management of the Court of Wards. The mother of the defendants who were then minors obtained for their benefit a temporary settlement of the land for a term of nine years from fasli 1316 to 1324 and executed a *kabuliat* which contained terms by which it was admitted that they had no occupancy rights in the land and that after the expiry of the lease the lands would be surrendered. After the term had expired the defendants refused to surrender possession and a suit was therefore instituted. In 1910 the mother of the defendants as guardian instituted certain suits in ejectment against trespassers and in the plaints in those suits also she admitted that the lands were private lands of the Dumraon Raja which were also recognised by custom as such. One of the questions raised and argued before the Privy Council was whether the admissions in the *kabuliats* executed after 2nd March, 1883, that the lands were the Maharajah's private lands were admissible in evidence. As already stated by me above, the Privy Council held that the said admissions were admissible. Their Lordships of the Judicial Committee considered the question even apart from the admissions contained in subsequent documents. At page 645 it is observed :

> "But quite apart from that and even if their Lordships had taken a strict view in favour of the appellant of section 120, the Bengal Tenancy Act, 1885, as it now stands, and irrespective of the patta of 1902 and the *kabuliyats* of 1883 and 1892, still having regard to the facts that the lands which the Government held for 30 years were used by the Government for similar purposes as they would have been used by the Maharaja of Dumraon if he had been the owner of a stud farm, that no one claimed any right in any of them as settled *zirait* or, except trespassers without any title, as having an occupancy right in any of them, and to the statements as to the character of the land by the defendants and their mother in the plaints of 1910, when they were the plaintiffs in the suits against trespassers to which their Lordships have referred, and to the *kabuliyat* given in 1908 by Musammat Radha Kuar to the Manager of the Court of Wards, their Lordships find that there was ample admissible evidence that the lands were a *zirait* of the Dumraon Raj, and that the defendants had no right of occupancy in them."

From a perusal of the reports of this judgment and the judgments of the High Court, in *Maharaja Kesho Prosad Singh* v. *Parameshwari Prasad Singh*[1], which was confirmed by the Judicial Committee it would be seen that from 1843 up to the date of the institution of the suit out of which the appeal arose, there was no trace of any cultivation or of an intention to resume cultivation at a future date in the case. The only evidence to prove that the land was private land was the admissions contained in the leases before 1883 and after and on that evidence, and on that evidence alone, the Judicial Committee concluded that the lands were proved to be private lands. All that is stated in the definition in section 120 of the Bengal Act excluding the first clause (*a*) which requires continuous cultivation for a period of 12 years is that the land is cultivated land which is recognised by village usage as proprietor's *Khamar* (*zirat, sir*) *nil, nijjot* (*or kamat*). No indication is given in this definition that the land should be within a particular distance of the Zamindar's residence and though the words '*kamar*' etc., occur which have been interpreted as lands which are in the cultivation of the Zamindar, still the Privy Council held that the

1. (1923) I.L.R. 2 Pat. 414.

lands are private lands, even though cultivation was not proved. From this decision which was pronounced by the highest Tribunal under a section which is in *pari materia* with that in the Estates Land Act, it follows that the test of cultivation or even the test of intention to cultivate is not the only mode by which a land could be established to be private land. This decision and the decision in *Lakshmayya* v. *Sri Raja Varadaraja Appa Rao Bahadur*[1], were not referred to either in the decision in *Jagadeesam* v. *Kuppammal*[2], by Wadsworth, O.C.J., or in the unreported decisions to which reference has already been made.

From the foregoing discussion the following propositions are established :

(1) If the land is known to be ryoti at its inception the only mode by which it could be converted into private land is by proof of continuous cultivation for a period of 12 years prior to the commencement of the Act.

(2) Even if the nature of the land is not known, continuous cultivation for the required period of 12 years before the commencement of the Act would conclusively establish that the land is private land.

(3) If there is no proof of cultivation for a continuous period of 12 years before the commencement of the Act, the land may be proved to be private land by other methods, provided the land was not shown to be once ryoti.

(4) Cultivation of the lands or leasing of the lands under short-term leases may be one mode of proof.

(5) An intention to cultivate or resume for cultivation is also a test to decide that the land is private land and such intention may be established by any other means, not necessarily by cultivation and by cultivation alone.

(6) The essence of private land is continuous course of conduct on the part of the landholder asserting and acting on the footing that he is the absolute owner thereof and recognition and acceptance by the tenants that the landholder has absolute right in the land.

(7) Mere proof that the landholder is the owner of both the warams is not sufficient to prove that the land is private land.

It now remains to briefly refer to the evidence in the case on which the finding of the Courts below is based. The evidence in the second appeals batch and in the C. R. P. batch is similar. Between the years 1815 and 1864 there are no documents throwing light on the question in issue. We do not know how the grantee enjoyed these lands from the date of grant up to 1864. Between the years 1864 and subsequently there are the sale deeds Exhibit P-1 series under which the temples acquired absolute rights in the property. The recitals in the sale deeds are more or less similar. Under these documents, the rights of the vendor in the nanja, punja, timber, fruit-bearing trees, thottam, well, inclusive of the hamlets together with the cocoanut trees and all trees excluding the residential quarters were conveyed. There is specific reference to the transfer of the '*iru-varams*' that is, both kudivaram and melwaram in all these sale deeds which indicates that the vendors were in enjoyment of the kudivaram right in the lands as well. There are next the leases executed by tenants commencing from 1886 in the second appeals batch and 1873 in the rent batch. The leases in the second appeal batch are Exhibits P-2 series and the clauses in all these leases are more or less similar. The tenants specifically admitted in those documents that the lessor was the owner of both the warams and agreed to harvest the crops under the supervision of the landholder and measure half of it to the landholder as melwaram, and in recognition of the right of ownership of Kudiwaram by the landholder and as lessee thereof they further agreed to pay one pangu of *swami bhogam* at the rate of 6 Ramalinga Marukkals and two straw bundles including cess for one transplantation

1. (1912) 23 M.L.J. 624 : I.L.R. 36 Mad. 168. 2. (1946) 1 M.L.J. 23 : I.L.R. 1946 Mad. 687.

at the rate of one anna and take the balance of the produce. There is the further condition that they would render service to the temple in respect of the share. There is also the 'quit' clause in all the leases by which the tenants undertook to surrender the lands after the expiry of the term fixed by the leases. The leases from 1866 to 1896 were for a period of five years. In 1898 there were two such leases for a period of three years. Then in 1902 there were leases for a period of five years except one which was for a period of four years. In 1919 the leases were all for a period of three years. In the rent batch also the leases were, in some cases for five years, in others, for three years, and there were also some leases for seven and more years. The documents have been analysed by the Courts below and the effect of the documents is summarised by the learned Subordinate Judge in paragraph 16 of the judgment in the Second Appeal batch and there is also a similar summary in the rent batch as well. He says that the temple owned the kudiwaram and melwaram rights; that though the tenants were not disturbed from possession of the lands, there were some instances in which there was also a change of tenancy. The rights of the temple to both the warams was admitted in the leases and there is the further payment of *swami bhogam*, a share from out of the tenant's share of the produce in recognition of the ownership of the temple to the lands. The tenants never asserted during the whole course of the period till 1930 that they were entitled to kudiwaram interest. On the contrary in almost all the documents there were clear admissions that they had no kudiwaram rights and that the temple owned the kudiwaram right as well as the melwaram. In some of the leases in describing the boundaries the surrounding properties were described as property owned by the temple and not by the cultivating tenants. The payment of *swami bhogam* by the tenants is a very important circumstance in my opinion indicating that the land is private land of which the temple is the full owner and is treated as a category of land in which the ryots could never acquire occupancy rights. The meaning of '*swami bhogam*' and its significance was considered by Sadasiva Ayyar, J., in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[1]:

"The word '*swami bhogam*' used in Exhibits A, F, F-1 and other documents has got a settled meaning in the Tanjore and Chingleput Districts. Wilson in his Glossary says: '*swami bhogam* in the Tamil country means the share of the produce or rent which is paid to the Mirasdar or hereditary proprietor by the tenant cultivator holding the land in farm for a fixed period.' I think the use of the word *swami bhogam* in Exhibit A is almost conclusive as to the full proprietorship of both the melwaram and kudiwaram rights in the temple.".

This decision was affirmed by the Privy Council in *Naina Pillai Marakayar* v. *Ramanathan Chettiar*[2]. At page 356 of the report the meaning given to local term by learned Judges of this Court was accepted and their Lordships observed:

"All those learned Judges were, from their local knowledge, in a better position than their Lordships, are, to correctly appreciate the meaning of the vernacular terms in use in the Tamil country of Tanjore in reference to interests in lands, and all those learned Judges in carefully considered and exhaustive judgments found, to state briefly their findings, that the endowed property of the temple, of which the lands in question formed part, was not an 'estate' within the meaning of Madras Act I of 1908 and that the defendants were not, under the Act or otherwise, tenants, with a right of permanent occupancy."

(*See also* the decision in *Muna Muhamad Rauthar* v. *Muthu Alagappa Chettiar*[3]).

In *Subramania Chettiar* v. *Subramania Mudaliar*[4], the Privy Council considered the meaning of '*tirwa swami bhogam*' which was paid by the tenants to the landholder. 'Tirwa' according to the Judicial Committee is the share of the rents payable to the Government, and '*swami bhogam*' is the revenue derived from the tenants or occupiers over and above what was necessary to pay the tax. In *Sivanpandia Thevar* v. *Zamindar of Urkuad*[5], '*swami bhogam*' was treated as part of the rent though it is something which is paid over and above the melwaram. It is unnecessary in this case to consider the correctness of that view. If a tenant

1. (1916) 36 M.L.J. 84 at p. 98.
2. (1923) 46 M.L.J. 546: L.R. 51 I.A. 83: I.L.R. 47 Mad. 337 (P.C.).
3. (1917) 34 M.L.J. 234 at p. 248.
4. (1929) 57 M.L.J. 1: L.R. 56 I.A. 248: I.L.R. 52 Mad. 549 (P.C.).
5. (1917) 34 M.L.J. 139: I.L.R. 41 Mad. 109.

called upon to pay more than the lawful rate of rent payable in respect of ryoti land, the excess would be an enhancement. It is however unnecessary to decide whether *swami bhogam* in such circumstances would not be an illegal enhancement. The payment of *swami bhogam* therefore is a clear indication of not only the admission by the tenant of the ownership of the landholder of the kudiwaram interest in the land but also an indication on the part of the landholder of his intention to retain the kudiwaram and the object of such a retention can only be that at some future date he intends to resume for cultivation, if necessary.

The learned Subordinate Judge points out that according to the Ramnad District Manual prepared by Mr. T. Rajaram Rao, Dewan of Ramnad Samasthanam, under the orders of the Court of Wards in 1890, 'pannai' lands in the district are those in which the Zamindar or Inamdar owns both the landlord's and tenants' right and that he can lease out the lands to any one he likes for cultivation and obtain from him *swami bhogam* or *thunduwaram*, a rent obtained in acknowledgment of the landlord's tenancy right in the soil, in addition to the melwaram or landlord's share, and that most of the Dharmasasanams in the zamindari were held under "Pannai Tenure". This indicates that in this district these incidents are understood by usage as establishing that the tenure is pannai tenure and therefore it follows that the lands are treated by usage as private lands of the landholder. The evidence therefore establishes in this case that for nearly a period of 80 or 90 years to which the documents relate, the lands are treated as lands in which the tenant under no circumstances acquire occupancy rights. In other words, the land is treated as private land and not ryoti. Apart from the execution of the leases, there are admissions by the tenants themselves even after the Act and even after 1898 establishing that the lands are the absolute property of the landholder which can only mean that they are private lands. Such evidence is admissible and it would be legitimate to draw from such admissions that the lands are private lands as has been laid down by the Privy Council in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*[1], already referred to. The leases were for short terms and contained surrender clauses; and the obligation to pay *swami bhogam* is also enjoined by the leases. This treatment of the lands by the landholder and the exercise of the rights by him as the absolute owner of the lands which was acquiesced in and acknowledged by the tenants is clear and cogent evidence from which to infer that the lands were private lands. The usage in the district as recorded in the Ramnad District Manual is also to treat the lands with such incidents as private land. Such usage will be local usage and local custom within the meaning of section 185 of the Estates Land Act, which again is permissible and relevant evidence when the question of determination of the character of the land arises. There is also similar evidence and similar findings in the rent batch also and it is unnecessary to refer to them in detail. There is one additional circumstance in the rent batch namely that repairs to the nanja lands were effected by the plaint temple which is also an indicative of the lands being private lands.

Apart from the ownership of the two warams by the temples we have the undisputed conduct of the parties, recognising the lands as private lands in which the tenants had no occupancy rights. The Courts below in my opinion were alive to the question that had to be decided and approached the evidence in the case from a proper perspective and the finding reached concurrently is not vitiated by any legal flaw so as to justify interference by this Court in second appeal. I have no hesitation therefore in confirming the decisions of the Courts below and dismissing the second appeals and the revision petitions with costs. In the second appeals the decree will be modified by deleting the direction to pay future mesne profits.

Viswanatha Sastri, J.—The decision of these second appeals and civil revision petitions turns upon the answer to the question whether the lands which formed

1. (1926) 51 M.L.J. 587: L.R. 53 I.A. 164: I.L.R. 5 Pat. 634 (P.C.).

the subject-matter of the suits were the "private lands" of the plaintiffs landholders, as defined in section 3 (10) (*a*) of the Madras Estates Land Act (I of 1908) hereinafter called 'the Act', or whether they were ryoti lands in which the defendants-tenants had acquired a right of occupancy by virtue of section 6 (1) of the Act. In the arguments before us, title to a permanent tenancy by prescription, pleaded and found against in the Courts below, has not been relied on and the tenants rested their case entirely on the Act.

The essential facts relating to the history of the land have been set out in the judgment of my learned brother Satyanarayana Rao, J., and I therefore forbear from summarising them on my own account. I agree that the village of Manamelpatti which was originally part of the Sivaganga Zamindari is an "estate" falling wthin section 3 (2) (*e*) of the Act. The plaintiffs are therefore "landholders" as defined in section 3 (5) of the Act. The defendants would be "ryots" if the lands in their occupation are "ryoti" as defined in section 3 (16) and the lands would be "ryoti" unless proved to be "private lands" as defined in section 3 (10) (*a*) of the Act.

The lands in question have been purchased by the plaintiffs and their predecessors-in-title under a series of sale deeds ranging from 1864-1914 with both warams rights. In vernacular conveyancing it is customary to speak of the absolute ownership of land as consisting of *iru-waram* rights, *i.e.*, of both melwaram and kudiwaram, even though there are no distinct, independent and co-existing interests in the land like melwaram and kudiwaram in the lands conveyed. In the case of ryotwari lands and "private lands" as defined in the Act the distinction between melwaram and kudiwaram is notional and the rent payable to the absolute proprietor of the land is called "melwaram" and the tenant's share of the produce "kudiwaram", though the tenant has no permanent right of occupancy in the lands and his rights are regulated solely by the contract of lease between him and the proprietor. The lands in question have been leased in parcels to tenants from time to time under terminable leases for periods ranging from three to ten years. The leases are not continuous but they cover the entire lands. All the leases contain a provision for the payment of *swami bhogam* to the lessors in addition to the melwaram. Under the leases of 1873 the tenants agreed to surrender the land to the lessors whenever required by the latter at the beginning of the Tamil New Year. In the leases of the years 1885 to 1891 there are provisions for surrender of the land after the expiry of the term in the Tamil month of Chitrai. In the leases of 1905, there is a stipulation that if the conditions of the leases are not observed the lessors would be at liberty to cancel the leases and let out the lands to other tenants even before the expiry of the term. In the leases for the period from 1919 to 1922 there is a provision for surrender of the lands by the tenants at the end of the term. In all the leases there is a stipulation for rendering service to the two temples to which the lands belong. The leases are described as *swami bhogam* leases and the title of the lessor to both warams in the lands is admitted. The leases range from 1873 to 1922. It has been found by the Courts below that though there has sometimes been a change in the personnel of the tenants, in the majority of cases the lands have continued to be in the occupation of the families of the tenants hereditarily. Before 1930 none of the tenants asserted or claimed a right of occupancy in the lands. During the years 1930 to 1935 two or three tenants purported to sell or mortgage their holdings under Exhibit D-4 to Exhibit D-7 but the plaintiffs were not parties to or aware of these transactions. There is no evidence of direct cultivation of any of the lands by the landholders by their own servants or by hired labour with their own or hired stock at any time.

The crucial question may now be posed. Are the lands in question the "private lands" of the landholders as defined in section 3 (10) (*a*) of the Act? Mr. Sundaram Iyer for the appellants contends—and this is the pinch of the case—that direct cultivation by the landholder for an appreciable period of time must be proved in every case where a land is claimed to be the "private land" of the landholder.

He says that direct cultivation is implicit in the very definition of private land in section 3 (10) (*a*) and that this is the view taken in the decisions of this Court and the Judicial Committee. He conceded the concession being both self-imposed and allowed by decisions that occasional or sporadic leasing of the lands with the intention of resuming direct cultivation by the landholder would not be fatal to a claim that the lands are "private lands". He relied on a number of reported and unreported decisions which will be referred to later. The contention of the respondent is that direct cultivation is only an evidentiary fact, may be an important piece of evidence, but is not a touchstone of the character of land as private land.

The draftsman of Act I of 1908 has assumed a certain amount of knowledge of the history and the incidents of land tenures in zamindari areas in this Presidency on the part of those who have to interpret the Act. Of recent years views have been advanced by some learned Judges of this Court which have introduced an element of doubt and perplexity in the interpretation of sections 3 (10) (*a*) and 185 of the Act. The arguments in this case fully reflected the uncertainty and conflict discernible in the decisions, attributable, in my humble opinion, to the Judicial embroidery of the language of the Act. In my recent judgment in *Penthakota Narayudu* v. *Venkata Ramanamurthi*[1], I ventured to protest, though alone, against the wrong approach to the question now under debate in some of the earlier decisions. I am loath to rely on my own decision as a precedent and I take this opportunity of expressing my views with great deference to those who have held differently and with more elaboration than I thought necessary on the previous occasion. The topic now under discussion has been darkened, rather than illumined, by a false analogy which has been drawn with feudal tenures and manorial customs in England. The substitution of extracts from judgments dealing with cases of conversion of ryoti land into private land for the language of sections 3 (10) (*a*) and 185 of the Act and the wholesale adoption of expressions used by learned Judges in that connection, as if they were the words of the Statute itself, have also been responsible for much of the uncertainty in this corner of the law.

My own researches have not been as wide as those of my learned brother Satyanarayana Rao, J., and in any case I need not cover the same ground. It is necessary, however, to sketch briefly the background of the legislation which became Act I of 1908. The whole of the lands, whether cultivated or cultivable or waste in the country have been from time immemorial apportioned to a particular village, so that all lands are within the known boundary of some village. Even to-day the village is the unit of revenue administration. Under what may be called the common law of this part of the country, there are two main beneficial interests in cultivable lands, *viz*., the melwarams and the kudiwaram. Melwaram belonged to the State or to its assignee who might be zamindar, poligar, jagirdar or inamdar and the kudiwaram to the ryot or cultivating occupant of the land who had a right to remain in possession of the land so long as he paid the rent or revenue exigible. These were the only principal and independent interests in the land but there might be subordinate interests derived from the one or the other. Subordinate tenure-holders from zamindars, poligars or jagirdars holding under grants either rent free or subject to the payment of a favourable rent to the superior landlords, were themselves in the position of landlords or persons entitled only to the melwaram. Persons holding as sub-tenants under the ryot or kudiwaramdar had no right of permanent occupancy in the lands. So far I have referred to two distinct and independent interests in the cultivable lands. There were also two distinct classes of such lands, *viz*., one the *pannai*, *kambatam*, *home-farm* or to use the phraseology of the Act, "private lands" of the zamindar, poligar or jagirdar and the other, the *ayan*, *zeroyati*, *seri*, or peasant lands styled as "ryoti" lands in the Act. In the first class of lands both the melwaram and kudiwaram rights belonged to the zamindar, poligar or jagirdar, and in the second, the melwaram alone. The bulk of

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1. (1949) 2 M.L.J. 623.

the lands belong to the latter class. The former rulers of the country had made special grants of land to the farmers of revenue or rent collectors who later on came to be known as zamindars, poligars or jagirdars for the subsistence of themselves, their families, followers, retainers and dependants. These dignitaries also brought under cultivation with their own servants or hired labour waste lands in which there was no right of occupancy. These lands constituted the private lands of the zamindar in which the cultivating tenants had no occupancy rights as contrasted with the public lands in which they could acquire such rights. This was the state of affairs at the time of the Permanent Settlement in 1802.

Both in the instructions issued to the Collectors for the purpose of carrying out the Permanent Settlement and under section 2 of Regulation XXV of 1802 the *pannai* or home-farm lands of the zamindar, poligar or jagirdar were treated as lands liable to pay revenue to the Government. They were taken into account in calculating the assets of the zamindari and fixing the peishcush payable to the Government. The position is thus stated in the Fifth Report :—

"All private lands at present appropriated by the zamindars and other landholders to the subsistence of themselves and families as well as all lands held by private servants and dependants will be considered as forming part of the circar land and therewith responsible for the public Jama."

Section 2 of the Regulation recognised and vested the proprietary right of the soil, at least in the pannai or private lands, in the zamindar, though its language was much more sweeping and all embracing and inappropriate with reference to the public lands in respect of which he was, under the customary law, entitled to the melwaram. Regulation IV of 1822 was passed declaring that Regulation XXV of 1802 was not intended to define, limit, infringe or destroy the rights of any description of tenants, but as these rights were nowhere defined, there ensued much litigation and controversy regarding the respective rights of zamindars and tenants in public lands. It is unnecessary, for the purposes of this case, to refer to the course of decisions in this Court resolving such disputes. Suffice it to say that the first two Indian Judges of this Court, whose knowledge of the land tenures of this Presidency was only equalled by the lucidity of their exposition of legal principles were largely responsible for according judicial recognition to the permanent occupancy rights of ryots of public lands in zamin areas by their bold declaration that "contractual relations and competitive rents" were incompatible with the status of such ryots. This principle applied not only to lands in the occupation of ryots but also to lands relinquished by former ryots as well as unoccupied but cultivable lands which were all considered to be public lands. See *Mahalakshmamma* v. *Ramajogi*[1], *Venkatanarasimha* v. *Dandamudi Kotayya*[2], *Cheekati Zamindar's case*[3]. But it was only in respect of the "public domain" later on, defined in the Act as "ryoti lands" that the cultivating tenant in possession or occupation acquired a permanent right of occupancy. This right was not extended to the *kambattam*, *pannai* or home-farm land, the "private domain" of the zamindar. In respect of such lands, the tenants did not acquire a permanent right of occupancy by reason of their cultivation of such lands, the relationship between the zamindar and the tenants being regulated by the terms of the contract between the parties.

Reference may here be made to a few decisions of this Court dealing with the rights of zamindars in *pannai* lands before the passing of Act I of 1908. Referring to *pannai* lands in a zamindari in the Madura district (of which the suit village and the Sivaganga zamindari once formed part) the District Judge observed in an early case as follows :—

"They are lands to which the proprietor has an exclusive right, that is to say, the right to receiv the kudiwaram produce and the right to receive the melwaram ; lands regarding which landholder can arrange their own terms of rent. Sometimes these lands are cultivated under the zamindar' own ploughs and sometimes they are let out for cultivation of others."

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1. (1892) I.L.R. 16 Mad. 271.
2. (1897) 7 M.L.J. 251 : I.L.R. 20 Mad. 299.
3. (1899) I.L.R. 23 Mad. 318.

This view was affirmed by a Bench of this Court, Kindersley, J., remarking—

"The Judge says that they are lands to which the proprietor has an exclusive right, a right to the kudiwaram and to the melwaram. This is certainly something more than the tenure of an ordinary ryot, who is not entitled to the melwaram. And it appears to me from this and other cases which I have met with in this Court, that we cannot say that the defendant would have held these *pannai* lands if he had not been the zamindar."

The case was decided by the District Judge in 1870. The decision on appeal is reported in *Nagayasami Kamayya Naik* v. *Tiramasami Kone*[1]. In a later decision in *Venkatagiri Zamindar* v. *Raghava*[2], Turner, C.J., stated the characteristic feature of "private" or home-farm lands in a zamindari in these terms :—

"They are lands which according to a very general custom of the country the zamindar reserves for his own cultivation when he thinks fit to resume them and on which a right of occupancy does not accrue."

That private lands in zamindari areas were often leased to tenants for cultivation on contractual terms, without the tenants acquiring any right of occupancy, is also clear from the discussion of the evidence by Sir S. Subramania Iyer, J., in the *Cheekati Zamindar's case*[3].

Though the kambattam, pannai, home-farm or private lands of the zamindar were distinct from the zeroyati, seri or ryoti lands in a village and the bulk of the lands belonged to the latter class, it was found in practice that the zamindars were gradually extending the area of their private land by incorporating ryoti lands therein. In a contest between a rich and powerful zamindar and ignorant and poor ryots the odds, were of course, immensely in favour of the former. The rights too, whose origin, had to be traced to remote times, were not capable of easy proof. According to contemporary testimony, ryots in the southern districts held their own against zamindars and even defied them, while in the Northern Sircars the zamindars were more grasping and were generally masters of the situation. The Estates Land Act was passed in 1908 in order, as its preamble states "to amend and declare the law relating to the holding of land in estates in the Presidency of Madras". Its general effect may be stated in the words of the Judicial Committee :

"In declaring the rights of the occupancy ryots and emphasising the distinction between the landlord's 'private lands' and the 'ryoti' lands, the new Act affirmed the old customary law that had always been recognised by the British administration. Apart from rules relating to procedure and jurisdiction of the revenue Courts, it created one new right in order to settle the constant disputes between landlords and tenants which had been going on for nearly a century; it gave occupancy rights to all *ryots* in occupation of lands within an 'estate' at the time of the passing of the Act. It also gave some security to non-occupancy ryots in the enjoyment of their lands. In other respects generally speaking, it declared and gave statutory recognition to existing rights and status . . . . The existence in a village of *pannai* lands, in which the tenant cannot acquire occupancy rights except by contract, connotes the existence of lands in which he can acquire such rights by prescription." (*Sivaprakasa Pandarasannadhi* v. *Veerana Reddi*[4].)

"Ryoti land" and "private land" are mutually exclusive categories under section 3 (16) of the Act though they may both form component parts of the same village. The distinction between the two clauses of lands is maintained throughout the Act in respect of the rights and liabilities acquired or incurred and in respect of the jurisdiction of the Courts that have to adjudicate upon them. The fundamental difference is that the landholder is the absolute owner of "private land" of both the melwaram and the kudiwaram, though the distinction between the two warams is notional in such a case. Nobody else has an interest except such as the landholder might create under a contract or grant. The landholder has a right to enjoy the land as he pleases either by direct cultivation or through tenants. He can lease out the lands at competitive rents and enforce the other terms of the contract of tenancy. The tenant does not acquire a permanent right of occupancy by being

1. (1872) 7 M.H.C.R. 53.
2. (1885) I.L.R. 9 Mad. 142.
3. (1899) I.L.R. 23 Mad. 318 at pp. 325 and 326.
4. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).

admitted to possession of such land. In the case of ryoti land there exist two separate and independent interests the melwaram and kudiwaram the former being vested in the landholder and the latter in the ryot and the relations between the landholder and the ryot are governed by the Act.

We are concerned in the present case to find out the true character of the land, whether it is ryoti or private land. Section 3 (10) (*a*) defines "private lands". The reference to *khambattam, khas, sir* or *pannai* is only by way of illustration. The test of direct cultivation prescribed in the second part of section 3 (10) (*a*) is not laid down for private lands falling within the first part of the clause. It is conceded by all the decisions that lands retained by a zamindar as resumable for direct cultivation by him would be private lands. Section 185 of the Act deals with evidentiary matters that have to be considered in arriving at a conclusion whether a particular land whose origin is not known is private land. The two provisions have to be read together. The first proviso to section 185 lays down a presumption that a land is ryoti unless the contrary is shown, thereby casting the onus of proof on the landholder. Section 185 does not profess to enumerate or exhaust all the heads of relevant evidence and does not shut out any evidence that would be admissible under the Evidence Act to prove a relevant fact or fact in issue except a particular category of evidence in connection with major inams. The reference to "local custom" in clause (1) of section 185 is somewhat vague and indefinite. It evidently contemplates cases where, according to the consciousness of the village community, certain lands are always regarded as the private lands of the zamindar as distinct from *serai, zeroyati* or ryoti land. It is well known that ryoti lands are treated differently from private lands in many respects. In the case of private lands the rents vary from time to time; the tenants change, periodical leases with provision for eviction or surrender are granted; and the landholder is recognised and admitted to be the owner of both the warams. In the case of ryoti lands the rents are uniform and fixed; the tenants have hereditary rights and the right of alienation; and pattas and muchilikas do not provide for surrender of possession by tenants. In these and other ways the villagers recognise private lands as distinct from ryoti lands. Section 185 (2) requires the Court to have regard to the question whether the land was specifically let as private land before the first day of July 1898, that being the date when the proposal for legislation which became Act I of 1908 was first mooted. It cannot be that the Legislature required that the expression "private land" which was defined for the first time in Act I of 1908 should have been used in that sense in leases granted before 1898. The word "let" emphasises the importance of the terms and the conditions of the tenancy and requires attention to the substance of the contract rather than the nomenclature of the land. If the landholder had dealt with the lands as an absolute owner and with the tenant as a person who had no higher or other rights than those conferred by the contract of lease, and the tenant has admitted the absolute ownership of the landholder and his own position as a person without any right of occupancy, evidence of such letting is relevant. Notwithstanding the opinions to the contrary expressed in this Court, it must now be held on the authority of the decision of the Judicial Committee in *Bindeshwari Prasad Singh* v. *Maharajah Kesho Prasad Singh*[1], decided under the corresponding provisions of section 120 of the Bengal Tenancy Act that leases subsequent to 1898 negativing a right of occupancy in the tenants are also admissible to prove the character of the land. This was also the view of Sundaram Ayyar, J., in *Lakshmayya* v. *Sri Rajah Varadaraja Apparao Bahadur*[2], of Wallis, C.J., in the first *Chellapalli case*[3] and of Krishnan and Venkatasubba Rao, JJ., in the *North Vallur case*[4] and of Abdur Rahim and Oldfield, JJ., in *Apparao* v. *Kaveri*[5]. Indeed section 185 (3) requires the Court to consider "any other evidence" that may be produced and is wide enough to allow the reception of leases after 1898 in evidence though

1. (1926) 51 M.L.J. 587 : L.R. 53 I.A. 164 : I.L.R. 5 Pat. 634 (P.C.).
2. (1912) 23 M.L.J. 624 : I.L.R. 36 Mad. 168.
3. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
4. (1926) 52 M.L.J. 38 : I.L.R. 50 Mad. 201.
5. (1917) 7 L.W. 271.

their probative value might not be as great as those of leases granted before 1898. There was a provision in section 181 of the Act that sections 6, 8, 10, 11, 12, 19 and 46 do not apply to a landholder's private land but this provision was deleted by the Amending Act of 1934 on the ground that those sections applied only to ryoti lands and the provision was otiose. The other provisions of the Act clearly also recognise that private lands could be let out by the landholder without the risk of the lands losing their character as private lands, see sections 19, 134, 158 and 161. Neither leases nor the exchange of pattas and muchilikas impair the character of lands as private lands. To arrive at the conclusion that though section 185 authorises the reception in evidence of leases containing admissions of tenants negativing their rights of occupancy in order to prove that a land is private land, such leasing is an infirmative circumstance and that the character of the land as private land could in no case be established without proof of the landholder's direct cultivation is a feat of mental gymnastics beyond my capacity. It is not, in my opinion, legitimate to write into section 185 limitations and qualifications which the Legislature has not thought fit to insert.

Section 185 (3) permits the production of "any other evidence". It is not without significance that in a section dealing with the evidence that has to be considered in arriving at a conclusion as regards the character of the land as private land, no specific reference is made, to what, according to the appellants, is a primary and indispensable evidentiary fact, *viz.*, direct cultivation by the landholder. I do not say that it is not a relevant or weighty consideration but it comes in only under the omnibus provision allowing "other evidence".

The further argument of Mr. A. Sundaram Ayyar for the appellants is that the requirement of direct cultivation by the landholder is obvious from or at any rate plainly implicit in the definition of "private land" in section 3 (10) (*a*) as the domain or home-farm land of the landholder. Occasional leasing with an intention to resume direct cultivation being permissible, it is said that section 185 (2) must be read as referring only to such leases. He says that section 185 which deals with evidentiary matters should not be construed so as to abrogate the substantive provision found in section 3 (10) (*a*). The argument has been sought to be sustained by reference to glossaries and dictionaries interpreting the words *sir*, *khas*, *kambattam* and *pannai* and the authority of prior decisions of this Court and the Privy Council. My learned brother Satyanarayana Rao, J., has discussed the dictionary or glossary meaning of these expressions and I need not traverse the same grounds. Section 3 (10) (*a*) deals with two categories of lands (*a*) private lands properly so-called, *i.e.*, home-farm lands of which *kambattam* and *pannai* are given as examples, (*b*) lands whose origin or character is not known or which were once ryoti lands. The enumeration of different kinds of private land in class (*a*) is only illustrative and not exhaustive. In the case of lands coming under class (*b*) above described, proof of direct cultivation by the landholder with his own servants or by hired labour with his own or hired stock for a continuous period of twelve years before 1st July, 1908, without any other evidence, constitutes the lands "private lands". Ryoti land however could be converted into private land only in this manner and no other, and direct cultivation by the landholder for the requisite period, is an indispensable condition of such conversion as held by this Court in *Bandara Jogi* v. *Seetharamamurthi*[1]. In the case of lands falling under class (*b*) above stated proof of direct cultivation for twelve years before 1st July, 1908, would, without more, conclusively establish they are private lands. In respect of lands once ryoti, direct cultivation for the specified period is the only mode by which they can be deemed to be private lands. The insistence on direct cultivation in the case of one species of lands deemed to be private lands is a clear indication that there might be other private lands which need not satisfy the test of direct cultivation and these are in-

1. (1947) 2 M.L.J. 263 : I.L.R. (1948) Mad. 223 (F.B.).

cluded in the first part of the definition in section 3 (10) (*a*). In respect of lands whose character as ryoti or private land is in dispute, direct cultivation for 12 years before 1908, is not the only mode by which their true character can be established. Section 185 renders admissible not only leases before 1898 showing that the lands were specifically let as private lands but also such other evidence as would be relevant under the Evidence Act. If in respect of such lands there is relevant evidence other than direct cultivation, it is open to a Court to find on such evidence that the lands are private lands.

Before I consider the cases cited at the Bar, I wish to clear the ground by stating that we are not concerned in this case with conversion of ryoti land into private land but only with the nature of the evidence required to establish the original character of the land as private land. Before section 185 was amended in 1934, it contained a proviso that land directly cultivated by the landholder as private land for 12 years before 1st July, 1908, shall be deemed to be private land even though the land was originally ryoti. It has always been the law that mere merger of the kudiwaram interest in the melwaram does not convert ryoti land into private land. Before the amendment of 1934 conflicting views were expressed by learned Judges as to whether the proviso to section 185 was exhaustive and retrospectively prohibited other modes by which conversion of ryoti land into private land had been effected before the Act. Wallis, C.J., in the *Chellapalli case*[1] and Krishnan and Venkatasubba Rao, JJ., in the *North Vallur case*[2] took the view that the proviso to section 185 was not exhaustive and that such conversion was not retrospectively affected by Act I of 1908 while Seshagiri Ayyar, J., in the *Chellappalli case*[1], Abdur Rahim and Burn, JJ., in *Yerlagadda Mallikarjuna* v. *Subbayya*[3] and Sadasiva Ayyar, J., in the *Nuzvid case*[4] took the opposite view. A reference to this past controversy is necessary in order to appraise the value of the decisions relied on by the appellants. Wallis, C.J., who was of the opinion that the proviso to section 185 (before amendment) did not retrospectively prohibit conversion of ryoti land into private land before the Act or the recognition of such conversion as legal by the Court after the Act, even though direct cultivation for 12 years before 1st July, 1908, under the proviso to section 185 (as it then stood) was not proved, observed that the test of direct cultivation found in the proviso might well be applied as a test even to other cases of conversion claimed to have been effected in other modes before the Act came into force. *Zamindar of Chellapalli* v. *Somayya*[1]. On appeal the Judicial Committee approved of the application of the test suggested by the proviso to section 185 even to cases of conversion not falling within the proviso—see *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[5]. The force of this observation is considerably weakened by the deletion of the proviso to section 185 in 1934. Though Wallis, C.J., started by observing that the case " raises a question of importance as to what constitutes private land under the Act ", the further discussion shows that the learned Chief Justice was considering only a case of conversion of what was once admittedly ryoti land into private land. He found that the zamindar had at no time directly cultivated the lands which he claimed to have converted and that his treatment of the lands as kambattam in his accounts was merely colourable for the purpose of defeating the occupancy rights of tenants. He referred to *Budley* v. *Buktoo*[6], itself a case of colourable conversion of ryoti land merely by means of entries in records as *sir* or private land, where the Court had observed that

> " *sir* land was land which a zamindar had cultivated himself and intended to retain as resumable for cultivation by himself even when from time to time he demised it for a season ".

Seshagiri Iyer, J., referred to home-farm land as land that " has been ordinarily cultivated personally by the landlord at the outset ". The policy of the Act is to prevent an extension of private land in a zamindary by a process of conver-

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1926) 52 M.L.J. 38 : I.L.R. 50 Mad. 201.
3. (1919) 39 M.L.J. 277.
4. (1921) 42 M.L.J. 161 : I.L.R. 45 Mad. 39.
5. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).
6. (1871) 3 N.W.P.H.C.R. 203.

sion or even by legitimate acquisition of the ryoti interest as shown by section 8 of the Act. The proviso to section 185 was deleted and a corresponding provision inserted in section 3 (10) (*a*) in 1934 to emphasise the position that direct cultivation for 12 years before 1st July, 1908, is the only method of conversion, of ryoti land into private land recognised by the Act, thereby overruling the views of Wallis, C.J., in the *Chellapalli case*[1]; and Krishnan and Venkatasubba Rao, JJ., in the *North Vallur case*[2] and Sadasiva Ayyar, J., in the *Nuzvid case*[3]. That this is the effect of section 3 (10) (*a*) after the amendment of 1934 has now been held by the Full Bench in *Bhandaru Jogi* v. *Seetharamamurthi*[4]. The stringent requirement of direct cultivation imposed by law to discourage conversion of ryoti land and to prevent a landholder from increasing his stock of private land at the expense of ryoti interests need not be imported into a consideration of the question whether a particular land whose origin is not known, is ryoti or private.

In the course of their judgment in the *Chellapalli case*[1], Wallis, C.J. and Sesha giri Ayyar, J., interpreted the word 'domain' in section 3 (10) (*a*) of the Act as denoting land immediately surrounding the mansion house, park or chase of a lord of the manor and in his immediate occupancy and applied the same test to determine the private land of his Indian counterpart, the zamindar. Wadsworth, O.C.J. and Koman, J., in *Jagadeesam* v. *Kupppammal*[5], observed that the word "domain" or home-farm would connote land appurtenant to the mansion of the lord of the manor kept by the lord for his personal use and cultivated under his personal supervision. In the Tedlam case *Sri Ranganilayam Ramakrishna Rao* v. *Mallareddi Seshayya*[6] decided by the learned Chief Justice and Rajagopalan, J., the latter, under the impact of these two decisions, felt bound to refer to the unpretentious village house of an absentee mokhasadar as answering the description of the "mansion of the lord of the manor" and the lands in the village of an extent of 1500 acres as lying round about the "mansion" house. The decisions in the *Chellapalli case*[1] and *Jagadeesam Pillai's case*[5] were cited, the latter at great length, and followed. In my judgment in *Pentakota Narayudu* v. *Venkataramanamurthi*[7], I have expressed my dissent from this narrow interpretation of this term and pointed out that it has no relation to the actual conditions prevailing in this Presidency. "The mansion house" test would not be applicable to this country except in rare cases. It is a matter of common knowledge that zamindars, poligars, jagirdars and major inamdars owned considerable extents of private land in several villages far removed from their dwellings. In England manorial lands were not contiguous and often lay scattered about amongst and intersected by other lands having nothing to do with the manor. The demesne lands fell into three classes (*a*) lands occupied by the lord of the manor himself, (*b*) lands which the lord allowed his villeins to occupy and cultivate upon certain terms corresponding to the copyhold lands of later times, (*c*) lands allowed to lie waste or common in which free tenants and copyholders had important rights along with the lord of the manor. The English country side is not organised on the same lines as Indian villages where by reason of facilities for irrigation, cultivable lands usually form a block separated from the inhabitants' houses which lie close together usually in the village natham.

Yerlagadda Mallikarjuna v. *Subbayya*[8] decided by Abdur Rahim and Burn, JJ., was also a case where lands admittedly once ryoti were claimed to have been converted into private lands by the zamindar of Chellapalli. Abdur Rahim, J., referred to home-farm land as "land which the zamindar is entitled to deal with in any way he chooses by contract without being hampered by the provisions of the Act". Burn, J., referred to private land as land in which the entire interest is vested in the

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1926) 52 M.L.J. 38 : I.L.R. 50 Mad. 201.
3. (1921) 42 M.L.J. 161 : I.L.R. 45 Mad. 39.
4. (1947) 2 M.L.J. 263 : I.L.R. (1948) Mad. 223.
5. (1946) 1 M.L.J. 23 : I.L.R. (1946) Mad. 687.
6. A. S. No. 53 of 1946.
7. (1949) 2 M.L.J. 623.
8. (1919) 39 M.L.J. 277.

landholder and the rights of tenants are based on contract in contrast with ryoti land in which two separate and distinct interests known as melwaram and kudiwaram exist, the former vesting in the landholder and the latter in the ryot. The learned Judges agreed with the opinion of Seshagiri Ayyar, J., in the earlier *Chellapalli case*[1] that the only mode recognised by the Act for converting ryoti into private land was direct cultivation by the landholder for twelve years before 1908. They also applied the test of direct cultivation or retention of land for direct cultivation adopted by Wallis, C.J., in the earlier case and held that as there had been no direct cultivation by the landholder at any time, the lands retained their original character as ryoti lands. The mere description of ryoti lands as kambattam in leases granted by the zamindar during comparatively recent times and the transfer of ryoti lands to the category of kambattam lands in the zamindari accounts without any change in the tenure of the land and without any idea of taking up direct cultivation were held to be mere colourable transactions. This case went on the same lines as the first *Chellapalli case*[1]. These two decisions do not compel us to hold that where the question is not whether land once ryoti has since been converted into private land but whether the land is ryoti or private land, it must be considered to be ryoti land in every case where there is no proof of direct cultivation by the landholder for a substantial period. The test of direct cultivation was not insisted upon even for a conversion of ryoti land into private land in *The North Vallur case*[2] overruled by a Full Bench on another point.

I shall now proceed to consider the decisions where the question was not one of conversion but of the ascertainment of the true character of the lands as ryoti or private lands. The earliest reported case after Act I of 1908, so far as I know, is the decision in *Lakshmayya* v. *Sri Rajah Varadarajah Appa Rao Bahadur*[3], where this Court held that the lands in dispute were the private lands of the Gannavaram Zamindar. There was apparently no evidence in that case of direct cultivation and certainly no such evidence was referred to, or relied upon, in the High Court. The lands had been leased to tenants under muchilikas from 1892 onwards, the lands being described as the 'savaram' lands of the zamindar, a description which this Court, differing from the District Judge, held to be one of ambiguous and uncertain import. Savaram lands which are analogous to nankar lands in Upper India connote lands kept by the zamindar for the support of himself and the members of his family and would *prima facie* be his private lands according to the notions prevalent in the Northern Circars. This Court posed the real question as being "whether the evidence was sufficient to establish that the zamindar was the owner of both the melwaram and the kudiwaram in the lands" and answered it in the affirmative relying on the following circumstances. The lands were treated in the accounts of the zamindar as different from *seri* or ryoti lands and were held by tenants on rates of rent different from those prevailing for *seri* lands. Water cess on the lands was paid by the zamindar while ryots paid the cess in respect of ryoti lands. In the leases granted since 1892 the zamindar asserted, and the tenants admitted, his full proprietary rights in the lands. In the leases of 1896 and 1897 the lands were let as private lands. Grain rents had been substituted for money rents and the leases had been granted by auction to the highest bidder. This decision is a clear pronouncement that the character of a land as a private land could be established by other modes than by proof of indirect cultivation by the landholder.

Sundara Ayyar, J., held that the Act did not lay down any definite rule as to all the kinds of evidence that might be produced to prove that the lands were private lands and that leases granted subsequent to July 1898 were not shut out by section 185 of the Act, a view which was affirmed by Wallis, C.J., in the *Chellapalli case*[1]

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1926) 52 M.L.J. 38 : I.L.R. 50 Mad. 201.
3. (1912) 23 M.L.J. 624 : I.L.R. 36 Mad. 168.

and Krishnan and Venkatasubba Rao, JJ., in *North Vallur case*[1] and the Judicial Committee in *Bindeshwari Prasad's case*[2].

The decision of the Judicial Committee in *Bindeshwari Prasad's case*[2] has in my opinion a very important bearing on the topic now under consideration. The case arose under section 120 of the Bengal Tenancy Act corresponding to section 3 (10) (*a*) and section 185 (1), (2) and (3) of our Act. It is a matter of common knowledge that our Act was modelled on the Bengal Tenancy Act, the Permanent Settlement having proceeded on the same lines in both Provinces. In that case the Maharaja of Dumraon, the landholder, sued for eviction of his tenants from the large extent of lands situated in the zamindari alleging that they were his zerait or private lands. The tenants pleaded that they were ryoti lands in which they had acquired a statutory right of permanent occupancy under sections 20 and 21 of the Bengal Tenancy Act corresponding to section 6 of our Act. The lands in question were 225 bighas in extent and had emerged in 1843 by the fluvial action of the Ganges and become part of the zamindari. The bulk of the lands was suitable for cultivation. The entire lands had been leased from time to time by the Maharaja to the Government from 1843 till 1873 when the Government surrendered possession to him. The lands were again leased in 1873 to a Mr. Fox for ten years, the lease being renewed in 1883 for a further term of nine years under the kabuliat which recited *inter alia* that the lands were *zerait* (private lands) of the lessor. In 1891 the Maharaja even granted permanent occupancy rights in the lands to Mr. Fox in consideration of his services. Mr. Fox fell into arrears of rent and the Maharaja filed a suit, obtained a decree and purchased the right, title and interest of Mr. Fox in the lands in 1896. Thereafter the lands were leased by the Maharaja to one Akauri Ram for a period of five years. In 1902 the proprietrix of the Dumraon Raj granted a lease of the lands to Keshav Prasad, the father of the defendants, for a term of 7 years, the lands being described in the kabuliat as the *zerait* lands of the lessor. The lessee agreed that the lessor would be at liberty to lease the lands to anybody he liked at the end of the term. The lessee, and after his death, his sons, remained in possession for the full term of seven years except during a temporary dispossession from some of the lands by trespassers who had no title and who had set up an untenable claim of occupancy right. In the suits filed by the heirs of the lessee for eviction of the trespassers they had described the lands as *zerait* lands of the Dumraon Raj. Under a fresh kabuliat executed on 8th December, 1908, by the heirs of Keshava Prasad, the original lessee, the term of the lease was extended till 1925. This kabuliat also contained admissions by the lessees that the lands were the *zerait* lands of the lessor and there were also stipulations to the effect that the lessees would not claim rights of occupancy and that the lessor would be at liberty to take and keep possession of the lands himself or settle the lands on any other person at the expiry of the term. On the expiry of the term of this last kabuliat, the lessees declined to give up possession and asserted that they were ryots who had acquired occupancy rights. The Judicial Committee held, affirming the decision of the Patna High Court, that the lands were the private lands of the Dumraon Raj in which the lessees could not and did not acquire occupancy rights. Though the lands had never been under the direct cultivation of the zamindar at any time since their emergence in 1843 and had always been leased to tenants as *zerait* lands for varying terms, they were nevertheless held to be the private lands of the zamindar. This conclusion was based only on the terms of the several leases referring to the lands as *zerait* lands and the admissions of the tenants that they had no right of occupancy in them. The Judicial Committee also held that the admissions in leases executed by tenants after 1883 (the corresponding date under our Act being 1898) negativing a right of occupancy in the lands were admissible in evidence to prove the character of the lands as private lands. In other words,

1. (1926) 52 M.L.J. 38 : I.L.R. 50 Mad. 201.

2. (1926) 51 M.L.J. 587 : L.R. 53 I.A. 164 : I.L.R. 5 Pat. 634 (P.C.).

the Judicial Committee did not exclude any evidence admissible under the Evidence Act to prove that the lands were the private lands of the zamindar. The learned advocate for the appellant distinguished the case as resting on the terms of section 120 of the Bengal Tenancy Act and as having no application to the construction of our Act. I am unable to find any appreciable difference between the two provisions. Section 120 (1) (*a*) of the Bengal Tenancy Act corresponds to the second part of section 3 (10) (*a*) of our Act; section 120 (1) (*b*) corresponds to the first part of section 3 (10) (*a*); and section 120 (2) corresponds to clauses (1), (2) and (3) and the first proviso to section 185 of our Act. Not only is there no material difference in the law applicable but the facts in the Patna Case were very much stronger against the case of the landholder who had even gone to the length of creating occupancy rights in Mr. Fox and might therefore well have been presumed to have given up any intention of direct cultivation. He had even purchased the occupancy rights of Mr. Fox at an execution sale for arrears of rent. Under section 22 of the Bengal Tenancy Act (corresponding to section 8 of our Act), an acquisition of occupancy rights by the landholder at a rent sale does not enable him to hold the land as ryoti. Nevertheless the Privy Council held that the transaction by which the Dumraon Raj conferred permanent tenancy rights on Mr. Fox did not affect the character of the lands as *zerait* and when they came back to the possession of the Raj by a purchase at an execution sale, they regained the character which they originally possessed. It is somewhat unfortunate that this decision has not been the subject of consideration by this Court on many occasions when its relevancy was beyond dispute.

I shall now deal with the later decisions of this Court. In *Chinnarigadu* v. *Rangayya*[1], the question was whether certain land was ryoti or the private land of the zamindar. There was no evidence of direct cultivation by the landholder at any time. On the other hand, the evidence adduced by the landholder consisted of periodical leases originating from 1877. The tenants had been given *sagubadi* pattas which were different from those isused to tenants of ryoti lands. The lands were described as kambattam and there was a provision in the leases granted before 1891 for surrender of the land by the tenants at the end of the term. The tenants however had not been turned out of the land but allowed to continue from year to year. On these facts, Madhavan Nair, J., held that the lands were the private lands of the landholder though never directly cultivated by him. In the unreported case of Sri *Thiagarajaswami Devasthanam* v. *Muthuswami Odayar*[2], Krishnaswami Ayyangar and Somayya, JJ., dealt with a case of private lands in a whole inam village which had been granted with both warams to a temple and which became an estate under section 3 (2) (*d*) as amended by Act XVIII of 1936. The Court held that the mere fact that the landholder was the grantee of both the warams was not sufficient to show that the land was his private land, having regard to the statutory presumption in section 185 of the Act that land is ryoti and also to the provisions of section 185-A and 185-B of the Act. There was no proof of direct cultivation of the land by the landholder at any time, the land having been periodically leased out as required by a scheme framed for the temple. The case fell within section 3 (10) (*b*) (1) of the Act, which, in the case of major inams, corresponds to the first portion of section 3 (10) (*a*) applicable to zamindaris, palayams and jagirs. It was pointed out by the learned Judges that the words "sir", "khas", "khambattam" and "pannai" were given in section 3 (10) merely as examples of private lands properly so called and that in the case of lands not bearing the particular nomenclature, the Court would still have to find out whether the lands were private lands, *i.e.* the domain or home-farm land of the landholder. The Court relied upon terms in the leases granted before 1st July, 1918, implying that the tenants had no right of occupancy in proof of the private character of the lands. The changes in the personnel of the tenants, the variations in the rent payable, the restrictions on the rights of tenants to enjoy the trees on the land, the fixing of a term of years with a

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1. A.I.R. 1935 Mad. 789.
2. C.M.A. 311 of 1943.

provision for surrender of the lands at the end of the term and the periodical auction of the leases to the highest bidder, were relied upon in support of the conclusion that the lands were private lands of the temple. The Court distinguished the cases in the first *Chellappalli Case*[1], and the second *Chellapalli Case*[2] on the ground that they were cases where the Court had to consider whether ryoti land had been converted into private land before the Act, in which case the test of direct cultivation might be a crucial test.

Kondayya Rao v. *Naganna*[3] was an appeal from a judgment of Wadsworth, J., in *Kondayya Rao* v. *Naganna*[4] and dealt with a case of conversion of private land into ryoti land by the grant of a permanent right of occupancy by a Mukhasadar to his tenants. Wadsworth, J., referred to home-farm land as land regarding which the landholder at least retained an expectation that he would at some not too distant a date, use it for his own cultivation and enjoyment following the *Chellapalli case*[1]. After examining the relevant provisions of the Act, Leach, C.J., on appeal observed :—

> "There was nothing in the Act as it stood before 1936, nor is there anything in it now, which prevents a landholder from leasing his private land on whatever terms he may think fit, so long as he does not part with the kudiwaram interest."

Towards the end of the judgment the following passage occurs :

> "The appellants here could have sold the lands in suit to the first respondent absolutely or they could have leased them at any rent they might have agreed upon without separating the kudiwaram right from the melwaram right, but as they chose to separate the kudiwaram right from the melwaram right and grant a permanent right of occupancy on the basis of the payment of rent relative to the melwaram right they must, in my judgment, be deemed to have converted the lands into ryoti lands ".

Leasing by itself does not, therefore, impair the character of lands as private lands. *Rajayya Nandiar* v. *Lakshmana Ayyar*[5] was also a case relating to the conversion of *iruwaram* land into ryoti land under section 3 (10) (*b*) (iv) of the Act. There a landholder had acquired the kudiwaram interest for valuable consideration before 1st November 1933 and had been letting out the land on leases ever since. It was contended that the land had regained its original character as ryoti in the absence of direct cultivation by the landholder. The Court (Somayya and Patanjali Sastri, JJ.) negatived this contention in these terms :—

> "The mere fact that the lands have been leased to a tenant for a number of years does not mean that the landholder has not retained the kudiwaram and that he has converted them into ryoti lands. Proof of intention on the part of the landlord to part with the Kudiwaram right is necessary."

In a similar case, *Swami Vanniar* v. *Nagaraja Moopanar*[6], Rajagopalan, J., observed as follows :

> 'Leases for short period with varying terms would really indicate a definite intention on the part of the landholder to retain his kudiwaram interest, not that he intended to part with them in favour of the lessee. The fact that the lessee was the same is not enough to prove an intention to part with the kudiwaram interest ".

I do not see why the same test should not be applied to a case where both the warams originally vested in the landholder and the question arises whether the lands have become ryoti or where the presumption under section 185 of the Act is sought to be relied upon.

The next reported case on which considerable reliance has been placed by the appellants is *Jagadessam Pillai* v. *Kuppammal*[7] the judgment of the Bench being that of Wadsworth, O.C.J. Stripped of unnecessary detail, the facts of the case

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1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1919) 39 M.L.J. 277.
3. (1941) 1 M.L.J. 336 : I.L.R. 1941 Mad. 720.
4. (1939) 2 M.L.J. 778.
5. (1945) 2 M.L.J. 148 : I.L.R. 1946 Mad. 181.
6. S.A. No. 847 of 1946.
7. (1946) 1 M.L.J. 23 : I.L.R. 1946 Mad. 687.

were these. The Rajah of Tanjore had, before his death in 1855, acquired the mirasi rights, *i.e.*, absolute ownership in the lands of Kaduveli village. On the death of the Rajah all his landed properties were annexed by the East India Company as an act of State and kept in the possession and management of the Company and its successor, the British Crown, till 1862, when they were regranted to the widows of the Rajah. Owing to quarrels among the widows, a permanent receiver was appointed by the Court in 1866 to manage the lands and divide the income among the widows. The receivers successively appointed by the Court were in possession of the lands till 1926. Thereafter the Kaduveli lands were divided among the claimants to the estate of the Rajah. In 1934 one of them granted a lease of the lands allotted to his share to a tenant for a term of three years. At the end of the term the tenant claimed that the lands were ryoti and that he had acquired occupancy rights under section 6 of the Act. The landholders sued to evict the tenant on the ground that the lands were private lands. The learned Judges of this Court held that the lands were ryoti in which the tenant had acquired occupancy rights under section 6 of the Act. A Full Bench of this Court in *Sundaram Ayyar* v. *Ramachandra Ayyar*[1] held that the villages comprised in the Tanjore Palace estate were "estates" within the meaning of section 3 (2) (*d*) of the Act, as it then stood, though the case related to the village of Ullikadai with reference to which, as pointed out by Sadasiva Ayyar, J., it was conceded that there was a grant only of the melwaram. The learned Judges in *Jagadeesam Pillai's case*[2], traced the history of the Kaduveli lands from 1830. The village was then a mirasi village, the lands being owned by the mirasdars as proprietors of the soil. The mirasi rights had thereafter been acquired by the Rajah of Tanjore and on his death in 1855, vested in the East India Company and its successor, the British Crown. In 1856 the Government leased the lands to a *purakkudi* or outside cultivator for a term of three years. In 1860 the Government leased the lands to a different tenant with a stipulation for payment of *miras thunduwaram* in addition to the melwaram in recognition of the Government's right as a holder of the mirasi rights in the lands. After the grant of the village by the Government to the widows of the Rajah in 1862, the lands which were styled as "palace miras" were leased to a tenant with a provision for a payment of *miras thunduwaram* in addition to the melwaram. The receivers who came into the management in 1866 and continued till 1926 went on granting periodical leases of the lands to the highest bidder, the lands being stated to be absolute property of the landholder in the leases granted before 1908 and to be the private lands of the landholder in leases after 1908. The lands were proved to have been cultivated in *amani* in 1870 which, with all deference to Wadsworth, O.C.J. meant direct cultivation. The Court expressed its conclusion on the facts in these terms :—

"We do not know how the Rajah of Tanjore acquired the mirasi rights in the main village of Kaduveli; but we may take it as established that after the rendition of the estate (1862) there was no recognition of the subsistence of any occupancy right in any tenants of the main village who were holding lands under the receivers or under the actual owners of the estate".

It is somewhat difficult to understand the exact process of reasoning by which the learned Judges reached their conclusion. If their view was that the village was an estate even under section 3 (2) (*d*) of the Act, as originally enacted in 1908, then the acquisition by the Rajah of the kudiwaram or mirasi right even though it was made before 1855 would not convert the land into private land; *see* section 8 of the Act. Even after the regrant of 1862 the land would continue to be held on the same tenure unless it came within section 3 (10) (*b*) (ii) to (v) of the Act which, however, was not the case. The long history of the lands prior to 1862 narrated in the judgment would not be germane unless the learned Judges thought that the Rajah was only a melwaramdar and that by his subsequent acquisition of the kudiwaram interest there was no merger so as to extinguish the kudiwaram right.

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1. (1917) 32 M.L.J. 333 : I.L.R. 40 Mad. 389. 2. (1946) 1 M.L.J. 23: I.L.R. 1946 Mad. 687.

In the course of the judgment, however, the Court proceeded on the basis that the confiscation swept away all antecedent rights of the Rajah, that the grant of the village in 1862 was a grant of both the warams to the Ranis and that the village became an estate under section 3 (2) (*d*) of the Act as amended by Act XVIII of 1936. They then proceeded to discuss the meaning of the term "private land" in section 3 (10) (*b*) (i) of the Act in the light of the observations of this Court and the Judicial Committee in the *Chellapalli Case*[1], affirmed on appeal, *Yerlagadda Mallikarjuna Prasada Nayudu* v. *Somayya*[2] .

Referring to the earlier judgment of this Court in C.M.A. No. 311 of 1943 decided by Krishnaswami Ayyangar and Somayya, JJ., their Lordships observe :—

"The learned judges deal with the definition in a way which, with very great respect, we find difficult to reconcile with the decision of the Privy Council just quoted, *Chellapalli Case*[1] on appeal in *Yerlagadda Mallikarjuna Prasada Nayudu* v. *Somayya*[2]. We are not concerned with the correctness of the unreported decision on the particular facts before the learned judges ; but with some of the observations contained in that judgment we must express our respectful disagreement."

It is rather unfortunate that the learned Judges did not point to any passage or any of the reasons contained in the judgment they were criticising but considered it sufficient to express a general feeling of dissatisfaction and disapproval. They, however, laid down the tests for ascertaining whether a land was private land or ryoti in an estate in these terms :—

"It seems to us that the sub-clause (*b*) (i) of the definition is intended to cover those lands which come obviously within what would ordinarily be recognised as the domain or home-farm ; that is to say, lands appurtenant to the landholder's residence and kept for his enjoyment and use. The home-farm is land which the landlord farms himself as distinct from land which he lets out to tenants to be farmed. . . . . The definition read as a whole indicates clearly that the ordinary test for private' land is the test of retention by the landholder for his personal use and cultivation by him under his personal supervision. No doubt such lands may be let on short leases for the convenience of the landholder without losing their distinctive character ; but it does seem to us to be inconsistent with the scheme of the Madras Estates Land Act as amended to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the warams in the lands and has been letting them out on short term leases. There must in our opinion be something in the evidence either by way of proof of direct cultivation or by some clear indication of an intent to regard those lands as retained for the personal use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights".

I have already stated that there is no warrant for confining "private land" to land adjoining or appurtenant to the residence of the landholder or to land that is kept for the personal enjoyment and use of himself and his establishment. The learned Judges themselves seem to concede that proof of direct cultivation is only one method of establishing the character of a land as private and that it can be established by some clear indication of an intent to regard the land as retained for the personal use of the landholder and his establishment. Why may not this indication be gathered from the terms of the leases themselves under which the lands have been let to tenants? The learned Judges did not give any indication of how "the clear indication" insisted upon by them is to be furnished or gathered. The short term leases granted by the Receivers as well as by the Government were as their Lordships themselves point out, on the footing that the lessors were owners of both the warams and wholly inconsistent with the recognition of any right of occupancy in any of the tenants who were holding under such leases. Except for one year during which the village was cultivated in *amani*, there was no evidence of direct cultivation by the landholder in that case. In spite of different tests differently worded and indicated in the different portions of the judgment, perhaps the only basis on which the conclusion of the learned judges rest is that proof of direct cultivation for a substantial period of time is absolutely essential to prove the character of lands as private lands in cases coming within section 3 (10) (*b*) (i) of the Act. If so, I am not prepared to go so far as the learned Judges have gone in that case.

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).

The decision of the Full Bench in *Bandaru Jogi* v. *Seetharamamurthi*[1], merely decided that in view of the amendment of section 3 (10) (*a*) and section 185 of the Act in 1934, the only mode of converting ryoti land into private land sanctioned by the Act is by direct cultivation of the land by the landholder with his own servants or by hired labour and with his own or hired stock for a continuous period of twelve years before 1st July, 1908, the date when the Act came into force. Some of the reported decisions which have already been referred to in this judgment were also noticed by the Full Bench but the case was one of conversion of ryoti land into private land. The Court had not to deal with the situation which has now arisen and to ascertain for the first time whether a particular land was private or ryoti. In *Pentakota Narayadu* v. *Venkataramanamurthi*[2], I held that the lands there in question were private lands relying on the course of dealing between the zamindar and the tenants as evidenced by leases from 1877 to 1939. I also pointed out that the test of direct cultivation was a useful test but direct cultivation was not an indispensable part of the evidence requisite for establishing that a land, whose character as private or ryoti is under investigation, falls within the former category. In *Sriranganilayam Ramakrishna Rao* v. *Mallareddi Seshayya*[3], it was held by the learned Chief Justice and Rajagopalan, J., that the lands in question in that case were private lands, relying on the evidence of direct cultivation by the landholder of different portions of the land at different times with his own stock. Passages from the judgment of Wadsworth, O.C.J., in *Jagadeesam's case*[4] were quoted *in extenso* and with evident approval and the tests formulated in the judgment were applied. As there was ample evidence of direct cultivation by the landholder in that case, the further question whether its absence was fatal to the claim of the landholder had not to be considered.

The last of the cases to be noticed is a decision of Subba Rao and Chandra Reddy, JJ., in *Parish Priest of Karayar Parish* v. *Kattalai of Sri Thiagarajaswami Devasthanam*, A.S. Nos. 176 to 178 and 493 of 1946 which related to lands in inam villages which had been granted to the Sri Thiagarajaswami Devasthanam. The learned Judges held that lands of the extent of about 1,000 acres involved in those appeals were not private lands of the temple but were ryoti lands in which a lessee of the lands from the Executive Officer of the temple had acquired permanent rights of occupancy as a result of the amending Act XVIII of 1936. The Court outlined the origin of private lands as lands directly cultivated by tribal chieftains through their farm servants or hired labour and waste lands gradually brought under cultivation by them with their own servants or hired labour. It was pointed out that

"even if a land is known as *kambattam* or *pannai*, unless it satisfied the characteristics of a domain or home-farm land, it cannot be private land within the meaning of the Act."

The description of "domain" land in the encyclopædia Brittanica and the definitions of "*kambattam*", "*sir*", "*kas*" and "*pannai*" in Wilson's Glossary were referred to. The learned Judges relied upon the *Chellapalli case*[5] and *Jagadeesam's case*[4] and applied the *Budley* v. *Buktoo*[6] test adopted by Wallis, C.J., as a correct test for ascertaining whether a land was ryoti or private land. They laid down that in addition to the recitals in lease deeds, there must in every case be evidence that the land in its origin was directly cultivated by the landlord or reserved by him for his own direct cultivation. The grant of short term leases with a provision for re-entry by the lessors on the expiry of the term was not sufficient to indicate an intention to resume direct cultivation. They further held that direct cultivation by the landholder for a few stray years was of no avail as in their opinion such cultivation might have been necessitated by the dearth of persons willing to take the lands on lease. The previous unreported decisions of this Court were not individually referred to or examined but distinguished on the ground that they were all decisions rendered

1. (1947) 2 M.L.J. 263 : I.L.R. (1948) Mad. 223 (F.B.).
2. (1949) 2 M.L.J. 623.
3. A. S. 53 of 1946.
4. (1946) 1 M.L.J. 23 : I.L.R. (1946) Mad. 687.
5. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
6. (1871) 3 N.W.P.H. C.R. 203.

on their own facts. The learned Judges rested their decision against the landholder Devasthanam on various other grounds also which are now not germane.

I may now summarise my conclusions on the legal aspects of the case. Where land proved or admitted to be once ryoti land is claimed to have been converted into private land, the claim is untenable unless the landholder proves direct cultivation for a period of twelve years before 1st July, 1908. No other mode of conversion is permissible. Where you have to find out whether a land is private or ryoti its original character not being known, proof of direct cultivation of the land by the landholder for twelve years before 1st July, 1908, would, without other evidence, conclusively establish its character as private land, but this is not the only mode of proof permitted to landholder. Other evidence may be adduced and looked into and might consist, among other matters of direct cultivation of the land at some period anterior to the twelve years preceding 1st July, 1908, but this is not indispensable. Direct cultivation may be valuable and weighty evidence and may be inferred from accounts and other records usually kept by large landholders. If, owing to lapse of time or other reasons, evidence of direct cultivation is not forthcoming its absence is not fatal to the claim that the land is private. Section 185 of the Act does not shut out, but on the other hand allows all evidence that would be relevant and admissible under the law of evidence, to prove the fact in issue, namely, whether the land is private or ryoti. Local usage or custom and the letting of the land as private land in leases before 1898 are specifically mentioned in section 185 (1) and (2) as being relevant evidence but other evidence is also expressly made admissible under section 185 (3). The classification of lands as private lands at the time of the permanent settlement or in the early records of zamindaries, the terms of the grant of an under-tenure, the assertion and enjoyment by the landholder of the right to both the warams, the intention to retain with himself the kudiwaram right and the consequent right to resume direct cultivation if he chooses, leases of the lands as private lands or with terms and conditions inconsistent with any right of occupancy in the lessees, admissions by tenants that the landholder is the owner of both warams and that they have no occupancy rights, changes in the personnel of the tenants, variations in the rates of rent payable by the tenants—these and kindred matters would be relevant and admissible in evidence to prove that the lands are private lands. The probative value of such evidence depends on the facts and circumstances of each case. The burden of proof that a particular land in an estate is private land rests on the landholder, the statutory presumption being the other way. This burden is not discharged merely by proving that both the warams were granted to or enjoyed by the landholder once upon a time. There must be evidence of the treatment of the lands as private lands by the landholder, either by direct cultivation or otherwise in the manner abovestated.

There is one feature of these cases which requires special mention. The leases granted from time to time to the tenants are styled "*Swami bhogam* leases" and there is a stipulation in all of them for payment by the tenant of *swami bhogam* to the landlords in addition to the melwaram proper. If the tenants had a right of occupancy in the lands they could have objected to the imposition of this liability for *swami bhogam* in addition to the rent; but they never raised any such objection. It has been pointed out in several decisions that the payment of *swami bhogam* by the tenants is a clear admission that the landlord is the owner of both the melwaram and the kudiwaram right in the land, *i.e.*, that he was absolute proprietor of the soil. *Naina Pillai Maracair* v. *Ramanathan Chettiar*[1], *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar*[2], *Subramania Karayalan* v. *Sivasubramaniam Pillai*[3], *Subramanya Chettiar* v. *Subramanya Mudaliar*[4]. At page 285 of the Rampad District Manual it is stated as follows:

"*Pannai* lands are those in which the zamindar or inamdar owns both the landlord's right and tenant's right. He can lease out the lands to anyone he likes for cultivation and obtain from him

1. (1916) 33 M.L.J. 84, 98.
2. (1917) 34 M.L.J. 234, 245.
3. (1921) 41 M.L.J. 175.
4. (1929) 57 M.L.J. 1 : L.R. 56 I.A. 248 ; I.L.R. 52 Mad. 549 (P.C.).

"*swami bhogam*" or "*thunduvaram*", a rent obtained in acknowledgment of the landlord's tenancy right in the soil in addition to the melwaram or landlord's share".

Swami bhogam is supposed to be taken out of the kudiwaram or cultivator's share of the produce and paid in addition to the melwaram or landlord's share. It consists of a one-tenth or a greater share of the kudiwaram produce which the tenant pays to the landlord along with the melwaram. *Thunduvaram* resembles very closely the *swami bhogam* and it is also a portion of the kudiwaram paid by the tenant to his immediate landlord in addition to the melwaram. The *swami bhogam* is a fixed amount while the *thunduvaram* may vary in proportion to the amount of crop actually harvested. The description of the leases in the present case as *swami bhogam* leases, as well as the provision in these leases for the payment of *swami bhogam* in addition to the melwaram by the tenants to the trustees of the temple would indicate an intention on the part of the landholder not to part with the kudiwaram interest but to retain the lands as resumable by him for direct cultivation in the future. Mr. A. Sundaram Iyer relied on the decision in *Sivanupandia Thevar* v. *Zamindar of Urkad*[1] where it was held that "*swami bhogam*" was part of the rent lawfully payable by a ryot to the landholder. There the lands were admitted to be ryoti and the tenants were ryots. The only question was whether the *swami bhogam*, paid all along to the landholder, was an illegal levy or part of the rent lawfully payable and it was held to be a part of the rent. The origin of the payment in that case was not known and it had been paid for a long time as a component part of the rent.

The evidence adduced in these cases to support the claim of the plaintiffs that the lands are private is somewhat meagre and of a poor quality. At the same time it cannot be said that irrelevant evidence has been admitted or that there is no evidence in support of the findings of the Courts below. Nor have the Courts below misdirected themselves on any point of law. I agree with my learned brother Satyanarayana Rao, J., as regards the result of these second appeals and Civil Revision Petitions.

Raghava Rao, J.—These second Appeals and Civil Revision Petitions raise two questions of some difficulty (1) whether the village in question is an estate within the Madras Estates Land Act, and (2) whether the land in the possession of the defendant is private land of the plaintiff's landholders. Both the Courts below have answered both these questions in the affirmative. The defendants are the appellants and the petitioners in these cases.

At the conclusion of the arguments I found myself by no means certain in regard to the answer to be given to the second question, although in regard to the answer to be given to the first I more or less made up my mind in favour of the appellants. I have had the advantage since of perusing the judgments of my learned brethren in order to arrive at a decision in their light as well as in the light of the arguments.

On the first of the questions I agree with my learned brethren that the suit village must be held to be an estate with reference to section 3 (2) (*e*) and not section 3 (2) (*d*) of the Madras Estates Land Act. The view of the learned Subordinate Judge on appeal in concurrence with the conclusion of the learned District Munsiff at the trial holding the village to be an estate with reference to the latter provision of the statute is beset with too much of error to commend itself to my acceptance. The grant which is not *badshahi* or royal is not of 1720 A.D. as supposed by the learned Subordinate Judge but of 1798 A.D. The year 1720 referred to in Exhibit P-26 does not relate to the era beginning with the death of Christ but to Salivahana saka as found out by us on our investigation at the hearing. Even on the assumption that the Dindigul referred to in section 2 of Madras Regulation XXXI of 1802 included the area in which the suit village is situate, the grant does not satisfy the description of a grant made before the 18th day of March, 1792, for it to attract the validating declaration contained in that section. Nor does Exhibit P-26 relate to a register maintained under section 15 of the Regulation. It may be that the character of the grant as that of a village was not disputed in

1. (1917) 34 M.L.J. 139: I.L.R. 41 Mad. 109.

the Courts below and is not necessarily belied by the contents of Exhibit P-26. But the question still remains whether, not having been dealt with by the Inam Commission, the grant can be said to be a village recognised by the British Government as contemplated by section 3 (2) (*d*). The declaration in section 2 of the Regulation not being applicable to the case and the entry in Exhibit P-26 not being one made in a register maintained under the regulation, the only other features remaining for consideration out of those relied on by the lower appellate Court for bringing the suit village within section 3 (2) (*d*) of the Act are, firstly the direction contained in the Inam Rules framed in 1859 or so for the guidance of the officers concerned with the Inam Settlement, that all inams held uninterruptedly for a period of 50 years should be treated as possessed under a valid title whatever may have been the origin and secondly, the collection of road cess by the Government from the inamdars. As regards the first, the fact remains that the rules never came into effect with reference to suit village which has been left severely alone and not at all touched by the Inam Settlement of the sixties of the last century or in any latter settlement. I am not satisfied that *Kumara Thirumalai Naick* v. *Bangaru Thirumalai Sauri Naick*[1], which related to the construction of section 4 of the Pensions Act, XXIII of 1871 is of any assistance to the determination of the present point as supposed by the learned Subordinate Judge. The argument in that case was that by confirming the grant of a village by a Sivaganga Zamindar to a Madura Naick at the time of the Inam Settlement the Government must be deemed to have themselves made a re-grant, and that a Collector's certificate was therefore required for the suit there in question to be maintainable. The argument was repelled for the reason that assuming that the act of the Government confirming the inam amounted to a re-grant of it, it could not be said that the giving of land free of the revenue is a grant of land revenue so as to bring the case within the provisions of the Pensions Act. The basis of the argument there, namely a confirmation of the grant by the Government at the Inam Settlement—does not exist here, and, in my opinion, the mere general direction in the Inam Rules above referred to not carried out admittedly at any Inam Settlement in relation to the suit village cannot be regarded as a recognition of the suit village by the Government as an inam for the purpose of section 3 (2) (*d*) of the Madras Estates Land Act. Nor am I satisfied that the mere collection of road cess by the Government in respect of the suit inam village is such a recognition—a recognition, I mean, of the validity of the original grant which has so far remained untouched by the Government. If as opined by the late Mr. Ramadoss in his commentary on the Act at pages 53 and 54 the word "recognised" might apply to the case of those inam grants which did not form the subject of the Inam Commissioner's inquiry but which have not been disputed, cancelled or resumed by the British Government, *i.e.*, those which have been continued by an implied consent without express confirmation, there would perhaps be some point in the reliance placed by the learned Subordinate Judge on the two features above mentioned. The question however has been raised in a case decided subsequent to the publication of that commentary in *Sam.* v. *Ramalinga*[2], whether the word "recognised" required something more than acquiescence by the British Government. The inclination of opinion expressed by one of the Judges in that case (Srinivasa Ayyangar, J., later Sir K. Srinivasa Ayyangar) is that recognition implies something more than acquiescence, something done by the Government, as for instance by acceptance of service, jodi, etc. From that inclination of opinion of that distinguished Judge I am not prepared to dissent, supported as it is by the analogy of the decision in *Secretary of State* v. *Bhanumaruthi*[3], which was no doubt a case under the Madras Proprietary Estates Village Service Act, II of 1894, but which in construing similar words "lands granted or continued by the State" occurring in section 17 of that Act held that continuance in the context of the section implied a recognition by the Government of the *right* of the inamdar which could have been set up by him in support of his possession, and that mere sufferance by the Government or forbearance from taking steps which

1. (1898) I.L.R. 21 Mad. 310.
2. (1916) 30 M.L.J. 600 : I.L.R. 40 Mad. 664.
3. 24 M.L.J. 538.

it might have been open to the Government to take or collateral expressions of opinion not intended to be recognition or confirmation of the *right* of the holder would not amount to continuance.

Section 3 (2) (*d*) of the Madras Estates Land Act being inapplicable for the reasons indicated, the question is whether section 3 (2) (*e*) catches the village concerned in this case. I am distinctly of opinion that it does. Exhibits P-23 and P-24 make it reasonably clear that the village was the subject-matter of a pre-settlement inam included later in the assets of the zamindari at the time of the Permanent Settlement as an *ayan* village in respect of which there was a subsequent reduction of the rent payable to the zamindar by the inamdar by way of *Dharmasanam* grant. That being so, the village is in the nature of an undertenure falling under clause (*e*) of section 3 (2).

I may state before passing on to the second question arising for determination that I have had to say so much as I have said on the question whether or not the suit village falls within clause (*d*) of section 3 (2) because in answer to an intimation of opinion from the Bench during argument that clause (*e*) and not clause (*d*) of section 3 (2) would govern the present case—a position which the learned advocates for the respondents accepted without any objection—the learned advocate for the appellants—petitioners stated that he was not prepared to abandon his contention as to the applicability of clause (*d*) whatever our opinion about the applicability or inapplicability of clause (*e*).

On the second question I felt a good deal of doubt as to the true view to take during the progress of the argument which did not by any means stand resolved at its conclusion. The uncertainty in which I was left was because of two conflicting considerations. On the one hand there was the natural feeling of the strong reluctance to overrule a whole catena of decisions beginning with *Zamindar of Chellapalli* v. *Somaya*[1], a decision of Wallis, C. J., and Seshagiri Ayyar, J., of 1914 and ending with two latest judgments of this year not yet reported of two different Benches—that of Rajamannar, C.J., and Rajagopalan, J., in *Ramakrishna Rao* v. *Malla Reddi Seshayya*[2], and that of Subba Rao and Chandra Reddi, JJ., in *Parish Priest* v. *Kattalai of Sri Thiagarajaswami Devasthanam*,[3] all *prima facie* speaking in one voice favourable to the contention of the learned advocate for the appellants and petitioners before us except a solitary decision in *Sri Thiagarajaswami Devasthanam* v. *Muthuswami Odayar*[4], striking a discordant note. Further in between 1914 and 1949 there is the decision of the Judicial Committee of the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[5], which affirmed in appeal the decision of the High Court in *Zamindar of Chellapalli* v. *Somaya*[1]. Further still there are two decisions of Division Benches in *Sreemanthu Raja Yerlagadda Mallikarjuna Prasad Naidu* v. *Subbiah*[6], and *Jagadeesam* v. *Kuppammal*[7], and one decision of a Full Bench in *Bandar Jogi* v. *Rajah Chintalapalli Seetharamamurthi*[8], in which the test of direct cultivation for ascertaining the character of private land propounded in *Zamindar of Chellapalli* v. *Somaya*[1], which has been insisted upon for the appellants and petitioners before us has been accepted. On the other hand, there seemed to go against the appellants and petitioners a ruling of the Privy Council in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*[9], which, if indistinguishable, must needs mean an end of these appeals and revisions.

Before I deal with *Bindeshwari Prasad Singh* v. *Maharajah Kesho Prasad Singh*[9] I shall deal with the decisions of this Court bearing on the point falling to be decided in order to ascertain *their* result, and before I deal with them, I wish to draw

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1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. A. S. No. 53 of 1946.
3. A. S. No. 176 to 178 and 493 of 1946.
4. C. M. A. No. 311 of 1948.
5. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).
6. (1919) 39 M.L.J. 277.
7. (1946) 1 M.L.J. 23 : I.L.R. (1946) Mad. 687.
8. (1947) 2 M.L.J. 263 : I.L.R. (1948) Mad. 223 (F.B.).
9. (1926) 51 M.L.J. 587 : L.R. 53 I.A. 164 : I.L.R. 5 Pat, 634 (P.C.).

attention to a few fundamental considerations required to be borne in mind, in my judgment, for a correct construction of the statute with which we are concerned in the light of which I propose to ascertain the true interpretation of the relevant provisions of the statute, as I conceive it.

The Madras Estates Land Act as passed in 1908 is a declaring and amending Act as the preamble shows, and it has since undergone vital changes in the years 1934 and 1936 in several particulars, more especially in regard to the definitions of 'estate' and 'private land.' The original Act and the changes from time to time have as everybody knows, been dictated by Governmental policies calculated to extend the sphere of 'estates' and further the rights of 'ryots,' to limit the extent and define the character of 'private land' and to discourage the growth, and expansion of 'private land' by the unjust efforts of landholders. It is impermissible, in my opinion, for any Court in construing any statute and much more so in construing a statute of this description passed to amend as well as declare the law relating to the holding of land in estates in the Presidency of Madras, to press into service historical knowledge or to resort to the antecedent state of the law, except for resolving doubts arising on the language of the enactment or for supplementing it in matters not covered or dealt with by it. The Court is not concerned with giving either more or less effect to the policies and purposes of the Legislature than is warranted by the letter of the statute except where the golden rule of literal construction as Lord Wensleydale described it in an early English case in the House of Lords, *Gray* v. *Pearson*[1], entails anomalies bordering on manifest absurdities and futilities leading to palpable injustice and infringing all reason whatsoever. 'Private land' may have meant anything according to Baden Powell or other text-book writers or Judges prior to the passing of the Estates Land Act. What 'private land' means as defined in the statute is, however, a matter to be ascertained in accordance with the precise language of the statute as interpreted by decisions rendered subsequent to the enactment of the statute without prepossessions or prejudices derived from or founded upon a knowledge of the prior state of the law. The statute must of course be read as a whole, and section 3 (10) and section 185, may have to be taken together so as to harmonise with each other—a matter to which I shall address myself in detail in the sequel. But the well-settled principle is that the language of a statute must not be strained and the scope of any definition therein extended so as to make it apply to a case to which it does not legitimately on its terms apply by invoking consideration of the supposed intention of the Legislature or by seeking to assimilate the law under the Statute somehow to the law in force prior to the enactment, even if the latter be found to be different in any respect from the former.

Then, again, the construction of a statute couched in English language can only be according to the meanings of the English words used in it, as those meanings can be ascertained from English Lexicons, Law Lexicons preferably and particularly. The employment of English as the vehicle of our statutory enactments had been the inevitable feature of our legislative life so far, and until the day comes when it ceases to be that, it is no good complaining of that feature however unfortunate it may be. It may or may not have been the fault of the Legislature to use words belonging to a foreign system of jurisprudence as the best possible approximates or the nearest possible equivalents available in the language of the English Law for giving effect to concepts connected with our own indigenous system of land tenures. While of course differences in fundamentals between the two systems ought not to be overlooked, affinities where they exist, ought not to be ignored either. Bearing in mind the affinities as well as the differences, if decisions of this Court have construed the English words of the statute in their English sense so as, it may be, to produce results disharmonious to the antecedent state of the law, such disharmony is, in my opinion, no ground for expanding the scope of the statute so as to accord with such a state of the law. No "judicial embroidery"—to use

1. 6 H.L. 61 at 106.

the figurative phrase used by my learned brother, Viswanatha Sastri, J., which by the way as I shall show hereafter is with due respect by no means a correct phrase in which to characterise the decisions relied on by the learned advocate for the appellants and petitioners before us—which has been imported by Judges into the interpretation of the Act need or ought to lure us or confuse us. But no Judge need or ought to re-shape the substance at the root, rewrite the language of the enactment itself so as to perpetuate the state of the law prior to the enactment, merely because his notions as derived from that state of the law may stand violated by the English words employed by the Legislature understood in their English sense. If there is vice or mischief at the basis of a legislative enactment it is not the province of the Court to remedy it of its own initiative by what is sometimes described as judicial legislation. It is for the Legislature itself if it so chooses to intervene to that end and for that purpose.

I may observe further that the rule of *stare decisis* which is an integral part of every system of administration of justice governed by precedents is a rule not to be lightly regarded or readily departed from. I, for one, see nothing wrong in the adoption by Judges in later cases of a *locus classicus* in an earlier decision which has expounded the definition in a statute in a correct and exhaustive manner or in their construction of the words used in such an exposition as if they were themselves the words used in the statute. As will be shown hereafter, the topic with which we are concerned has not been as supposed by my learned brother, Viswanatha Sastri, J., *darkened* by any false analogies drawn with feudal tenures or manorial customs but only sought to be dimmed by an attempt made in just a case or two to get away from the authority of a fully considered and binding exposition of the law by distinguished Judges such as is contained in *Zamindar of Chellapalli* v. *Somaya*[1], which, affirmed, as it has been, by the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[2], and adopted as it has been in later cases by the learned Judges of this Court, has stood the field and governed the notions of litigants, lawyers and Judges in this Province for three decades and a half.

I have considered it not only proper but necessary to make the foregoing remarks founded on principles of Statute construction so elementary as even to seem platitudinous in justification of my dissent from the view of my learned brethren on this part of the case. Of course, if the authority of a superior tribunal such as is alleged to exist in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*[3], of the year 1926 overruled expressly or impliedly the view taken in earlier decisions here which all the same has been followed by learned Judges in later cases the matter would stand on a different footing. Likewise, should I be satisfied that the statement of law to be found in *Zamindar of Chellapalli* v. *Somaya*[1], which has been accepted in later cases is not the *ratio decidendi* but only an *obiter dictum* I might not hesitate to disturb the course of decisions if I found the dictum to be obviously erroneous, although, even then, there would be the difficulty in my way that the *obiter dictum* accepted and approved as it has been by the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[2], in an appeal from the same case must of course be followed by me. Even viewing my powers as a member of a Bench of three Judges not necessarily bound by any decision of Divisional Benches one way or the other, I should think that I have still to prescribe for my guidance the considerations expressed in the following passage in section 557 pages 257 and 258 of Lord Hailsham's Halsbury's Laws of England, Volume 19:

"Apart from any question as to the Courts being of co-ordinate jurisdiction, a decision which has been followed for a long period of time, and has been acted upon by persons in the formation of contracts or in the disposition of property, or in the general conduct of affairs, or in legal procedure or in other ways, will generally be followed by Courts of higher authority than the Court establishing the rule, even though the Court before whom the matter arises afterwards might not have given the same decision had the question come before it orginally. But the supreme appellate Court will not

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).
3. (1926) 51 M.L.J. 587 : L.R. 53 I.A. 164 : I.L.R. 5 Pat. 634 (P.C.).

shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of a mistake; and where the course of practice is founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes, at any rate, that tribunal from correcting the error, although the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless the House of Lords can say positively that it is wrong and productive of inconvenience. Furthermore, the same considerations do not apply where the decision, though followed, has been frequently questioned, and doubted. In such case it may be overruled by any Court of Superior jurisdiction ".

After all, this Court is not the Supreme Appellate Court of the land, although this Bench is of superior authority to that of Divisional Benches. The law laid down in *Zamindar of Chellapalli* v. *Somaya*[1] has been accepted and acted upon for a long time. Neither the Privy Council (leaving alone for the moment *Bindheshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*[2]), nor the Federal Court has so far said that it is wrong and productive of inconvenience. It is not as if the law so laid down has been frequently questioned and doubted. It has been questioned and doubted in just a case or two, as I have already observed, there too not on any valid ground, as I shall show hereafter.

Next, before concentrating attention on the view taken in the decisions of this Court I should like to define the exact contentions of counsel before us and to notice the relevant provisions of the statute.

The contention of the appellants and petitioners as I understood it is not that there should be direct evidence of direct cultivation by the landholder of the property claimed by him to be his private land at some time or other and for an appreciable or substantial period of time. The contention broadly stated is that there must be some proof—direct and positive or indirect and circumstantial it does not matter—of direct cultivation by the landholder at some time or other and for some time or other. It may be proof furnished by any evidence admissible under the Indian Evidence Act consistently with the provisions of the Madras Estates Land Act. But it must be evidence tending to show, except where a local custom to the contrary is proved, that at some time or other and for some time or other the land was actually under the direct cultivation of the landholder, that is, by himself, his own farm servants or hired labour. If after that, there happens to be any leasing out, as there may well be, the leases must be of such a kind and character as to be consistent with an intention on the landholder's part to resume direct cultivation in the future. Such direct cultivation except in cases of local custom to the contrary is a fact to be proved as a requirement implicit in the definition of private land before the presumption that all cultivable land in an estate is ryoti can stand rebutted. Where admittedly ryoti land or cultivable land in an estate not proved to have been of the character of ryoti land or of private land at the inception has been proved to have been the subject of direct cultivation by the landholder for a continuous period of 12 years it automatically gets impressed with the stamp of private land by force of an express statutory provision. Into the case of ascertainment of the character of land as private land for the first time as well as into the case of ascertainment of the conversion of admittedly ryoti land or land, the exact character of which is not known, into private land, the idea of direct cultivation as a *sine qua non* does in the learned counsel's submission enter; only, in the latter case the period of direct cultivation must be full 12 years before the 1st day of July, 1908. The contention for the respondents, on the other hand, is that direct cultivation is the exclusive test only in cases of conversion of admittedly ryoti land into private or in cases where land whose exact character as ryoti or private is not known earlier but which is proved to have been the subject of such cultivation for a period of 12 years immediately before the commencement of the Act is claimed by the landholder to be his private land. It is also urged that reading section 3 (10) (*a*) with section 185 (with the second proviso of the latter section excluded), it becomes clear that there may we l

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.

2. (1926) 51 M.L.J. 587 : L.R. 53 I.A. 164 : I.L.R. 5 Pat. 634 (P.C.).

be other modes of proof of the character of land as private land than proof of its direct cultivation at some time or other and for some time or other.

The relevant provisions of the Madras Estates Land Act are those of section 3 (10) (*a*) (excluding the inclusive part) and section 185 (with the second proviso excluded)—one a definition section, the other an evidential section. There are other provisions proving the lettability of private land and providing for exchange of pattas and muchalikas in connection therewith which are not, in my opinion, material, as it is not the contention for the appellants and petitioners that there can be no letting at all of private land which is such by reason of proved prior direct cultivation. The definition section so far as it is plain cannot be controlled in its operation by the evidential section which must accordingly be read except where it contains matter repugnant, in conformity to the definition section. Only when the definition section is ambiguous can such light as may be thrown upon its meaning by the evidential section be carved in aid of the interpretation of the definition section.

The relevant part of section 3 (10) (*a*) uses two words " domain " and " home-farm " as signifying two categories of private land within the intendment of the statute. The meaning of each one of these two words it is necessary to ascertain in order to arrive at a proper decision in the present case. Neither " domain " nor " home-farm " is defined in the statute ; but in regard to " home-farm " in particular, beyond what is implicit in the word itself the Legislature gives a further clue to its meaning by use of illustrative terms in the explanatory phrase " by whatever designation known, such as *kambhattam*, *khas*, *sir* or *pannai*." These illustrative terms are popular labels the use of which *prima facie* connotes the character of the land as " home-farm." The Legislature intends them only as interpretative aids by no means either exhaustive or conclusive with reference to the application of the statutory test of " home-farm " the interpretation of which is the primary matter for consideration.

To take up the meaning of the word " domain " it has been defined in *Zamindar of Chellapalli* v. *Somaya*[1], as " the land about the mansion house of the Lord and in his immediate occupancy." To that interpretation of the word no exception has been so far taken except in a recent decision of my learned brother, Viswanatha Sastri, J., reported since the hearing of this case in *Pentakota Narayudu* v. *Venkata Ramanamurthi*[2], and in his judgment in this case just delivered. The passage in the former judgment which embodies the exception taken is as follows :

" There has been, in my judgment, some amount of misconception as regards the meaning of the words "domain " or " home-farm " land of the landholder— expressions found in section 3 (10) (*a*) of the Act. To interpret these words as confined to 'land immediately surrounding the mansion or the dwelling-house, the park or chase of the Lord ' which would be the dictionary meaning of these English words is to import feudal ideas of medieval English into the system of land tenures in this country without adequate justification. . . . . . It is a far-fetched construction to impute to the Madras Legislature an intention to incorporate the English conception of ' demesne ' land as a test for differentiating the public domain from private land in a zamindari ".

In the judgment of my learned brother just delivered there are two passages pertaining to this point, one is where the conclusion expressed in the passage just quoted is repeated which I need not reproduce. The other is where my learned brother refers to the three classes of demesne lands existing in England in support of his view that the mansion house test as he compendiously describes it, bears no relation to the actual conditions, prevailing in this presidency.

"It is a matter of common knowledge ",

says my learned brother

" that Zamindars, Poligars, Jagirdars and major inamdars owned considerable extents of private land in several villages far removed from their dwellings ".

The three classes of demesne in England are then described by my learned brother as follows :

" (*a*) lands occupied by the Lord of the manor himself ; (*b*) lands which the Lord allowed his villains to occupy and cultivate upon such terms corresponding to the copyhold lands of later times ;

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1949) 2 M.L.J. 623.

and (c) lands allowed to lie waste or commons in which free tenants and copyholders had important rights along with the Lord of the manor ".

Of the three classes of demesne property in England the first, in my opinion, does correspondingly exist in this country as well. In most cases of landholders it is common knowledge that they not only have land immediately surrounding their dwelling houses but also have it in their immediate occupancy. There is no fundamental difference in this respect between conditions in England and in India, and I cannot see how if a meaning had to be given to the English word " domain " occurring in an Indian Statute any other meaning could reasonably be given to it than the one given from Webster's Lexicon by Wallis, C.J., in *Zamindar of Chellapalli* v. *Somaya*[1], namely "the land about the mansion house of a Lord and in his immediate occupancy." in which Seshagiri Ayyar, J., concurred after his own independent reference to the Encyclopaedia Britannica which brought into his judgment more matter, not strictly relevant, about the English feudal tenure of land let out by the Lord of the manor as tenemental land to his retainers or villani—the original of the modern copyhold tenure in Egland and which has apparently provoked the comment of my learned brother on the undesirability of importing conceptions connected with the feudal tenures of medieval England into the interpretation of a statute like the Madras Estates Land Act. The comment understood in that limited sense may well stand justified ; but in the absence of any alternative interpretation of the word " domain " which certainly has not been vouchsafed by my learned brother and in view of the existence in India of lands about the dwelling house of the landholder in his immediate occupancy corresponding to such land in existence as demesne in England the meaning of the word as given by Wallis, C.J., in *Zamindar of Chellapalli* v. *Somaya*[1], must, in my opinion, be accepted. In fact, it will be seen from the passage in *Pentakota Narayudu* v. *Venkata Ramanamurthi*[2], quoted above that the exception taken by my learned brother is not to the meaning of the word " domain " as such so much as to the meaning of the two expressions " domain " and " home-farm " which, as he supposes, have been, taken together and interpreted, rather misinterpreted, as confined to land immediately surrounding the mansion or dwelling house, park or chase of a Lord. I regret I cannot and do not share this view. In fact in *Zamindar of Chellapalli* v. *Somaya*[1], while the meaning of the word "domain" is specially noticed it is not that the word " home-farm " has been ignored by the learned Judges. It will be seen from the discussion in that case that the word " home-farm " has not been confused with " domain " but interpreted and given effect to with reference to the land in question in that case. The question in that case in fact arose with reference to other than domain land, *i.e.*, land situated far away from the dwelling house of the zamindar and actually in a village of the zamindari known as *Iyanki* different to the village Chellapalli in which the dwelling house of the zamindar was situated. In that case as well as in other cases in which the question of the character of the land as private or ryoti arose with reference to the lands situated far away from the dwelling house or in any other village or villages than the village in which the dwelling house was situate, the work of the Court in the matter of the determination of the character of the land would have stood absolutely simplified, had the mansion house test been applied. In that case it was not the word " domain " but the word " home-farm " that fell to be applied to the land in question, and the test of direct cultivation propounded was really because of what was implicit in the word " home-farm ". It is not correct, in my opinion, to say that the Judges who decided that case treated the words " domain " and " home-farm " together as importing that the zamindar's private land must be confined to land surrounding his place or residence as in the case of demesne land of an English Lord of the manor. I not only feel highly reluctant, I find it in fact wholly impossible to impute to Judges so distinguished and so experienced as those who decided that case any ignorance of the very well-known fact that private land in an estate might not only

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 2. (1949) 2 M.L.J. 623.

be situate far away from the dwelling house of the zamindari in the same village but might also well lie scattered in different villages throughout the estate, especially when the case before the learned Judges was itself concerned with the latter type of land. I am surprised to find the remark in *Pentakota Narayadu* v. *Venkata Ramanamurthi*[1], made to this effect:

"So far as I know in no case prior to *Zamindar of Chellapalli* v. *Somaya*[2] was it suggested that the zamindar's private land must be confined to land surrounding his palace or residence as in the case of demesne land of the English Lord of the manor".

But was it so suggested in that case and could it be? I quite agree that the mansion house test which has reference only to the word "domain" is necessarily narrow, for there is the other word "home-farm" in the definition of private land, and land may well be private land if, although not domain land, it is home-farm land.

Before I proceed to consider the meaning of the expression "home-farm" land I have a few more remarks to make on the decision in *Pentakota Narayudu* v. *Venkata Ramanamurthi*[1], which though not strictly pertinent to the particular point which I am just discussing I may as well make even now and here. In the first place I have no quarrel with the actual decision in the case, and I am not by any means sure that I would not have myself arrived at the same conclusion. There was ample evidence furnished in that case by the description contained in several documents including leases both after and before 1898 that the land in question was *rajuseri* (zamindar's seri or cultivable land), *sontaseri* (home-farm) or private *seri* (private cultivable land of the zamindar). There was also oral evidence of actual personal cultivation at some time or other. My learned brother held that the ruling in *Bindheswari Prasad Singh* v. *Maharaja Kesho Prasad Singh*[3], justified the reception in evidence on a question of private land or ryoti land of admissions by tenants in leases subsequent to 1898 whatever their probative value, and virtually, though not in terms, resolved the conflict of judicial opinion on that point in this Court. With this view I perfectly agree. The second remark that I have to make is that in referring to direct or personal cultivation my learned brother observes that it "may be and is often a useful test for determining the character of land in an estate, that is to say whether it is private land or ryoti land, but that leasing by itself is not fatal to the claim, that the land in question is private land". The antithesis in the sentence is between direct cultivation and leasing. The learned counsel for the appellants-petitioners before us has not argued that leasing is *per se* fatal to any claim of private land. Only he has insisted that the leasing must be of a kind and character not inconsistent with an intention to resume direct cultivation. The third remark that I should make is that while rightly rejecting the mansion house test as too narrow my learned brother accepted and applied the test of direct cultivation subject to the qualification that leasing by itself is not fatal to the claim of private land. Referring to the test of direct cultivation what my learned brother further says is that it is not an indispensable condition that the private lands should be proved to have been cultivated by the landholder himself or his hired labour, be it noted, *within recent times*. In other words, the direct cultivation test is accepted as the test of private land qualified however in its application by the consideration adverted to in the judgment. The fourth remark that falls to be made is that the Privy Council ruling in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[4], is referred by my learned brother as approving the observations made by Sir John Wallis in *Zamindar of Chellapalli* v. *Somaya*[2], with reference to the test of direct cultivation as the test for the determination of the character of land as private land. The fifth and last remark called for is that the case before my learned brother was not a case of conversion of admitted ryoti land or land of unknown character into private land, and yet the test of direct cultivation was applied without regard to any differentiation of the kind attempted by the learned counsel for the respondent and

1. (1949) 2 M.L.J. 623 at 626.
2. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
3. (1926) 51 M.L.J. 587 : L.R. 53 I.A. 164 : I.L.R. 5 Pat. 634 (P.C.).
4. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).

accepted by my learned brother in the present case. It may be that my learned brother has had the chance of a better and fuller consideration of the matter in the light of the arguments before us and has been able to go further than he did in *Pentakota Narayudu* v. *Venkata Ramanamurthi*[1]. All that I am concerned to point out at this juncture is that while that portion of his judgment in that case which imputes the mansion house test to the learned Judges who decided *Zamindar of Chellapalli* v. *Somaya*[2], is in my respectful opinion erroneous, the rest of the judgment is by no means adverse to the contention for the appellants and petitioners before us. Why I am concerned to point out this is that there may be and ought to be no mistaking of that judgment as militating against the whole catena of decisions in this Court relied on in support of that contention. The unreported decision of Krishnaswami Ayyangar and Somayya, JJ., in *Sri Thiagarajaswami Devasthanam* v. *Muthuswami Odayar*[3], is of course no doubt there, in conflict with that catena of decisions, and with that, I shall deal later.

Now to turn to the word "home-farm" land I find that the words "home" and "farm" are separately defined and annotated in dictionaries, and what has to be done in order to get at the meaning of the compound is to combine the meaning of the two words after ascertaining them separately in the manner most suited to the context of the definition so as to make of them a compound calculated to harmonise with the common spirit of the several illustrative terms employed by the Legislature in the explanatory phrase attached to "home-farm land of the land-holder" occurring in section 3 (10) (*a*), namely, "by whatever designation known such as *kambattam, khas, sir, or pannai*". These terms are no doubt only illustrative and not exhastive, as the words "such as" preceding them show. Other terms of a like significance it is not difficult to conceive of. We have them in "*Sonta Seri*" and "*Rajau Seri*" in *Pentakota Narayudu* v. *Venkata Ramanamurthi*[1] and in *Nagari Iduva* in *Venkatagiri Zamindar* v. *Raghavan*[4] and in *Samasthanam Kanigai* which is found mentioned in the leases discussed in *Chinnarigadu* v. *Rangiah*[5], and to which along with *Nagari Iduva* Mr. Vedantachari refers in his commentary on the Act. *Sonta Kamatam is another expression also in vogue to the same effect, a variant of kambatam.* In my opinion, as I have already indicated, "domain" and "home-farm" are two different expressions, and the explanatory phrase qualifies only the latter expression and not the former. Pursuing this process for determining the meaning of the compound "home-farm" I find first that the separate meaning of the word "home" suitable to the context is the kind of meaning obtainable from phrases like "at home" and "home rule", the former of which is explained in the Concise Oxford Dictionary of current English (3rd Edition reprinted in 1944) as meaning "in one's *own* house", and the latter of which is explained in the same Dictionary as meaning "the Government of a country by its *own* citizens". I find next that the separate meaning of the word "farm" suitable to the context to be found in the same Dictionary is "tract of land used under one management for cultivation". Putting together the meanings of the two words "home" and "farm" as so chosen I hold that the home-farm land of the landholder means 'land of the landholder in his own cultivation'. In fact, "home-farm" is also explained in the same Dictionary in the context and under the heading of "farm" itself. "Farm" is first defined in its noun form as meaning "tract of land used under one management for cultivation" (originally of leased land) and then is given the meaning of the word "home-farm" thus—"*reserved* and *worked* by *owner* of an estate containing other farms". I have italicised the words 'reserved', 'worked' and 'owner' from which it seems to me that in the words "home-farm land of the landholder" occurring in section 3 (10) (*a*) of the Madras Estates Land Act is implicit the idea of land reserved and kept in the land-holder's own or direct cultivation—the idea, to borrow words occurring elsewhere in the same clause of the same sub-section of the same section, of cultivation by the

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1. (1949) 2 M.L.J. 623.
2. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
3. C. M. A. No. 311 of 1943.
4. (1885) I.L.R. 9 Mad. 142.
5. A.I.R. 1935 Mad. 789.

landholder himself by his own servants or by hired labour with his own or hired stock.

This conception of " home-farm land " according to the statute thus deducible is further emphasised by the Legislature by its use of the phrase by whatever designation known such as "*kambattam, khas, sir* or *pannai* ". These four illustrative words have about them the common idea, the idea, again, of direct cultivation. They are not, as I have already pointed out, conclusive legal labels which themselves constitute the definition of private land. They are significant, popular, vernacular terms current in the country at the time that the Madras Estates Land Act was passed, which have been specifically mentioned by the Legislature in the explanatory phrase attached to " home-farm land of the landholder " in the definition of " private land " in order to serve as aids to the ascertainment of the meaning of " home-farm ", not itself separately defined by the Statute. From the mode of treatment accorded by my learned brother, Satyanarayana Rao, J., concurred in by my learned brother, Viswanatha Sastri, J., without any discussion of his own, to the question of the relevancy of these words used by the Legislature to the construction of the word " home-farm " and to the question of the exact meanings to be assigned to these words so used I must express my unqualified but deferential dissent. Their utility in the context of such construction has been unduly underestimated by my learned brother, Satyanarayana Rao, J. His Lordship's whole discussion, reveals many a point, of approach as well as of detail, which in spite of my very respectful consideration have unfortunately not commended themselves to me. In the first place, it is said that the Legislature has not made of the four terms and their meanings as given in Wilson's Glossary the essence of the definition of private land. The question is not, in my opinion, precisely that but materially different. The question rather is whether the Legislature has not made of the terms the essence of the explanatory phrase attached by it to " home-farm land ", in the definition of ' private land ' whatever may be the meanings that may be attached to those terms in accordance with Wilson's Glossary or by any other means, which is another matter. Has not the Legislature made of the terms which are manifestly illustrative only and not exhaustive, interpretative aids to the ascertainment of home-farm ? On what basis did it conglomerate these terms except the basis of some common concept running through them all, whatever the concept may be, which is another matter ? For what purpose did it conglomerate except that of illustrating as evident from the words " such as," the designations by which home-farm land may be known in different areas ? Is not what is meant by ' home-farm ' which is not separately defined by the Act to be gathered from the illustrative words of designation employed in the Act ?

Secondly my learned brother observes :

> " It (*i.e.*, the definition of private land) does not say that the land would be private land if it is *kambattam, khas, sir* or *pannai*, or if it is known to be such."

The words in brackets are, I may say, mine that is by the way. True, the home-farm part of the definition of private land does not say that land would be ' home-farm ' land and fall within that category of private land only if it was or went by the names of *kambattam, khas, sir* or *pannai* ; but that part of the definition does say that the land must be ' home-farm ' land, *i.e.*, must indeed and in fact be ' home-farm ' land by whatever designation known such as *kambhattam, khas, sir* or *pannai* in order to fall within that category of private land.

Thirdly, it is observed in the judgment of my learned brother that it is not possible to infer from these four expressions and particularly from the meanings as given by Wilson in 1855 that they would have the same meaning at the present day, or, at any rate, in 1908, when the Madras Estates Land Act was passed. It is hardly necessary for me to point out that the high authority of Wilson's Glossary which has been oft relied upon by the High Courts and the Privy Council is too well-known to be disregarded or discountenanced except where statutes since passed or judicial decisions since rendered contain anything in express terms or

by necessary implication repugnant to the meanings as given in the Glossary so as to render them obsolete altogether or limit their operation. I cannot understand too what significance is implied in the contrast between the present day and the date of the passing of the Madras Estates Land Act in the observations of my learned brother. Surely it has not been so far suggested anywhere that, nor has it been stated by my learned brother why, if the meanings are good to-day, they were not as good in 1908. The real question is whether in the Act there is any clear evidence of any legislative departure in 1908 from the meanings of Wilson which would only be possible if there had been a departure from them in popular parlance between 1855 and 1908. I have not been able to find evidence of any such departure either of the latter kind or of the former. Our attention has been drawn to no authority suggesting such a departure, derived from statutes in *pari materia*, if they may be so called compendiously, in force in other Provinces so far as they may be relevant or from decisions pronounced under those statutes or rendered in this Province prior to 1908. The Bengal Tenancy Act VIII of 1885 contains no definition of the words current in Bengal and Bihar to denote private land which are no doubt referred to in section 120 (1) of that Act. The word "sir" used in our Act is not therefore defined by that Act. That word is also the word current in the United North-West Provinces of Agra and Oudh and Central Provinces and Berar. I have looked into the definitions of that word in Acts in force in those Provinces given in section 4, sub-section (12) of the North-West Provinces Land Revenue Act (III of 1901) and in section 4 (6) of the Central Provinces Land Revenue Act (XVII of 1881) after calling for the United Provinces Code and the Central Provinces Code not available in the library of the High Court, from the library of the Legislatures in the Fort. I have found nothing in those definitions which are partly based on special conditions relating to the previous Revenue Settlements in those Provinces which militates against the ordinary meaning of the word as given in Wilson's Glossary. On the other hand, the idea of cultivation by the proprietor himself with his own stock or by his servants or by hired labour as of the essence of "*sir*" seems to be recognised by those definitions also, although adapted to such special conditions in the way that the Legislatures of the Provinces deemed fit so to adapt. I do not consider it necessary to reproduce those definitions here or to pursue this aspect of the matter any further. The meaning of the word "*sir*" as given in Wilson's Glossary is, it may however be noted, in no way militated against by what is accepted by *Budley* v. *Bukhtoo*[1], which is in fact based on the same idea as is expressed by the meaning given in the Glossary. In our Province before the Madras Estates Land Act of 1908, although there was no statute defining any one of the four words *kambhattam*, *khas*, *sir* and *pannai*, there was just one decision reported in *Nagayasami Kamayya Naik* v. *Yiramasami Kone*[2], defining *pannai* land. The question there was whether a suit before the revenue Courts under section 12 of Madras Regulation VIII of 1865 by a tenant for reinstatement after the Zamindar's ejectment in respect of *pannai* lands was maintainable. The argument for the defendant, the Zamindar, was that it was not, because the *pannai* lands were of their nature not part of the zamindari, and the defendant was not a Zamindar in respect of such lands within the definition of the term "landholders" used in that Act. The Civil Judge negatived the argument holding that *quoad* such lands the Zamindar could not, as contended, be treated as himself a tenant with the cultivator as his sub-tenant. For so holding the Civil Judge referred to the character of *pannai* lands as being lands to which the proprietor had an exclusive right, a right to the melwaram as well as the kudiwaram, adding further what is perhaps more material that those lands are sometimes cultivated under the Zamindar's own ploughs and sometimes they are let out for cultivation by others. The High Court after referring to what the Civil Judge had said upheld his view that the suit before the Collector was maintainable notwithstanding that the lands were *pannai*. I am not able to so read the observations of the Civil Judge accepted by the High Court as to dispense with requirements of proof, if a question of the character of the lands as '*pannai*' arose, of direct cultivation or in case of letting, of the

1. (1871) 3 N.W.P. H.C.R. 203.
2. (1872) 7 M.H.C.R. 53.

character of the letting being in its terms in no way inconsistent with an intention on the landholder's part to resume direct cultivation.

Fourthly, it is remarked by my learned brother that the meanings given in Wilson's Glossary do not have the common feature of personal cultivation. One has only to look at those meanings as conveniently reproduced at pages 75 and 76 of Mr. V. Vedanthachari's Commentary of the Madras Estates Land Act to appreciate aright the correctness or otherwise of the remark. I need only observe to avoid a slight confusion which may otherwise result at first sight of the passage in the Commentary that the annotation of the word "*pannai*" as given in the Commentary corresponds to what is given in the Glossary under the word "*pannai*" as well as the words "*panniah*", "*punna*", "*punnah*", the meaning of which latter words follows closely enough on the meaning of "*panna*" separated only by the meanings of two other connected words "*pannikaran*", "*pannaissumai*" which may also be usefully consulted in this connection, although the meaning given under the words "*panniah*", "*panna*", "*pannah*" taken together is the more relevant. I propose to reproduce here so far as is relevant the Glossary meanings of the four words used in the statute, not of the two other words connected with one of those words "*pannai*", namely, "*pannaikaran*" and "*pannaissumai*".

Kamatam or *kambatam*: The land which a Zamindar, Jagirdar or Inamdar keeps in his *own* hands *cultivating* it by labourers in distinction to that which he lets out in farm.

Khas: As a revenue term it is applied also to lands held by Zamindars and *cultivated by themselves for their own benefit.*

Sir: A name applied to the lands in a village which are *cultivated* by the hereditary proprietors or village zamindars *themselves* as their own especial share either by their *own* labourers or at their *own* cost or by tenants at will not being let in lease or farm.

Pannai: A field, a rice field, cultivated ground, tillage, husbandry.

Panniah, Punna, Punnah: An estate or farm the property of a Rajah and *cultivated by his slaves.*

It will be seen from the words italicised by me of each of the Glossary meanings extracted above, that in all of them the features of direct cultivation of the landholder is manifestly present. I may add in this connection that in the Tamil Lexicon of 1931 published under the authority of the University of Madras which I have consulted, there are several meanings assigned to the word "*pannai*", at page 2453, column 2 of which the seventh and eighth meanings and more particularly the seventh which are material to the present discussion are "direct cultivation" and "establishment of farm labourers" respectively. My learned brother further observes that the words "*khas*" and "*sir*" are not words at all used in this Presidency. I regret I cannot appreciate the significance of the observation. The words are there in the Statute and unless they are to be regarded as surplusage—which is obviously impossible—their meaning must be ascertained and applied. Assuming the observation to be relevant, I very much doubt with respect, whether that is right. So far as the word "*khas*" is concerned, reference may be made in this connection to *Chinnarigadu* v. *Rangayya*[1], a case from the District of Chittoor where in regard to a portion of a village called *khasbagayat* it was held that the expression indicated that the lands in that portion were held by Zamindars and cultivated by themselves for their own benefit. Moreover, I may say from my own personal knowledge that there is in the zamindari of Pithapuram adjoining the Fort an extent of 20 or 30 acres of land known as *kasuthota, i.e.*, garden in the direct cultivation of the Zamindar which is the only private land comprised in that estate. It may not also be correct, in my opinion, to suppose that the word "*sir*" has not been known at any time to be in use in this Presidency. It seemed to me strange that a word not in use in this Presidency, as I too first thought of this word though not of the word "*khas*", was used in a legislative enactment of the Province as a descriptive designation of home-farm land which is part of the definition of private land. After my mind had been somewhat exercised over this thought

1. A.I.R. 1935 Mad. 789.

it occurred to me that it might possibly be an Uriya word in vogue in the Ganjam District which when the Madras Estates Land Act was passed in 1908 was a part of this Presidency, though it has since gone into the separately formed province of Orissa consisting of the original Orissa part of the Province of Bihar and Orissa and the Ganjam District part of the Madras Presidency. Consulting then at the University Library Poornachandra Ordia Bhasha Kosha compiled by G. C. Prahraj, Advocate, High Court, Patna and published by the Utkal Sahitya Press, Cuttack in 1928, I found therein the word "*sir*" in fact explained at the top of column 2 of page 8519 as meaning a permanent home-farm of a proprietor or maphidar or lakharajadar. That is the meaning of the Uriya word "*sir*" while the meaning to be found in Wilson's Glossary is that of the Hindi word "*sir*". The two meanings substantially agree. Only, comparatively the one is compendious while the other is elaborate, and possibly the compiler of the Dictionary took the word "home-farm" from the definition of private land in the Madras Estates Land Act. Then as regards *kambattam* my learned brother himself concedes that it is in Telugu used in a general sense to denote a man's personal cultivation. Born to the language like my learned brother I too cannot understand the word in any other sense. That, in my view, is also the meaning as given in Wilson's Glossary and the meaning of the word as used in the Act. My learned brother has given no reason why the undoubted and undisputed meaning of this word should be excluded from consideration in understanding the word "home-farm" in connection with the explanation of which it occurs in the Act. Nor am I prepared to treat the word "*pannai*" used in the Act as being of no assistance, because it means nothing more than a field, a rice field, cultivated ground, tillage and husbandry according to the meaning given by Wilson. As I have shown above, it does mean according to the Tamil Lexicon something more definite, something clearly in point—namely, direct cultivation, and it has been applied to the property of a Rajah cultivated by slaves as also pointed out by Wilson himself. In these circumstances I cannot but conclude that the meaning of the word occurring in section 3 (10) (*a*) of the Madras Estates Land Act as given in Wilson's Glossary may well be accepted as a safe guide for their interpretation for the purposes of the present case.

Fifthly, my learned brother observes after referring to the words used in section 120 of the Bengal Tenancy Act—namely, *cultivated* as *kamar*, *zeroyiti*, etc., which no doubt do not occur in our Act that the expression "by whatever designation known" in our Act must have reference to a recognition of certain lands in the village as *kambattam*, *khas*, *sir* and *pannai*. I respectfully doubt whether this viewpoint is correct for a two-fold reason: first that there is the word "home-farm" in the definition in our Act which sufficiently fulfills the purpose of "cultivated" in the Bengal Tenancy Act, second that while *kambattam*, *khas*, *sir* and *pannai* are words of popular usage meant in recognition of the character of land they have been chosen by the Legislature as illustrative terms entering into the explanatory phrase attached to "home-farm land of the landholder"—"by whatever designation known such as *kambattam*, *khas*, *sir* or *pannai*" because of their appropriateness, attributable to their meanings as given in the foregoing, to the context of the legislative explanation of home-farm land as part and parcel of the statutory definition of private land.

It will be seen that my exposition of the definition of private land in the foregoing certainly favours the submission of the learned counsel for the appellants and petitioners. The lines of argument by means of which the learned counsel for the respondents sought to invalidate are, fisrtly that according to decisions of this Court prior to the Act which ascertained and applied the common law right the expression "private land" is much larger in the scope of its context than is warranted by this narrow view of the statute, which ought not ordinarily to be presumed to interfere with the common law unless and until the contrary is shown beyond doubt; secondly that section 185 of the Act when carefully scrutinised yields considerations warranting the larger view, that is to say, of the common law in force prior to the Act.

In connection with the first line of argument reference was made by the learned counsel for the respondents to *Nagayasami Kamayya Naik* v. *Yiramasami Kone*[1], which I have dealt with already. There is also the case in *Venkatagiri Zamindar* v. *Raghava*[2], referred to by my learned brother, Viswanatha Sastri, J., in his judgment in this connection. That case arose with reference to certain lands in the zamindari of Venkatagiri which were the subject-matter of a muchalika executed by the father of the defendants. The plaintiff Zamindar sued the defendants in ejectment relying on a condition in the muchalika that the lands were to be returned whenever wanted and alleging that due notice to quit had been served on the defendants. The muchalika described the lands as *Nagari Iduva* (*i.e.*, lands belonging to the *samasthanam*)—the words in brackets are by the way mine. The defendants denied that the lands were of that character. They further alleged that the lands were *Ijara Iduva* not liable to be recovered by the plaintiff but liable only to be delivered by them to the ijaradar if the lands were leased out by the plaintiff on *ijara*. The learned District Judge in the appellate Court held that on the construction of the muchalika the defendants could not be ejected unless the lands were let on *ijara* by the plaintiff to a stranger. On appeal to the High Court Turner, C.J. and Muthuswami Ayyar, J., in the judgment of the Court delivered by the former said this :

> "The Judge has, in our judgment, misunderstood the condition in the muchalika of fasli 1285. If the lands held by the defendants are what are known as home-farm lands of the zamindari, they are lands which according to a very general custom of the country the Zamindar reserves for his own cultivation when he thinks fit to resume them and on which a right of occupancy does not accrue. The Zamindar when he lets such lands has ordinarily a right to resume them at the end of any agricultural year on giving due notice."

On this passage there are two remarks which I desire to make. For one thing it refers to 'home-farm land of the landholder' which is the expression made use of by the Legislature in the definition of private lands in the Act of 1908. For another it recalls to one's mind the passage in the decision in *Budley* v. *Bukhtoo*[3] to which Turner, C.J., had been while a puisne Judge of the North-West Province a party sitting with Pearson, J., of that Court. The passage in the decision runs as follows :—

> "*Seer* land, as we understand it, is land which at some time or other had been cultivated by the Zamindar himself, and which although he may from time to time for a season demise to Shikmees he designs to retain as resumable for cultivation by himself or his family whenever his requirements or convenience may induce him to resume it."

I cannot read the passage in *Venkatagiri Zamindar* v. *Raghava*[2], in the way in which my learned brother seems to read it—that is to say, as not making of direct cultivation an essential part of the character of home-farm land. It may be that the test of direct cultivation does not apply to 'domain' land category of private land which may never be cultivated, although cultivable, because all that "domain" means is "land about the mansion house of the Lord and in his immediate occupancy" and not necessarily in his direct cultivation, although when and if let out even the leasing of such land must be on terms not inconsistent with an intention on the part of the Zamindar to take it back for his own direct use. The test of direct cultivation is clearly implicit in the very idea of home-farm lands to which the learned Chief Justice refers in terms of *resumption* for the landholder's *own* cultivation. No question of conversion of ryoti land into private land arose in *Venkatagiri Zamindar* v. *Raghava*[2] and what the Court did was to enunciate the proposition that home-farm land is land in which a right of occupancy does not necessarily accrue, in contradistinction apparently to ryoti land in which such a right does arise, by letting.

The two broad categories of ryoti and private lands in estates with this feature of distinction have existed from time immemorial. As pointed out by the Rt. Hon. Mr. Ameer Ali in the very passage from the case in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[4] quoted by my learned brother, Viswanatha Sastri, J. :

1. (1872) 7 M.H.C.R. 53.
2. (1885) I.L.R. 9 Mad. 142.
3. (1871) 3 N.W.P.H.C.R. 203.
4. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 at 601 and 602 (P.C.).

"One important feature of the Act is worthy of note. It throws into relief the component parts which from immemorial times go to constitute a village; first, the lands in the *direct cultivation* of the proprietor (called by various names); second, lands occupied by tenants or ryots and third old waste lands over which by custom the landholder possessed certain specific rights now crystallised in the statute."

It will be seen from the words italicised by me above that in referring to the first of the three categories of lands going to constitute a village, the Rt. Hon'ble Mr. Ameer Ali is referring to the home-farm land with the explanatory phrase attached to it which is part of the definition of private land in section 3 (10) of the Act. It will also be seen that in an earlier page 599, the Rt. Hon'ble Mr. Ameer Ali specifically refers to the definition of "private land" in section 3 as meaning "the domain or home-farm land" (expressions borrowed from English law) of a landholder by whatever designation known such as *kambattam*, *khas*, *sir* or *pannai*. These words so referred to by him in connection with the definition of "private land" are apparently the words had in mind by him in describing the first of the categories of lands constituting a village at page 602 of the Report. It is further noticeable that while the Privy Council refer to "domain" or "home-farm" land as expressions borrowed from English Law, they make no grievance of the use of such expressions in the statute, as in any way inappropriate to an Indian Statute dealing with conceptions sometimes different, it may be, from those which are associated with the system of feudal tenures in England. Far from supporting the view urged for the respondents in regard to what "home-farm land" means, the passage in the judgment of the Privy Council just quoted rather supports the contention advanced by the learned counsel for the appellants and petitioners that in order that lands may be held to be home-farm lands and therefore private lands it is essential to prove their direct cultivation on the part of the proprietor at some time or other. The statement of law in the passage in question, being of the highest tribunal, is binding on us and cannot be whittled down by any process of reasoning whatsoever on the part of any Indian Court.

The references which my learned brethren have made to the decisions in *Venkatanarasimham* v. *Dandamudi Kotayya*[1] and *Cheekati Zamindari case*[2] as indicating the gradual growth and evolution of the rights of ryots in estates are absolutely unexceptionable; but they hardly bear speaking with all respect, upon the point what exactly 'private lands' are according to the definition of the Statute. On the other hand, assuming such references to be relevant, one should rather imagine that from the unrighteous attempts which the landholders had been making prior to the Act to expand their private land by seeking to convert ryoti land into private the Legislature was solicitous to define and limit private land in a straight and simple, if somewhat narrow manner which would not only serve to assist the Courts in the determination of the question, which had become confused and complicated by the conduct of landholders, whether any particular land claimed to be private or ryoti as such, but also serve to preclude the landholders from expanding their private land by persisting even after the Act in the couse of such conversion of ryoti land into private. The way in which apparently the Legislature chose to achieve the object that it had in view was by insisting irrespectively of historical origins which need no longer be probed into, upon proof of the character of the land claimed to be private as either that of domain land or as that of home-farm lands explained by the statute itself by means of the expression "by whatever designation known as *kambattam*, *khas*, *sir* and *pannai*" inserted in the section. Judging from this standpoint I wonder how the Zamindar's private lands even if they consisted of the three categories referred to by Baden Powell in his Land Systems of British India, Volume I, page 515, as a matter of historical information can be understood in any other sense than what is expressed or implied by or in the definition section of the Madras Estates Land (Act I of 1908). Had the intention of the Legislature been to impress with the stamp of private land all land in which the landholder

1. (1897) 7 M.L.J. 251 : I.L.R. 20 Mad. 299.   2. (1899) I.L.R. 23 Mad. 318.

had at the commencement of the Act a right to both the mèlwaram and the kudiwaram the definition could well have run in very simple terms expressive of such an intention. The Legislature could have well adopted in that case the language of the civil Judge in the case in *Nagayasami Kamayya Naik* v. *Yiramasami Kone*[1], which is supposed by my learned brethren to be an accurate, judicial definition of private land prior to the Act, for the purpose of the definition of private land in the statute itself. Nothing could have been easier than that. The private land of a landholder in ordinary English may well mean in contradistinction to ryoti land, land in the ownership of the landholder which he has kept for himself without creating any rights in the ryots. But if the Legislature has prescribed a method of ascertainment of such land by limiting it to specified categories—domain land and home-farm land—no Court can in its legitimate function add to the statute so as to restore the expression to its connotation in ordinary parlance. This disposes of the first line of argument of the learned counsel for the respondents in answer to the submission of the learned advocate for the appellants and the petitioners before us so far as it is favoured by my exposition of the definition of 'private land' in the foregoing.

Turning now to the second line of argument advanced by the learned counsel for the respondents it comes to this, shortly stated, firstly that section 185 of the Act contains nothing to indicate direct cultivation as one of the matters of evidence for the Court to have regard to for determining whether any land is the landholder's private land; and secondly that the transposition of the proviso of old section 185 to the second part of clause (*a*) of sub-section 10 of section 3 is significant as showing that direct cultivation is not the test of home-farm land in the earlier part of the definition of private land in section 3 (10) (*a*).

Section 185, as I have already observed, is an evidential section while section 3 (10) (*a*) is the definition section. The former cannot except by force of its specific terms be read so as to override the latter. The two sections must, as I have already observed, be read so as to harmonise with each other. The object of section 185 is only to provide for certain matters as being evidence relevant to determining whether any land is the landholder's private land. It seems to me illogical or at any rate unnecessary for the Legislature to repeat the essential matter already expressed or implied in the definition section itself. The position might well be different where, as in the Bengal Tenancy Act, the Legislature did not enact a definition of private land and had therefore to use in section 120 the words "cultivated as *khamar*, etc." For land to be held to be private land, evidence of direct cultivation at some time or other and for some time or other being necessary according to the definition section itself of our Act by reason of what home-farm land by whatever designation known such as *kambattam*, *khas*, *sir* or *pannai* means, as I have already explained, the Act has in the evidential section only stated that regard shall be had to certain factors bearing on the essential matter of the definition. Local custom comes in, because proof of that may clear up the difficulty in demarcating how far the land about the mansion or dwelling house of the Zamindar and in his immediate occupancy extends or may, where the words used in the statute, *kambattam*, *khas*, *sir* or *pannai*, are not in vogue but other words are in a particular locality, help the Court to decide upon the home-farm character of the land by ascertaining the meanings of those other words. Local custom may sometimes even stamp land with the character of private land which does not fall within the definition section at all. To that extent the force of the restrictive definition given in the statute as compared with the larger definition to be found in Baden Powell or in decisions prior to the Act, *if any*, may well stand cut down so as to bring in under the head of private land waste lands and *nankar savaram* lands although regularly leased out without regard to terms and conditions making resumption of direct cultivation possible, *pro tanto* rehabilitating that larger definition which, if it existed, was taken leave of by the framers of the Act in 1908 not without reason.

1. (1872) 7 M.H.C.R. 53.

as already pointed out by me. Then comes, in section 185, letting out of land specifically as private land before the 1st day of July, 1898, because evidence of that kind relating to a period more than 10 years prior to the passing of the Act and relating to a period prior to the publication of the Bill which became afterwards the Madras Estates Land Act of 1908 may well be presumed to be dependable evidence of a conduct on the landholder's part not dictated by an indecent anxiety to create evidence of the character of land as private land in view of the approaching legislation. Any other evidence that may be produced bearing on the character of the land as private land is next referred to in section 185, and that includes as ruled by the Privy Council in *Bindeshwari Prasad Singh* v. *Maharajah Kesho Prasad Singh*[1] and as not disputed by the learned counsel for the appellants and petitioners, admissions of tenants that the land is private land even in leases subsequent to the 1st of July, 1898, whatever their probative value. It is asked by my learned brother, Viswanatha Sastri, J., in his judgment how the definition of private land in the Act which came in only in 1908 could possibly be present to the minds of landholders and tenants prior to the Act, and how possibly they could describe any land as private land specifically in leases prior to the Act. The answer is firstly that there is no substantial difference between the conception of private land prior to the statute, and the conception under the statute which only throws into relief, to use the language of the Privy Council in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddy*[2], the three component parts which from times immemorial have gone to constitute a village and secondly that if there is any difference while the statutory definition cuts out certain classes of land recognised as private land prior to the Act the definition in the Act does not create any category of land for the first time as private land till then unknown. So that, specified letting of land as private land in the usual vernacular terms prior to the passing of the Act is not an impossible species of evidence on the construction of the definition of private land contended for by the appellants and petitioners.

Then on the question whether the transposition of the proviso of old section 185 of the Act to the definition section makes any difference to the interpretation of section 3 (10) (*a*), I am distinctly of opinion that it does not. The idea of the proviso was that continuous cultivation of the kind and of the length of time contemplated by it should raise an irrebuttable presumption that land is private land. It is only natural that when the Act of 1908 was amended in 1934 and 1936 the logically appropriate place for the proviso was considered by the Legislature to be the definition section itself in view of the indistinguishability in practical effect between a provision by way of an irrebuttable presumption that in a certain case the land is private land and a provision by way of inclusion in the definition section itself that the land shall in such a case be private land. What is more, the juxtaposition of the old proviso to section 185 in relation to the old section 3 (11) as effected by the transposition is, in my opinion, accounted for by the affinity of ideas between the subject-matter involved in the definition of private land as home-farm land, and the subject-matter of the old proviso to section 185 raising the irrebuttable presumption that land is private land in a certain contingency contemplated by the proviso. It seems to me *non sequitur* to say that the reference to direct cultivation in the proviso to the evidential section which has become part of the definition section by the amendment dispenses with proof of direct cultivation which is a requisite implicit in the home-farm part of the definition of private land as even the dicta of the Privy Council in *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddy*[2], to which I have already referred go to show. The only effect of the transposition of the old proviso to section 185 to the definition section is to emphasise the view which was not unanimous in this Court till *Bandaru Jogi* v. *Rajah Chintala Seetharamamurthi*[3], that there is only one mode of conversion of ryoti land into private

1. (1926) 51 M.L.J. 587 : L.R. 53 I.A. 164 : I.L.R. 5 Pat. 634 (P.C.).
2. (1922) 43 M.L.J. 640 : L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).
3. (1947) 2 M.L.J. 263 : I.L.R. (1948) Mad. 223 (F.B.).

recognised by the Act, namely, the mode enacted by the old proviso which has now become part of the definition section itself by legislative amendment.

I shall proceed next to a consideration of the decisions on the construction of the definition of " private land " in this Court subsequent to the passing of the Act. These decisions may be divided into two categories, decisions pronounced prior to *Zamindar of Chellapalli* v. *Somaya*[1], and decisions beginning with that case and coming down to date.

Of the first it is unnecessary for me to refer to any other case than the one in *Lakshmayya* v. *Sri Rajah Varadaraja Apparao Bahadur*[2] in which the two learned Judges who decided it differed on the question as to the admissibility in evidence of leases subsequent to 1898 in aid of the determination of the character of land as private land, a question on which there is now the binding authority of the Privy Council in the case in *Bindeshwari Prasad Singh* v. *Maharajah Kesho Prasad Singh*[3]. It is true that private land is contrasted in that case by Sundara Ayyar, J., with the public land, as he calls it, held by ryots with occupancy right and that the former kind of land is broadly assumed to be land of which the zamindar is the owner of both the melwaram and the kudiwaram. There is no discussion in that case of the question what the home-farm part of the definition of private land in the Act means, which is the question raised before us. Moreover, there was in that case evidence amongst other things of specific letting of the land as private land before the 1st day of July, 1898, specifically mentioned in section 185 of the Act. The learned Judges accepted the finding of fact of the lower appellate Court as vitiated by no legal error and well supported by the evidence which, as I have already observed, need not after all be direct evidence of direct cultivation, at some time or other, evidence in the nature of *pratyaksha pramana* but may well be inferential or circumstantial evidence, evidence in the nature of *Anumana*, to use the sanskrit words of Hindu Sastras employed by Sadasiva Iyer, J., in that case. The evidence of conduct on the part of the zamindar in according to the lands in question there a different kind of treatment to that accorded by him to ryoti lands in the estate was relied upon by the learned judges as sufficient to justify the finding of the lower appellate Court that the land was private land.

The turn next to the second category of decisions it is not denied that but for the unreported decision of Krishnaswami Ayyangar and Somayya, JJ., in *Sri Thiagarajaswami Devasthanam* v. *Muthuswami Odayar*[4], and possibly the decision of Madhavan Nair, J., in *Chinnarigadu* v. *Rangayya*[5], with both of which I shall hereafter deal, the trend of judicial opinion in this Court has been quite unanimous and in a sense favourable to the contention of the learned counsel for the appellants and petitioners before us. Some of these decisions have been attempted to be distinguished in the course of the argument as decisions relating to the conversion of admitted ryoti land into private land. Others which could not be so distinguished were attacked as wrong. With reference to these other decisions, reasons have been given by my learned brethren in their judgments for their view that they are erroneous reasons which I have already dealt with in my own judgment hereinbefore. I need therefore only show here that the attempt made by counsel to distinguish those other decisions in which the test of direct cultivation has been laid down as confined in their operation to cases of conversion of ryoti land into private land is not warranted either by the reason of the thing or by the course of decisions which have applied that test to cases like the present as well. In *Zamindar of Chellapalli* v. *Somaya*[1], the way in which Wallis, C.J., begins his judgment is this:

> " This case raises a question of considerable importance as to what constitutes private land under the Madras Estates Land Act, 1908 " ;

and then he proceeds to consider the meaning of the word " domain " and in effect to apply the home-farm part of the definition of private land to the evidence on

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1912) 23 M.L.J. 624 : I.L.R. 36 Mad. 168.
3. (1926) 51 M.L.J. 587 : L.R. 53 I.A. 164 : 5 Pat. 634 (P.C.).
4. C.M.A. No. 311 of 1943.
5. A.I.R. 1935 Mad. 789.

record about the lands in question before the Court. He winds up the whole discussion with the following remarks:

"In some parts of India lands of this kind are known as *sir* lands, and this is one of the terms mentioned in the definition. In *Budley* v. *Bukhtoo*[1] it was held that *Sir* land is land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied, here and that as the plaintiff has failed to satisfy it the appeal fails and must be dismissed with costs."

From this it will be seen that the test of direct cultivation accepted by the learned Chief Justice and concurred in by his colleague, Seshagiri Ayyar, J., constitutes the very *ratio decidendi* and is not in the nature of a mere *obiter dictum*. The distinction between *ratio decidendi* and *obiter dictum* given in Halsbury's Laws of England, Volume 19, at pages 251 and 252 is as follows:

"It may be laid down as a general rule that that part alone of a decision of a Court of law is binding upon courts of co-ordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the *ratio decidendi*. Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that is unnecessary for the purpose on hand (usually termed *dicta*) have no binding authority on another court, though they may have some merely persuasive efficacy."

Bearing this distinction in mind I have no doubt but that what the learned judges in *Zamindar of Chellapalli* v. *Somaya*[2], have said with reference to the test of direct cultivation is really the basis for their decision in that case and not something which went beyond the occasion. The statement of the law laid down in the case has been accepted by the Privy Council in *Zamindar of Chellapalli* v. *Somaya*[3], in appeal against the decision in the same case. After setting forth the passage in Wallis, C.J.'s judgment which I have myself extracted above, Sir John Edge, delivering the judgment of the Judicial Committee, observed that

"that test is obviously suggested by section 185 of the Act and was rightly applied by the Chief Justice."

It is said for the respondents that because of the reference to section 185 of the Act by the Privy Council in accepting the test propounded by the Chief Justice it follows that the decision must be confined only to cases of conversion of ryoti land into private covered by the proviso to section 185. I think that is a wrong view to take of the meaning of the decision of the Privy Council. Although the test of direct cultivation is not specifically referred to by the Privy Council as a test adopted by the Chief Justice from the language of the definition section, and although the facts of the case before the High Court and before the Privy Council pertained to evidence bearing upon the conversion of ryoti land into private, it is clear that the passage in the learned Chief Justice's judgment which enunciates the test derived from *Budley* v. *Bukhtoo*[1], has not been understood by the Privy Council as a test derived only from the proviso to section 185 of the Act. Clearly, section 185 of the Act and not the proviso to section 185 of the Act alone and in particular is what is referred to generally by the Privy Council in their acceptance of the test of Wallis, C.J., as one suggested by that section. The section itself being one which had to be read with the definition of private land in the statute which the learned Chief Justice interpreted and applied by reference to *Budley* v. *Bukhtoo*[1], there is nothing in the general reference to section 185 of the Act by the Privy Council or in the absence of any reference by them to section 3 (10) of the Act, which militates against the obvious meaning of the passage in Wallis, C.J.'s judgment or confines its operation only to cases of conversion of ryoti land into private. The definition of private land was obviously before the Privy Council as well as before the High Court, and the way in which the judgment of the High Court had referred to the meaning of the word "domain" and had actually applied the home-farm part of the definition of private land to the case before the Court, winding up the whole discussion with a reference to *Budley* v. *Bukhtoo*[1], obviously negatives any

1. (1871) 3 N.W.P.H. C.R. 203.
2. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad.
3. (1918) 36 M.L.J. 257 : L.R. 46 I.A 44 : I.L.R. 42 Mad. 400 (P.C.).

justification for limiting the test of direct culitivation only to cases of conversion contemplated by the proviso to section 185 of the Act.

The next important decision to which I wish to refer is *Jagadeesam* v. *Kuppammal*[1], which when carefully scrutinised is not really the confused and confusing one that it has been supposed to be by my learned brethren. I regret to have to say that I cannot with all respect to my learned brethren who I know have studied that case with much greater meticulousness than I have done agree with a good deal of the criticism levelled against it by them so far as the exposition of the law there is concerned. With the facts of that case as they were ascertained by the learned judges in their judgment, I am not so much concerned as with the question how far the law as enunciated by the learned judges for the purpose of its application to those facts is correct. I do not consider it material to make sure for myself how far the criticism of my learned brethren against the way in which the Court in that case ascertained the relevant facts is correct. I shall assume with respect that that criticism is correct. I need only say that the Court in that case adopted a two-fold factual basis for its conclusion on the question raised before it whether the lands were private lands within section 3 (10) (*b*). The first factual basis was that the lands in question were originally ryoti, and the question which arose for consideration on that basis was whether there was sufficiently effective conversion of the land into private. That was negatived by the High Court in appeal in concurrence with the learned Subordinate Judge at the trial. The second factual basis was that the title of the plaintiff to sue the defendants in ejectment was to be traced solely to the grant of 1862 by the Government after confiscation without reference to the existence of a mirasi tenure in the previous owner.

Since the case was considered by the High Court on both the basis I cannot agree with the contention of the learned Counsel for the respondent that the case must be treated only as a case of conversion of ryoti land into private like the case in *Zamindar of Chellapalli* v. *Somaya*[2], and can be distinguished from the present case on that ground. As I have already pointed out, this kind of distinction attempted by the learned counsel for the respondents is of no substance and cannot be accepted. The point to note about the decision in *Jagadeesam* v. *Kuppammal*[1], which is material to the present discussion is that while dealing with the law on the second factual basis Wadsworth, O.C.J., delivering the judgment of the Court points out correctly how the direct cultivation test of home-farm land has been laid down by Sir John Wallis, C.J., in *Zamindar of Chellapalli* v. *Somaya*[2], with reference to *Budley* v. *Bukhtoo*[3], after a consideration of the meanings of " domain " and " home-farm " land, and how that test so laid down was later accepted by the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[4]. The learned Officiating Chief Justice then proceeds to apply that test himself to the case before the Court which, be it noted, was a case under section 3 (10) (*b*) and not one under section 3 (10) (*a*) like the present, after making on the unreported decision of Krishnaswami Ayyangar and Somayya, JJ., in *Sri Thiagarajaswami Devasthanam* v. *Muthuswami Odayar*[5], an adverse comment to the effect that those learned judges had dealt with the definition of private land in the statute in a way which with great respect he found it difficult to reconcile with the decision of the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[4]. In applying Sir John Wallis, C.J.'s, test of direct cultivation the learned officiating Chief Justice proceeds to note that in Ordinary English usage the term " domain " or " home-farm " would connote land appurtenant to the mansion of the lord of the manor, kept by the lord for his personal use (that, so far as domain is concerned, as I think), and cultivated under his personal supervision (this so far as home-farm land is concerned as I think). Having said so with reference to the first clause of section 3 (10) (*b*) he proceeds to observe that the other clauses, *i.e.*, (ii), (iii) and (iv), referred to

1. (1946) 1 M.L.J. 23 : I.L.R. (1946) Mad. 687.
2. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
3. (1871) 3 N.W.P. H.C.R. 203.
4. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).
5. C.M.A. No. 311 of 1943.

land other than strictly domain or home-farm land within the first clause, and that the definition in section 3 (10) (*b*) read as a whole, that is, in all its clauses, indicates clearly that the ordinary test for private land is the test of retention by the landholder for his personal use and cultivation by him under his personal supervision. Then follow these observations :

"No doubt such lands may be let on short leases for the convenience of the landholder without losing their distinctive character ; but it does seem to us to be inconsistent with the scheme of the Madras Estates Land Act *as amended* to treat as private those lands with reference to which the only peculiarity is the fact that the landlord owns both the varams in the lands and has been letting them out on short term leases. There must in our opinion be something in the evidence either by way of proof of direct cultivation or by some clear indication, of an intent to regard these lands as retained for the personal use of the landholder and his establishment in order to place those lands in the special category of private lands in which a tenant under the Madras Estates Land Act cannot acquire occupancy rights.

It seems to us that there are no materials in the present case to show that these lands have been so cultivated or retained by the landholder ".

Two lines of criticism have been levelled by my learned brethren against this case. First it is said that the adverse reference in this case to the unreported decision of Krishnaswami Ayyangar and Somayya, JJ., is only an expression of general dissatisfaction and disapproval giving no exact indication of what the dissatisfaction or disapproval is about. I find no difficulty in understanding what the dissatisfaction or disapproval is about. The dissatisfaction or disapproval is about the way in which the learned Judges in the unreported decision confined the test of direct cultivation propounded in *Zamindar of Chellapalli* v. *Somaya*[1], and accepted by th Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[2], to cases of conversion of ryoti land into private. Nor,—and here comes the second line of criticism—do I read the passage quoted above from *Jagadeesam* v. *Kuppammal*[3], and the preceding discussion as betraying the mansion house test, as my learned brother Viswanatha Sastri, J., calls it, as the sole test propounded by the learned Officiating Chief Justice in that case for the ascertainment of the character of private land or as betraying confusion on account of a series of varying tests appearing from place to place and not easy to reconcile with each other or one another. The learned Officiating Chief Justice accepts, in my opinion, the test of domain and home-farm as interpreted according to the ordinary English meanings of those words by Sir John Wallis, C.J., in *Zamindar of Chellapalli* v. *Somaya*[1] so far as the first clause, section 3 (10) (*b*) (i) is concerned, and reading the other clauses (ii) to (iv) of section 3 (10) (*b*) along with clause (i) the learned Officiating Chief Justice proceeds to wind up by saying that the definition read *as a whole* indicates clearly the test of retention by the landholder for his personal use and cultivation by him under his general supervision. It is impossible for me to believe that a Judge of such long revenue experience in the Presidency as the learned Officiating Chief Justice restricted home-farm land to land lying about the dwelling house of the landholder or thought that there could be no home-farm land beyond the precincts of the domain attached to mansion. I hold that the decision in *Jagadeesam* v. *Kuppammal*[3], states the law with substantial if not literal accuracy and in loyal and respectful conformity to *Zamindar of Chellapalli* v. *Somaya*[1] and *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[2], so far as concerned the meaning of domain or home-farm land of a landholder by whatever designation known such as *khambattam*, *khas*, *sir*, or *pannai*.

This view of private land and of home-farm land in particular as defined in *Jagadeesam* v. *Kuppammal*[3] on the basis of the decisions in *Zamindar of Chellapalli* v. *Somaya*[1] and *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[2] has been accepted in the till now unreported judgment of the learned Chief Justice and Rajagopalan, J., in *Ramakrishna Rao* v. *Malla Reddi Seshayya*[4], which related to the case of a village in the Tedlam Estate falling within section 3 (10) (*b*). Rajagoplan, J., delivering

1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).
3. (1946) 1 M.L.J. 23 : I.L.R. 1946 Mad. 687.
4. A.S. No. 53 of 1946.

the judgment of the Court, and after referring to the finding of the learned Subordinate Judge that there was no proof that the mokhasadars actually cultivated the suit lands continuously for a period of 12 years before the commencement of the Estates Land Act observed that in the circumstances of the case before the Court there could be no question of any statutory 12 years period for cases falling under section 3 (10) (*b*) (i) *even taking section* 185 *of the Act into account.* The learned Judge proceeded to say that the test laid down in *Zamindar of Chellapalli* v. *Somayya*[1] and approved by their Lordships of the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[2], was applied in *Sreemantha Raja Yerlagadda Mallikarjuna Prasada Naidu* v. *Subbiah*[3] as pointed out by the learned Subordinate Judge. It was the same test, says the learned Judge, that was applied by a Bench of this Court in *Jagadeesam* v. *Kuppammal*,[4] from which the relevant passages are thereafter quoted by him in *extenso*. Then follows a discussion of the facts of the particuar case which is not material to the present discussion. It will be seen from this that the conclusion expressed by the Court that there could be no question of any statutory 12 years period for cases falling under secton 3 (10) (*b*) (i) is on the basis of even taking section 185 of the Act into account. Section 3 (10) (*b*) (i) is really the thing corresponding so far as our present case goes to section 3 (10) (*a*) first part. I respectfully agree with this decision. The decision of another Bench of this Court, Subba Rao and Chandra Reddi, JJ., in *Parish Priest* v. *Kattalai of Sri Thiagarajaswami Devasthanam*[5] which is to the same effect so far as the interpretation of the character of the home-farm species of private land is concerned has not also so far been reported. There is a very careful and detailed discussion to be found in that judgment with reference to the entire case-law on the subject as well as with reference to the definitions of *Kambattam*, *khas*, *sir* and *pannai* in Wilson's Glossary. The decision in *Jagadeesam* v. *Kuppammal*[4] is in the result accepted by this Bench as it was by the Bench consisting of the learned Chief Justice and Rajagopalan, J., in the *Tedlam case*[6] already referred to. I hope that the two unreported decisions will soon be reported, to render our judgments in this case more fully intelligible even as the decision of my learned brother, Viswanatha Sastri, J., in *Pentakonta Narayudu* v. *Venkata Ramanamurthi*[7] unreported at the hearing of this case has since been reported.

As I have already noted, although not as a matter strictly necessary for their own decision of the particular point which arose in the case in *Bandaru Jogi* v. *Rajah Chintalapati Seetharamamurthi*[8], the learned Judges of the Full Bench who decided that case (*Gentle, C.J., Horwill, and Rajamannar, JJ.*) accepted the test laid down in *Zamindar of Chellapalli* v. *Somaya*[1] and *Jagadeesam* v. *Kuppammal*[4]. There the learned Chief Justice points out :

> "In *Zamindar of Chellapalli's Case*[1] and in *Jagadeesam Pillai's Case*[4] the meaning of 'domain or home-farm land'—the expressions used in section 3 (10) and the nature of private land were discussed. It was pointed out that the above expressions would connote land appurtenant to the mansion, kept for personal use and cultivated under personal supervision, as distinct from land let to tenants for farming."

Then the contrast is brought out between the nature of the land before the Court in that case and domain or home-farm land as interpreted in the decisions referred to, in the following terms :

> "That is not a description of ryoti land which a landholder cultivates for less than twelve years after its reclamation from waste land, and then lets to tenants as private land at a considerable profit rental."

In the passage just quoted I find a considered comment of approval by the Full Bench of the decisions in *Zamindar of Chellapalli* v. *Somaya*[1], and *Jagadeesam*

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1. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
2. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).
3. (1919) 39 M.L.J. 277.
4. (1946) 1 M.L.J. 23 : I.L.R. (1946) Mad. 687.
5. A.S. No. 176 to 178 and 493 of 1946.
6. A.S. No 53 of 1946.
7. (1949) 2 M.L.J. 623.
8. (1947) 2 M.L.J. 263 : I.L.R. (1948) Mad. 223 (F.B.).

v. *Kuppammal*[1], which, in my opinion, is entitled to very great weight when we are called upon to overrule those earlier decisions.

I do not think it necessary to discuss any more cases subsequent to the passing of Madras Estates Land Act, 1908 except that I have still to deal with the unreported decision of Krishnaswami Ayyangar and Somayya, JJ., in *Sri Thiagarajaswami Devasthanam* v. *Muthuswami Odayar*[2], and the decision of Madhavan Nair, J., reported in *Chinnarigadu* v. *Rangayya*[3]. To take up the first of these two decisions, that pertains, it must be observed, to a case under section 3 (10) (*b*). The learned Judges negative the applicability to the case before them of clauses (*ii*) to (*iv*) and in dealing with clause (*i*) which was the clause applicable they had, unlike in the present case which refers to a case under section 3 (10) (*a*) first part, to take into account the second proviso to section 185 which enacts the admissibility or inadmissibility in evidence of expressions in leases, pattas or the like executed before or after the 1st day of July, 1918 to the effect or implying that a tenant has no right of occupancy, or that this right of occupany is limited or restricted in any manner. The relevancy of that decision to the present case consists in this that the learned judges rejected the argument for the respondent before them that proof of direct cultivation would according to the decisions in *Zemindar of Chellapalli* v. *Somaya*[4], and *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[5] be necessary in order to establish the character of land as private land in cases within section 3 (10) (*b*), clause (*i*) which corresponds to the first part of section 3 (10) (*a*) dealing with home-farm land as part of the definition of private land. In so rejecting the argument the learned Judges explain away the decisions in *Zamindar of Chellapalli* v. *Somaya*[4] and *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[5], as cases where the lands were originally ryoti lands and were claimed by the landholder to have been later converted into private lands. It is on this decision that the learned counsel for the respondents before us based his argument in this regard which I have already repelled. I have already dealt with the decision in *Jagadeesam* v. *Kuppammal*[1], which, in my opinion, also militates against any such manner of distinction. I do not need to say anything more upon this decision except firstly that the learned Judges themselves seem to make it clear that the mere vesting of both the melwaram and the kudiwaram in the landholder is not sufficient to prove the character of land as private land and secondly that the learned judges refused sanction for the reporting of their judgment as turning on facts essentially.

There remains for consideration only the case in *Chinnarigadu* v. *Rangayya*[3]. I am not clear that this strikes a note of dissent from the test of direct cultivation on which the argument for the appellants and petitioners before us is founded. I am rather inclined to think that it favours the argument. All that that decision, in my opinion, says is that there need be no direct evidence of personal cultivation. Referring to the case in *Zamindar of Chellapalli* v. *Somaya*[4], it is observed by the learned Judge as follows:

> "In the case quoted *Zamindar of Chellapalli* v. *Somaya*[4] it was thought that it was necessary that *direct evidence of cultivation* should be given to prove that the land in question was private land, because it was proved that the land originally was ryoti land."

What the learned Judge had in mind is obviously a contrast between direct evidence of cultivation and indirect evidence of cultivation. In the case before the learned Judge, there was such indirect evidence to support the finding of the lower appellate Court that the land in question was home-farm land which was furnished by the description of the land as *khasbagayat* in several documents and by the proved fact that the lands in question were let yearwar to different tenants and on different rates of rent. The learned Judge lower down in the judgment observes:

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1. (1946) 1 M.L.J. 23 : I.L.R. (1946) Mad. 687.
2. C.M.A. No. 311 of 1943.
3. A.I.R. 1935 Mad. 789.
4. (1914) 27 M.L.J. 718 : I.L.R. 39 Mad. 341.
5. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).

"It was not contended before me that the only evidence that will prove that the land belongs to the zamindar as his home-farm land is *evidence of direct cultivation*. For if that is the case there is no such evidence in the case before us."

It is clear therefore that in that case, there was no contention before the learned judge of the kind which has been advanced before us for the appellants and petitioners, and the case in question even if it is not to be regarded as a decision in their favour cannot certainly be regarded as a decision against them.

That disposes of what I consider to be the material case-law which deserves discussion for the purpose of the present case. I am of opinion that the well settled authority of this Court on the point under consideration which in the bulk if not entirely is in favour of the appellants and petitioners before us ought not to be departed from and that the conflict introduced into the situation by the unreported decision in *Sri Thiagarajaswami Devasthanam* v. *Muthuswami Odayar*[1], should be resolved in favour of that well settled authority.

But then, it is said that there is a decision of the Privy Council reported in *Bindeshwari Prasad Singh* v. *Maharaja Kesho Prasad Singh*[2], which is inconsistent with the contention for the appellants and petitioners before us and entails its rejection. The facts of that case have been fully set forth in the judgments of my learned brethren and need not be referred to over again by me. It seems to me however that before treating the decision in that case as concluding the contention of the appellants and petitioners before us adversely to them it is necessary to bear in mind in regard to the point under consideration the features of difference as well as of affinity between the Bengal Tenancy Act under which that case arose and the Madras Estates Land Act under which the present appeals and revision petitions have arisen. I am not certain that the two Acts are strictly speaking in *pari materia* though it is well known that in no small measure was our Act based on the Bengal Tenancy Act. The Bengal Tenancy Act deals with a more complex system of land tenures than the Madras Act does, and the treatment of private land in the two Acts is not by any means the same or even substantially similar. As observed in volume 31 of Hailsham's Edition of Halsbury's laws of England at pages 486 and 487 it is difficult to define what constitutes being in *pari materia*, and I am by no means clear that the two statutes passed by two different Provincial Legislatures of the country with reference to not altogether similar conditions of lanhdholding can be regarded as so far in *pari materia* that a decision under the Bengal statute must necessarily rule a case under the Madras Act. Even in cases of statutes in *pari materia* it is laid down at the same place in the same volume of Halsbury's Law of England that while it may be presumed in the absence of context indicating a contrary intention that similar language is to be similarly interpreted the same word used in different Acts may however have different meanings in each statute according to the intentions of the Acts. A comparative study of section 3 (10) (*a*) and section 185 of the Madras Act on the one hand and of section 120 of the Bengal Act on the other makes it clear that while home-farm land by whatever designation known such as *kambattam*, *khas*, *sir* or *pannai* of section 3 (10) of the former Act corresponds to section 120 (1) (*b*) of the latter, private land under the latter Act is, as shown by section 120, not necessarily cultivated land but may well be other than cultivated land. There are no definitions to be found in that Act of ryoti land and private land as we have in ours. Private land is, in that statute, apparently treated as synonymous with land of which the landholder is the full owner. That is how their Lordships' reliance upon the facts adverted to by them in the penultimate paragraph of their judgment in support of their conclusion in favour of the private character of the land in question in that case becomes intelligble. "Any other evidence that may be produced" which is the language of section 120 (2) of the Bengal Tenancy Act could therefore well cover such facts. Similar language in section 185 (3) of the Madras Estates Land Act cannot have the same result because the evidence in question must bear upon the home-farm character, which

1. C.M.A. No. 311 of 1943.
2. (1926) 51 M.L.J. 587: L.R. 53 I.A. 164: I.L.R. 5 Pat. 634 (P.C.).

is part of the statutory definition of private land, of the land claimed to be private, that is, upon the character of the land as land directly or personally cultivated by the landholder himself or under his supervision by his own servants or by hired labour with his own or hired stock. The Privy Council ruling might be useful and apposite if private land meant here, as held by my learned brethren all land in the absolute ownership of the landholder. Not otherwise. Since I hold that private land does not mean that, according to the Madras Statute, the Privy Council ruling has, in my opinion, no application. Moreover, in that case it will be seen that of the facts to which their Lordships had regard in upholding the private character of the land there in question even on the basis of the appellants' construction of section 120 of the Bengal Tenancy Act and even without reference to the patta of 1902 and the kabuliats of 1883 and 1892 one important fact is the admission on defendants' behalf in the plaints of 1910 as to the character of the land as *zirait*. The admission as noted by their Lordships at page 640 of the Report are that " in the plaints in each of the suits the lands are described as lands the *milkiat* interest in which belonged to the Dumraon Raj and the lands were stated to be *zirait* lands and to have been recognised as such by village custom ". There was therefore before Their Lordships indirect evidence, if not direct, of the character of the land as cultivated land falling within clause (*b*) of sub-section (1) of section 120. I am not like my learned brother Viswanatha Sastri, J., surprised in these circumstances that this case has not been referred to so far in any case of this Court as bearing upon the matter on hand. Nor do I share his view that it is unfortunate that it has not been so referred to. It is also noticeable that no case under the Madras Estates Land Act was cited to the Board in this Patna case as is made clear by the report of arguments to be found in *Bindeshwari Prasad Singh* v. *Kesho Prasad Singh*[1], as would have been done had the two Acts in the respect with which we are concerned, been regarded as in *pari materia*.

Now, to summarise my conclusions on the question of law they are as follows :

(1) that domain land which is one category of private land is land about the dwelling house of the landholder and in his immediate occupancy ;

(2) that there must be proof that at some time or other and for some time or other there was direct cultivation by the landholder before cultivable land in an estate can be claimed to be ' home-farm ' land and hence ' private land ' within the definition of ' private land ' in the statute ;

(3) that the evidence may be direct and positive or indirect and circumstantial ;

(4) that the mere existence in the landholder of both the warams in a land in an estate does not *per se* make of it private land ;

(5) that where there is any letting of any private land, as there may well be, the letting must be on terms and conditions consistent with an intention on the part of the landholder to resume direct cultivation or personal use.

(6) that local custom may well define and demarcate private land in an estate in accordance with customary notions of people of the locality although in a manner different sometimes to what the statutory definition of private land may justify ;

(7) that, otherwise, any evidence admissible under section 185 of the Madras Act must be such as satisfies the requirements of the definition of ' private land '; and,

(8) that cultivable land in an estate must be presumed to be ryoti, unless the contrary is shown, and that the contrary is not shown by the circumstance of the existence of both warams in the landholder.

Next in order to apply these propositions of law to the present case I must turn to the findings of fact of the lower appellate Court which are binding on this Court in second appeal and in revision. The question then will be whether

1. (1926) 51 M.L.J. 587 : L.R. 53 I.A. 164 : I.L.R. 5 Pat. 634 (P.C.).

these findings in the light of the law, as I have stated above, justify the rejection of these appeals and revisions or require that they should be allowed.

The learned Subordinate Judge holds in paragraph (7) of his judgment that the defendants had never any occupancy right and till recently did not claim any, and points out in paragraph (13) of his judgment that there have been admissions by some of the defendants or their predecessors-in-title touching the existence of both the warams in the landholders as by their being parties to the description of land as *irwaram* land in documents and by their aggreeing to the payment of *swami bogam* to the landholder. He holds in paragraph (14) that sometimes there has been a change of tenancy though generally the lands have continued to be in the occupation of the same family hereditarily and observes in paragraph (16) that there is no evidence as to when the defendants or their predecessors-in-title were actually let into possession. He says that we have no evidence as to who brought the lands under cultivation but that from 1864 onwards successors-in-interest of the original inamdars have been claiming both the warams in lands by dealing with them and leasing them out. He does not find that varying rates of rent have been charged or paid. These are essentially the findings of fact of the lower appellate Court.

The learned judge however seems to think, as appears from paragraph (16) of his judgment, that considering the evidence as a whole and having regard to all the circumstances the question for consideration is whether the tenants had any occupancy rights in the land. The question, in my opinion, is not precisely that but rather whether the plaintiffs have established the character of the land as private land and effectively rebutted the statutory presumption that the land is ryoti. He also discusses the case as if it fell under section 3 (2) (*d*) and section 3 (10) (*b*) and not under section 3 (2) (*e*) and section 3 (10) (*a*) of the Act which are really the relevant parts of the statute for consideration on our conclusion as to the nature of the inam grant. With reference to the law applicable, the learned Subordinate Judge relies on *Chinnarigadu* v. *Rangayya*[1], with which I have already dealt in the foregoing. He also relies on a statement in the Ramnad Manual prepared by Mr. T. Rajaram Rao, the Dewan of the Ramnad Samasthanam under the order of the Court of Wards in 1890, which I shall quote and consider presently.

On the findings of the lower appellate court just referred to, it seems to me that applying the law as laid down in the foregoing I can only reach one result namely, that these appeals and revisions must be allowed subject of course to what I shall have to say *infra* on the passage in the Ramnad Manual relied upon by the lower appellate Court. The learning about *swami bogam* and what it means has been referred to in detail in the judgments of my learned brethren; but that word, as I think, emphasises nothing more than the existence of the kudiwaram as well as the melwaram in the landholder. It is no doubt a payment in separate recognition of the landholder's right to the kudiwaram, but cannot in my opinion, afford any evidence however indirect, of direct cultivation of the lands by the landholder at some time or other and for some time or other, proof of which by means of one species of evidence or another within the intendment of section 185 of the Madras Estates Land Act is a condition prerequisite for the recognition of the lands in suit as private lands. Where there is proof of direct cultivation at some time or other and for some time or other, subsequent letting may not matter, and the respondents can well rely on the leases in the present case as in no way inconsistent with an intention on the landholder's part to resume diect cultivation. Proof of the direct cultivation required is admittedly lacking in the present case, and the judgment of the lower appellate Court which mistakes the law and also misconceives in a way the rule of *onus probandi* applicable to the appreciation of the evidence cannot be allowed to stand. After all on the plaintiff's side the positive evidence adduced to prove the private character of the lands is as rightly remarked by my

1. A.I.R. 1935 Mad. 789.

learned brother Viswanatha Sastri, J. poor in quality and meagre in extent and the statutory presumption of the ryoti character of the lands must, in my opinion, be held not to have been effectively rebutted.

The passage in the Ramnad Manual which has still to be considered is as quoted by the lower appellate Court in its judgment to the effect that

> "*pannai* lands are those in which the zamindar or inamdar owns both the landlord's and tenant's rights and that he can lease out the lands to any one he likes for cultivation and obtain from him *swami bogam* or *thunduvaram* a rent obtained in acknowledgment to the landlord's tenancy right in the soil in addition to the melwaram or landlord's share, and that most of the *dharmasanams* in the zemindari were held under under *pannai* tenure."

After all, the manual itself has not been produced before us and I am afraid that this passage, standing by itself, cannot if properly read, be of any conclusive assitance to the respondents. It is not stated in it that every land in which the zamindar or inamdar owns both the landlord's and tenant's right is necessarily *pannai* land irrespective of the requirement of proof of direct cultivation which is implicit in the word '*Pannai*'. What all is stated there is that *pannai* lands are lands in which the zamindar or inamdar owns both the landlord's and tenant's rights. Then again it may be that *pannai* lands can be leased out by the zamindar or inamdar to any one he likes for cultivation, and that *swami bogam* or *thunduvaram* can be obtained in respect of them. It has not been suggested for the appellants and petitioners or in any of the decisions relied upon by them that *panni* land cannot be leased out at all ; nor does the fact that *swami bogam* or *thunduvaram* can be obtained by the owner of *pannai* lands from his tenant necessarily show anything more than that there is a distinct recognition of the existence of the kudivaram right in the landholder. It was contended in fact before the lower appellate Court that the fact that in the documents relied upon by the plaintiffs there was reference to both the warams showed that the two interests in the land were kept distinct, which is not possible in the case of *pannai* lands, and that therefore the lands must be treated as ryoti lands. Whether a contention going so far as that is well founded or not is another matter ; but there is no doubt but that the charging of *swami bogam* or *thunduvaram* by the landholder when leasing out lands is not a necessary indication of the character of the lands as *pannai* lands. In fact in a case in *Sivanupandia Thevar* v. *Zamindar of Urkad*[1] to which our attention was drawn by the learned counsel for the appellants and petitioners it was held that *swami bogam* was part of the rent lawfully payable by a ryot to the landholder even in respect of ryoti land. It is remarkable that in none of the documents on record is any description to be found of the suit lands as *pannai* land, although *pannai* is a term certainly in vogue in the area from which these cases have come. It is difficult in these circumstances to attach any great importance to the passage in the Ramnad Manual relied upon by the lower appellate Court. Much less am I prepared to read the passage in question as indicative of a local custom whereby if land is shown to be land belonging in both the warams to the landholder on which when leased out *swami bogam* or *thunduvaram* is collected, it is *ipso facto* liable to be treated as home-farm land and as therefore private land according to the definition of 'private land' in the statute. In fact, I may observe that no question of local custom as such was at all argued by counsel before us. Nor does it appear to have been raised in the Courts below.

This disposes of all that I consider to be relevant matter for the purpose of the present appeals and revisions, which must, in my opinion, be allowed. I regret that I am obliged to differ from my learned brethren for the reasons indicated in the foregoing, as I am quite alive, to the consideration that the ruling of this Bench in these appeals and revisions cannot of course be quite as authoritative as it would be, if the decision were unanimous. At the same time, I must say that I differ with no sense of diffidence but with every sense of confidence inspired by former judgments of distinguished judges of this Court which derive support from

1. (1917) 34 M.L.J. 139 : I.L.R 41 Mad. 109.

the dicta of the Privy Council in *Yerlagadda Mallikarjuna Prasad Nayudu* v. *Somayya*[1] and *Sivaprakasa Pandara Sannadhi* v. *Veerama Reddi*[2] and which have held the field for more or less an unbroken period of more than three decades. Out of the great sense of deference that I entertain for my learned brethren, I have anxiously considered whether I may not bring myself to agree with their conclusions, whatever my view of some of their reasoning; but the points of disagreement in perspective and detail alike have been too marked and too defined to admit of my concurrence at least in the result. Out of the same sense of deference, I have had to deal in greater detail than I should have otherwise done in a manner perhaps savouring somewhat of the argumentative with parts of the reasoning of my learned brethren which I could not after the most earnest and anxious consideration accept. Some of those parts of the reasoning relate to points not raised or enlarged upon by learned counsel in the case on whom I mean no remark of disparagement on that account. I have had therefore to make references to those points by making reference to the judgments of my learned brethren and not to the arguments of learned counsel. I must say further that I have laboured under some slight sense of embarrassment when called upon to deal with the judgment of my learned brother, Mr. Viswanatha Sastri, J. in *Pentakota Narayadu* v. *Venkataramanamurthi*[3] when sitting in his company. His Lordship knows perhaps better than I do to estimate its ambit and explain its import. I have not however felt myself relieved on that account of the responsibility of interpreting that decision in my own way and according to my own lights in the context of the prior case law on the subject. I can only hope that I have performed that rather delicate task with all the success of which the situation admitted. In conclusion, I desire to express my sense of grateful appreciation of the judgments of my learned brethren which I have had the advantage of reading before preparing my own and of the able and exhaustive arguments of learned counsel on both sides, on account of the great assistance which I have derived from those judgments as well as those arguments in reaching, in particular, on the second of the points for decision set forth by me at the opening of this judgment, my own conclusion which, although to my regret a dissident one is the only one which I have found it possible to reach in all the circumstances of the case.

By Court :—In accordance with the opinion of the majority the civil revision petitions and the second appeals are dismissed with costs, subject to the modification indicated above of the decrees in second appeals. Rupees five hundred is fixed as Advocate's fee in each batch.

K.S. *Appeals and Petitions dismissed.*

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1. (1918) 36 M.L.J. 257 : L.R. 46 I.A. 44 : I.L.R. 42 Mad. 400 (P.C.).
2. (1922) 43 M.L.J. 640=L.R. 49 I.A. 286 : I.L.R. 45 Mad. 586 (P.C.).
3. (1949) 2 M.L.J. 623 at 624.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

M. Kali Mudaliar .. *Appellant**

v.

A. Vedachala Mudaliar and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 64—Order changing starting time of bus belonging to one permit-holder—Appeal against by another permit-holder—Sustainability.

V was granted two stage carriage permits for the route from Vanangupet to Madras. The time fixed for starting the two buses was 7 A.M. *K* was granted a permit for the route between Vanangupet and Maduranthakam and the time fixed for starting of his bus was 8-5 A.M. On an application by *K* the Regional Transport Authority changed the timings for his bus to 6-40 A.M. instead of 8-5 A.M. Against that order *V* preferred an appeal to the Central Road Traffic Board which restored the original timings. Thereupon *K* preferred a revision to the State Government under section 64-A of the Motor Vehicles Act. The Government set aside the order of the Central Road Traffic Board and restored the order of the Regional Transport Authority. On application to quash the order of the Government.

Held : The time fixed by the Regional Transport Authority at the time of the grant of the permit is not one of the conditions of the permit and an application to vary the timings cannot be regarded as an application for a permit within the purview of Rule 208 (*b*) of the Rules. Section 48-A has no application to the case because there has been no variation cancellation, or addition to any conditions attached to a stage carriage permit. Section 64 has equally no application. It is only if there is any variation of a condition that clause (*b*) of that section would apply. Clause (*f*) also has no application. It cannot be said that *V* is a person who had opposed the grant of a permit.

Accordingly an appeal to the Central Road Traffic Board against the order of the Regional Transport Authority changing the timings was not maintainable and the order of that Board setting aside the order of the Road Transport Authority is therefore void. As the result of the setting aside of the void order on revision by the Government is to restore the order of the Road Transport Authority there is no reason why the High Court should quash that order of the Government.

Even if the timing can be said to be a condition attached to a permit *V* cannot be treated as a person aggrieved by the variation of the conditions of the permit within the meaning of clause (*b*) of section 64 of the Motor Vehicles Act.

Order of Subba Rao, J. in *Vedachala Mudaliar* v. *State of Madras*, (1951) 2 M.L.J. 411, reversed.

Appeal under clause 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Subba Rao, dated 14th August, 1951, made in Writ Petition No. 171 of 1951.

K. Bashyam Aiyangar and *R. Rajeswara Rao* for Appellant.

S. Rangaswami Aiyangar and the Government Pleader (*P. Satyanarayana Raju*) for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal against the judgment and order of Subba Rao, J., quashing an order of the Government dated 5th July, 1951, passed under section 64-A of the Motor Vehicles Act. The first respondent before us was granted two stage carriage permits for the route from Vanangupet to Madras. The time fixed for starting the two buses, the one from Madras and the other from Vanangupet was 7 A.M. The appellant before us was granted a permit for the route between Vanangupet and Mathuranthakam. The time fixed for starting of his bus was 8.5 A.M. The Regional Transport Authority on an application by the appellant changed the timings for his bus to 6-40 a.m. instead of 8-5 A.M. by his order dated 21st July, 1950. Against this order the first respondent herein preferred an appeal to the Central Road Traffic Board which restored the original timings. Thereupon the appellant preferred a revision to the Government under section 64-A of the Motor Vehicles Act. The Government set aside the order of the Central Road Traffic Board and restored the order of the Regional Transport Authority. There was an application to this Court for a writ of *Certiorari* to quash the order of the Goverment and this Court allowed that application and

* L.P.A. No. 86 of 1951. 17h September, 1951.

quashed the order on the ground that the order on the face of it did not disclose why the Government passed the order under section 64-A. The appellant again moved the Government subsequent to the order of this Court and the Government once again set aside the Central Road Traffic Board's order and restored the order of the Regional Transport Authority. The first respondent again filed another application which came on before Subba Rao, J. The learned Judge first heard and overruled a preliminary objection raised by the appellant to the maintainability of the application for a Writ of *Certiorari* based on the ground that the order of the Regional Transport Authority in fixing the timings was an administrative act and therefore the order of Central Road Traffic Board made on appeal and the order of the Government passed under section 64-A in revision were also Administrative Orders not liable to be quashed by a Writ of *Certiorari*. The learned Judge then held that viewed as a judicial order, the order of the Government must be set aside, because the Government had not assiged any reasons for their conclusion. His conclusion is stated thus :—

> "In the present case the latest order of the Government is only a mechanical repetition of the words in section 64-A of the Act. It is not a judicial determination of the conditions laid down in section 64-A which entitle them to interfere with the order of the subordinate authorities. I have therefore no alternative but to quash the order of the Government."

In our opinion the appeal must be allowed, but on a ground which apparently did not loom large before the learned Judge, though it cannot be said that the point was not taken at all. It was contended by Mr. Bashyam Ayyangar for the appellant that an appeal from the order of the Regional Transport Authority changing the timings of his bus did not lie to the Central Road Traffic Board and therefore the Government by restoring the order of the Regional Transport Authority was in effect doing a proper thing, because the order of the Regional Transport Authority had become final. The only provision in the Motor Vehicles Act which confers a right of appeal in certain specified cases is section 64. The question is whether the first respondent herein could be deemed to fall under any of the clauses (*a*) to (*g*) of that section. The learned Judge (Subba Rao, J.) was apparently inclined to take the view that he would fall within clause (*b*), namely, any person " aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof." Before us Mr. Rangaswami Aiyangar for the first respondent suggested as an alternative clause (*f*) which runs thus :

> "Any person being a local authority or police authority or an association which, or a person providing transport facilities who, having opposed the grant of a permit, is aggrieved by the grant thereof or by any condition attached thereto."

We have considerable doubt as to the correctness of the learned Judge's conclusion so far as clause (*b*) is concerned. But it is not necessary to deal with this aspect of the matter, because we agree with Mr. Bashyam Aiyangar that the change of the timing of the petitioner's bus cannot be held to be a variation of any of the conditions of the permit. If it is not, then neither clause (*b*) nor clause (*f*) will apply.

The material provisions of the Act which have any bearing on the question which falls for decision are sections 46, 47, 48, 48-A and 59. Section 46 deals with an application for a stage carriage permit. It provides that such an application shall contain certain particulars. Mr. Rangaswami Ayyangar contended that all these particulars when incorporated in the permit would become conditions of the permit. We have no hesitation in rejecting this contention. One of the particulars which has to be mentioned in the application is the type of the vehicle in respect of which the application is made. Surely it cannot be contended that the mention of the particular type in the permit would amount to imposing a condition in respect of the permit. Section 46 deals with the stage of an application by the owner of the vehicle and does not purport to deal with the conditions which may be imposed by the authority granting the permit. Section 47 prescribes the procedure which the Regional Transport Authority has to follow in considering applications for stage carriage permits. He is enjoined to have regard to certain

matters and to take into consideration any representations made by persons already providing road trnansport facilities along or near the proposed route or by any local authority or police authority within whose jurisdiction any part of the proposed route may lie or by any association interested in the provision of road transport facilities. Under section 47 (2) the Regional Transport Authority is bound to refuse to grant a stage carriage permit if it appears from any time table furnished that the provisions of the Act relating to the speed at which vehicles may be driven are likely to be contravened. Section 48 confers certain powers on the Regional Transport Authority. These powers are not all of the same nature and do not belong to the same category. The only common thing is that these powers are to be exercised in the interests of the public and to provide adequate transport facilities to the public. The powers conferred are (*a*) the power to limit the number of stage carriages in any particular region or in any specified area or on any specified route, (*b*) the power to issue a stage carriage permit in respect of a particular stage carriage or a particular service of stage carriages, (*c*) the power to regulate timings of arrival or departure of stage carriages whether they belong to a single or more owners, (*d*) power to attach to a stage carriage permit any prescribed condition or any one or more of the conditions enumerated in sub-clauses (i) to (vi) of clause (*d*). The relevant sub-clause is sub-clause (iii) which runs as follows :—

"That copies of the fare table and the time table shall be exhibited on the stage carriage and that the fare table and time table so exhibited shall be observed."

Under section 48-A the Provincial Authority is entitled to vary, cancel or add to any conditions attached to a stage carriage permit in pursuance of clause (*d*) of section 48. Section 59 (3) prescribes the conditions to which every permit is subject. They are :

(*a*) that the vehicle or vehicles to which the permit relates are at all times so maintained as to comply with the requirements of Chapter V and the rules made thereunder,

(*b*) that the vehicle or vehicles to which the permit relates are not driven at a speed exceeding the speed lawful under this Act ;

(*c*) that any prohibition or restriction imposed and any maximum or minimum fares or freights fixed by notification made under section 43 are observed in connection with any vehicle or vehicles to which the permit relates ;

(*d*) that the vehicles or vehicles to which the permit relates are not driven in contravention of the provisions of section 72 ;

(*e*) that the provisions of this Act limiting the hours of work of drivers are observed in connection with any vehicle or vehicles to which the permit relates ; and

(*f*) that the provisions of Chapter VIII so far as they apply to the holder of the permit are observed.

In exercise of the powers conferred on the Government rules have been framed under the Act. Rule 269 relates to the change of timings. It runs thus :

"The Transport Authority, from time to time may (i) by a general order prescribe a schedule of timings for stage carriages running on specified routes ; or

(ii) by a special order, prescribe a schedule of timings for each stage carriage."

Rule 270 provides that when a schedule of timings has been prescribed under rule 269, every stage carriage on such a route shall run in accordance with it, except when prevented by accident or other unvoidable cause or when otherwise authorised in writing by the authority granting the permit. Rule 208 is in these terms :

' (*a*) Upon application made in writing by the holder of any permit, the Transport Authority may at any time, in its discretion, vary the permit or any of the conditions thereof subject to the provisions of sub-rule (*b*).

(*b*) If the application is for the variation of the permit by the inclusion of an additional vehicle or vehicles or if the grant of variation would authorise transport facilities materially different from

those authorised by the original permit the Transport Authority shall deal with the application as if it were an application for a permit ".

In our opinion, the time fixed by the Regional Transport Authority at the time of the grant of the permit is not one of the conditions of the permit. The sections above referred to clearly indicate what is meant by a condition attached to a stage carriage permit. Section 59 (3) mentions the conditions which should be attached to every permit and section 48 (3) gives power to the Regional Transport Authority to attach to a permit any one or more of the conditions mentioned in sub-clause(i) to (vi) of section 48 (*d*). There may be also other conditions, but they should be in *pari materia* with the conditions mentioned above. The Regional Transport Authority is given the power to regulate the timings of arrival and departure of stage carriages whether they belong to a single owner or several owners. This power to regulate has nothing to do with the grant of the permit to individual owners. It is a comprehensive power conferred on the authority to be exercised in the interests of the general public. The only condition in this matter would be a condition that the timing as fixed from time to time should be exhibited on the stage carriage and the timing so exhibited should be observed. For a breach of any of these conditions, a permit may be cancelled, under section 60 of the Act. We think therefore section 48-A has no application to this case, because there has been no variation, cancellation or addition to any condition attached to a stage carriage permit. It follows that section 64 has equally no application. It is only if there is any variation of a condition that clause (*b*) of that section would apply. Clause (*f*) also has no application. It cannot be said that the first respondent is a person who had opposed the grant of a permit. It is true that Rule 208 provides that if there is an application for the variation of the permit which would authorise transport facilities materially different from those attached to the original permit, the procedure to be followed is the same as that prescribed for considering applications for permit; but we do think that because this procedure applies, the person opposing an application for variation could be deemed to be a person opposing the grant of a permit within section 64 (*f*). We must therefore hold that an appeal against the order of the Regional Transport Authority changing the timings to the Central Road Traffic Board was not maintainable. The order of the Central Road Traffic Board purporting to set aside the order of the Regional Transport Authority on appeal is therefore void. The result is that the original order of the Regional Transport Authority stands unaffected. This is exactly the result of the order of the Government setting aside the order of the Central Road Traffic Board and restoring the order of the Regional Transport Authority. In these circumstances we see no reason why this Court should quash an order of the Government, the result of which has been to maintain a lawful order passed by the Regional Transport Authority which could not be interfered with on appeal and which had been improperly set aside by the Central Road Traffic Board.

Even if the timing can be said to be a condition attached to a permit, we do not agree with the learned Judge that the first respondent could be treated as a person aggrieved by the variation of the conditions of the permit within the meaning of clause (*b*) of section 64. The expression " the permit " in that clause must obviously refer to the permit mentioned in clause (*a*). That permit is a permit granted to any person by the Transport Authority. We think the proper construction of that clause is to confine its application to persons aggrieved by the revocation or suspension of the permits granted to them or aggrieved by any variation of the conditions of such permits granted to them. That clause does not confer a right on one person to appeal against an order varying the condition of a permit granted to another person.

In this view it does not become necessary to examine the correctness of the learned Judge's conclusion on the other important question argued before him as to the nature of the order of the Regional Transport Authority in fixing or regulating the timings. On the merits we hold that the order of the Central Road Traffic Board was void, because there was no appeal against the order of the Regional Transport Authority.

The appeal is allowed and the order of the learned Judge quashing the order of the Government is set aside and the application (W. P. No. 171 of 1951) is dismissed. There shall be no order as to costs.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Gudivada Jagannadham .. *Petitioner**

v.

Messrs. A. S. Krishna and Co., Ltd., Guntur, represented by its Managing Director A. S. Krishna and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 10—Application with specific grounds some of which are not pressed—Order dismissing—Finality as to grounds not pressed.

When an application with specific grounds is filed and if some of the grounds are not pressed, the order of the Court dismissing the application on that basis is a final adujdication on the questions raised but not pressed and is a bar to the maintainability of a subsequent application on such grounds.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* and call for the connected records in R. F. 49—5—1950, Rent Controller, Guntur, and C. M. A. No. 58 of 1950, Subordinate Judge's Court, Guntur, and quash the order of the said Court of the Subordinate Judge of Guntur dated 3rd August, 1950, in the said C. M. A. No. 58 of 1950.

V. Subramaniam and *M. Ramakrishna* for Petitioner.

K. Rajah Aiyar and *A. V. Krishna Rao* for Respondents.

The Court made the following

ORDER.—This is an application for issuing a writ of *certiorari* to quash the order of the Additional Subordinate Judge of Guntur made in an appeal filed against the order of the Rent Controller of Guntur. The first respondent is the owner of a three-fifths share in the house and premises bearing door No. 741-1 in Guntur Municipality. The petitioner is a tenant in respect of that share. It is not necessary to notice the previous litigation between the first respondent and others, whereunder the first respondent's right to three-fifths share in the suit premises was recognised and declared, as the title of the first respondent to that share is not now disputed before me. The first respondent filed H. R. C. No. 13 of 1949 under section 7 (2) (i) of the Madras Act XXV of 1949 for evicting the petitioner. It was alleged in that petition that the house required urgent repairs and also that the petitioner made a default in payment of the rent. That application was filed on 2nd February, 1949. On 12th April, 1949, the petitioner filed another application for amendment of the petition by adding the following clause to paragraph 7. It reads :

"as the petitioner's lease to occupy the premises which he has been occupying has expired by 1st February, 1949, and the petitioner has vacated the same and as the petitioner does not own any other non-residential building in Guntur town for the purpose of carrying his business and as there is no other non-residential building in Guntur to the possession of which it is entitled for carrying on its business."

There is some argument before me on the question whether this amendment was actually ordered by the Rent Controller of Guntur. A counter-affidavit was filed to the application for amendment on 18th April, 1949. The Rent Controller noticed the argument based upon the amendment. He practically, though not definitely, accepted all the grounds alleged in the petition and that added by the amendment and ordered eviction. The respondent preferred an appeal (C.M.A. No. 54 of 1949) to the Subordinate Judge of Guntur. In that appeal, the points formulated for decision were as follows :

"1. Whether the rent fixed by the Rent Controller is fair and reasonable ; if not, what is the fair rent due for the building in question ?

* C.M.P. No. 9258 of 1950. 10th September, 1951.

2. Whether the appellant was in arrears of rent and was liable to be evicted ?"

The appellate judgment also disclosed that the advocate who appeared for the respondent at that stage gave up his other two contentions, namely, that the appellant caused damage to the building, and that, subsequent to the filing of the petition for eviction, the respondent wanted the building for carrying on his own business. The learned Subordinate Judge held against the petitioner on the points formulated and allowed the appeal. From the aforesaid facts, it is manifest that the amendment must have been allowed. Otherwise the Rent Controller would not have decided the point raised by the amendment. Nor would the appellate Judge have recorded the fact that the point raised by the amendment was not pressed before him. Indeed, the learned Subordinate Judge who diposed of the present appeal observed in his judgment that the amendment must presumably have been allowed. In the counter affidavit filed by the respondent before him it is not stated either expressly or by necessary implication that the amendment was not made. Indeed, throughout the proceedings the case was argued on the basis that the amendment was allowed. It may therefore be accepted for the purpose of this application that amendment was allowed. The result of the previous litigation would then be that the petitioner applied for eviction on four grounds and that he gave up two grounds, and, in respect of the other two grounds, the learned Subordinate Judge found against him. The respondent filed the present application for eviction against the petitioner, the main ground being that the petitioner required the premises for his own occupation. The Rent Controller ordered eviction. The appeals filed against that order was also dismissed. The petitioner questions that order on the ground that the learned Subordinate Judge erred in holding that the order in the previous application did not preclude the respondent from filing the present application under section 10 of the Madras Act XXV of 1949. Section 10 reads as follows :

"The Controller shall summarily reject any application under sub-section 2 or under sub-section 3 of section 7, which raises between the same parties or between the parties under whom they or any of them claim, substantially the same issues as have been finally decided, or as purport to have been finally decided in a former proceedings."

The only question therefore is whether the learned Judge in C. M. A. No. 54 of 1949 finally decided or purport to have finally decided the question, namely, whether the respondent required the premises for his own occupation. From the narration of the aforesaid facts it will be seen that the learned Subordinate Judge dismissed the application of the respondent as he did not press the present contention before him and as he found against him on other contentions raised. Ordinarily, a decision arrived at by a court of law in those circumstances would operate as a bar of *res judicata* under section 11, Civil Procedure Code. But Mr. Rajah Aiyar contended that the wording of section 10 of Madras Act XXV of 1949 is different and that unless the question was finally decided in the previous application, section 10 would not operate as a bar for the maintainability of a fresh application. In support of his argument, he relied on the decision of Rajamannar, C.J. and Raghava Rao, J., in *Miss Revathi* v. *Venkataraman*[1]. There, the previous application was dismissed for default. When a second application was filed, the learned Judges held that a dismissal for default would not be a final decision within the meaning of section 10. I respectfully agree with the view expressed therein. But that decision has no bearing on the question to be decided in the present case, where an application is dismissed not for default, but on merits. It is also not necessary to consider the question whether the principle of constructive *res judicata* applies to this case, for the question was specifically raised and not pressed. I hold that when an application with specific grounds is filed and if some of the grounds are not pressed, the order of the Court dismissing the application on that basis is a final adjudication on the questions raised but not pressed. In that view, the order made in C. M. A No. 54 of 1949 is a bar to the maintainability of the present application. In the result, the order of the learned Subordinate Judge is hereby quashed and the petitioner will have his costs.

K.S. — *Order quashed.*

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1. (1949) 2 M.L.J. 594.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI GOUNDER.

Mareboyina Nagamma .. *Appellant**

v.

Madala *alias* Koranki Nagamma .. *Respondent.*

Registration Act (XVI of 1908), section 49 (c)—Scope—Unregistered partition deed—Admissibility to prove division in status.

Where a party seeks to rely on an unregistered document only as proof of division in status and not as evidence of any right, title or interest to or in immoveable property, such a document is admissible in evidence. *Case law discussed.*

Appeal against the decree of the Court of the Subordinate Judge, Tenali, in A. S. No. 10 of 1947, preferred against the decree of the Court of the District Munsif, Tenali, in O.S. No. 229 of 1945.

M. S. Ramachandra Rao for Appellant.

A. V. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—The defendant is the appellant. The suit was filed to recover possession of a plot of land 52 cents in extent. The plaintiff is the concubine of one Mareboyina Bhavanayakudu to whom this property belonged. He had a son by name Ankalu who died issueless in the year 1930 but left a widow who is the defendant. The plaintiff's case is that after the death of the son Ankalu the property belonged absolutely to Bhavanayakudu and he executed a deed of gift, by Exhibit P-1, to the plaintiff on 5th June, 1936. It is under this document that the plaintiff claims title to the whole of the property. On the other hand the defendant who is the daughter-in-law raised the contention that prior to the death of her husband in the year 1930, *i.e.*, on 2nd August, 1929, there was a partition between the father and the son, in which the father got the western moiety and the son the eastern moiety; and so the defendant conceded that the plaintiff was entitled to the western moiety under the gift deed, Exhibit P-1, and claimed the eastern moiety to herself as her husband's share. In support of the defendant's case, she produced a document which purports to be a partition deed by which the property was divided in 1929 in the manner stated by her. But unforunately it was not a registered document, and so, for want of registration, both the lower Courts rejected it as inadmissible in evidence. However, the learned District Munsif on other evidence, came to the conclusion that there was a division in status between the father and the son and passed a decree in favour of the plaintiff for an undivided moiety of this property. On appeal, the learned Subordinate Judge agreed with the learned District Munsif in holding that the unregistered partition deed was inadmissible in evidence for want of registration but held that without the document the partition could not be proved and therefore decreed the plaintiff's suit in its entirety; and it is against that decree that the defendant has preferred this appeal.

It will be seen that the onus of proving the partition set up by the defendant is upon her and if she fails to make out that case then it will follow that the plaintiff will be entitled to succeed in respect of the entire property. The learned counsel for the defendant concedes that the partition deed which he relies on is inadmissible in evidence for want of registration in the sense that the particulars of the partition could not be gathered from such a document; but he contends nevertheless that the document could be looked into for the purpose of substantiating his case that there was a severance in status in the family. The learned District Munsif has held, relying on the evidence of two attesors and the writer who were examined as D. Ws. 2 to 4, that this document was genuine; and though the learned Subordinate Judge has not considered this question, I have examined the evidence myself and I am inclined to agree with the finding of the learned District Munsif.

* S.A. No. 710 of 1948. 23rd October, 1951.

We must therefore proceed on the footing that the partition deed is genuine and both the father and son executed it in token of the partition. That being so, the only question that has to be decided is whether that document could be looked into as furnishing evidence of a division in status in the family. In *Saraswatamma* v. *Paddayya*[1], a Bench of this Court held that though such a document may be inadmissible in evidence to prove a partition, still it is admissible as evidence to prove an intention amongst all the members to become divided in status. At page 355, it is observed :

> "For effecting a division in status in addition to conduct or declarations, the intention must be unequivocally and clearly expressed to the other members of the family. For ascertaining whether a deed amounts to such conduct or contains evidence of it, or contains declarations of intention, I fail to see why it should not be looked at, although it may refer to immovable property and is not registered."

Again in *Subba Rao* v. *Mahalakshmamma*[2], another Bench of our High Court took the same view. At page 41, Beasley, C.J., observes :

> "But even though inadmissible in evidence to prove a partition, I am of the view that it could be used in evidence not for what it contains but as evidence of a division in status."

At page 53, Curgenven, J., observes :

> "I think, accordingly, that, following the current of judicial opinion, there is no question but that we may look into Exhibit VIII to decide whether the brothers were joint or several in status."

The learned counsel for the respondent contends that these two decisions must be deemed to have been disapproved by the Full Bench decision in *Ramayya* v. *Achamma*[3]. In that case this question did not arise for decision and what was decided was that where a deed of partition is inadmissible in evidence for want of registration, the partition cannot be proved by evidence apart from the deed. No doubt, that Full Bench overruled the decision of Kumaraswami Sastri and Venkatasubba Rao, JJ., in *Ramu Chetty* v. *Panchammal*[4], which held that where a partition had taken place under a deed and the deed could not be proved for want of registration, the fact of partition could be proved by other evidence, namely, the conduct of the parties in their dealings with each other and with regard to specified items of property. I do not find anything in the judgment of the Full Bench to warrant the contention that any dissent of the aforesaid two decisions has been expressed. On the other hand, at page 162, His Lordship, Leach, C.J., refers to the decision in *Subba Rao* v. *Mahalakshmamma*[2], and states that the correctness of that decision has not been questioned. In the latest Full Bench decision in *Murugesa Mudaliar* v. *Subba Reddiar*[5] the effect of section 49 (*c*) of the Registration Act was considered and my Lord, the Chief Justice at page 483, states :

> "My view of section 49 (*c*) of the Indian Registration Act is this. It prohibits the use of an unregistered document in any legal proceeding in which such a document is sought to be relied on in support of a claim to enforce or maintain any right, title or interest to or in immovable property. So long as the document is not sought to be relied on as evidence of any right, title or interest to or in immovable property, there is nothing to prevent the document being received in evidence for other purposes."

In this case the plaintiff seeks to rely upon this document only as proof of division in status and not as evidence of any right, title or interest to or in immoveable property. It therefore seems to be apparent from these decisions that it is open to the defendant to rely upon this document as affording proof of her case that there was a division in status between the father and the son. If that is so, it will follow that the decision of the learned Subordinate Judge was erroneous and that the decision of the learned District Munsif was correct. The second appeal is therefore allowed and the decree of the learned Subordinate Judge set aside and the decree of the learned District Munsif restored with half costs in the lower Courts and full costs here.

K.S. ——— *Appeal allowed.*

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1. (1922) 44 M.L.J. 45 : I.L.R. 46 Mad. 349.
2. (1930) 59 M.L.J. 558 : I.L.R. 54 Mad. 27.
3. (1944) 2 M.L.J. 164 : I.L.R. (1945) Mad. 160 (F.B.).
4. A.I.R. 1926 Mad. 402.
5. I.L.R. (1951) Mad. 473.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

T. M. Munusamappa and Sons .. *Appellant**

v.

The Assistant Custodian of Evacuee Property, Madras .. *Respondent.*

Administration of Evacuee Property Act (XXXI of 1950), section 8 (4)—Vesting of property in Custodian and taking of formal possession—Custodian taking cheque for amount of monthly rent from tenant and allowing him to continue in possession—Effect—Tenant if can be evicted by Custodian as person in permissive possession.

Where after the vesting of property in him and taking formal possession of property, the Custodian took a cheque from the tenant for an amount which was equal to the monthly rent and allowed him to continue in possession, the tenant cannot be evicted as a person in permissive possession. In such circumstances it is impossible to say that the relationship between the parties is not that of landlord and tenant. The only provision that enables the Custodian to evict the tenant is rule 14 (2) framed under Act XXXI of 1950, and the notice to the tenant to vacate must conform to it.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *Certiorari* of Prohibition in regard to the order of the respondent, dated 21st June, 1951, contained in his notice dated 21st June, 1951, for eviction of the petitioners from any of the two godowns in No. 7, Stringer Street, G.T., Madras, now in the occupation of the petitioners.

K. S. Varadachari for Petitioners.

V. P. Sarathy for the Advocate-General (*V. K. Thiruvenkatachari*) for the State Counsel (Messrs *John and Rao*) on behalf of the Respondent.

The Court made the following

ORDER.—This is an application for issuing a writ of *prohibition* restraining the respondent from taking forcible possession pursuant to the notice dated 21st June, 1951. The petitioners are occupying two out of the three godowns bearing present Municipal door No. 7 in Stringer Street, G.T., Madras. The property was declared to be evacuee property. The petitioners were paying rent to the evacuee Hajee Mohammed Abbas from 9th December, 1943, till about 25th January, 1951. After the property vested in the respondent under section 8 (4) of the Evacuee Properties Administration Act, 1950, the Deputy Tahsildar took formal possession of the same on 1st February, 1951. He took a cheque for a sum of Rs. 150 from the petitioners and allowed them to continue in possession on payment of a monthly rent of Rs. 150. It is not disputed that the petitioners were paying rent of Rs. 150 per month from 1st February, 1951, to the end of June, 1951. After some correspondence between the parties, on 21st June, 1951, the Assistant Custodian issued a notice to the petitioners directing them to vacate one of the two godowns by 23rd July, 1951 and hand over its possession to his representative. They were also informed that in case they did not deliver possession peacefully, they would be evicted from one of the godowns with such police force as might be necessary. The said notice was issued on the basis that the petitioners were not tenants but were in permissive possession.

The learned counsel for the petitioners contended that the relationship between the parties was that of landlord and tenant, and that the Custodian had no power to evict them forcibly. On the facts admitted, it is impossible to say that the relationship between the parties is not that of landlord and tenant. The petitioners were admittedly the tenants of the evacuee. On 1st February, 1951, the Deputy Tahsildar took only formal possession, as the petitioners were in actual occupation. The petitioners also were paying rent from 1st February, 1951, till the end of June. In the absence of any other evidence to establish that the petitioners were allowed to continue to be in possession under some arrangement other than that of a tenancy, I must hold that the petitioners are tenants on a monthly basis. If so, the only

* W.P. No. 178 of 1951. 16th October, 1951.

provision that enables the Custodian to evict the tenants is Rule 14 (2) framed under the Act (XXXI of 1850). It reads:

"In case of a lease or allotment granted by the Custodian himself, the Custodian may evict a person on any ground justifying eviction of a tenant under any law relating to a control of rents for the time being in force in the State concerned, or for any violation of the conditions of the lease or the allotment".

The notice issued in this case does not comply with the provisions of the said rule. It was obviously based on the assumption that the petitioners were not tenants.

In the circumstances I direct a writ of prohibition to be issued restraining the respondent from evicting the petitioners otherwise that in strict compliance with the provisions of rule 14 (2) framed under the Act. The parties will bear their respective costs.

K.S. — *Writ of prohibition directed to be issued.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

Velur Devasthanam by its Head clerk, R. Ramaswami Pillai .. *Petitioner**

v.

A. Sambandamurthi Nainar .. *Counter Petitioner.*

Criminal Procedure Code (V of 1898), section 145—Scope and object of—Dropping proceedings under section—When proper—Powers of Magistrate after dropping proceedings.

The object of section 145, Criminal Procedure Code, is to preserve public peace and tranquillity of the realm from riots and commotion. Orders under section 145 are merely police orders made to prevent breaches of the peace and they decide no questions of title. The foundation of the jurisdiction of the Magistrate is the apprehension felt by him that unless action is taken there will be a breach of the peace. It is the Magistrate who should be satisfied that the apprehension is an existing one and an adequate one for taking action to avert the breach of the peace. Mere apprehension of the party or even of the police or by a superior authority, namely, the District Magistrate is not sufficient ground for taking action. When therefore the Magistrate comes to the conclusion that there was no longer any apprehension of a breach of the peace it is his duty to drop further proceedings leaving it open to the parties to resort to appropriate remedies in civil Courts. This can be done at any stage. It is not obligatory for a Magistrate to take evidence before dropping proceedings under section 145 and he need not give an opportunity to the parties to establish the contrary.

It is undesirable that an order in which the Magistrate clearly says that he does not apprehend a breach of the peace and that further proceedings may be safely dropped should be interfered with in revision and the Magistrate be made to feel an apprehension which he does not really feel especially when such order is reasonable and based upon acceptable evidence.

The Magistrate dropping proceedings does not become *functus officio* but has jurisdiction to pass further orders in the case for winding up the proceedings started under section 145.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order, dated 29th September, 1951, in M.C. No. 74 of 1951, on the file of the Sub-Divisional Magistrate of Mayuram, etc.

Mr. T. S. Kuppuswami Iyer for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

The Court made the following

ORDER.—Criminal Revision Case No. 1227 of 1951 has been filed against the order dropping proceedings under section 145, Criminal Procedure Code, made by the Sub-Divisional Magistrate, Mayuram, in M. C. No. 74 of 1951.

The facts are: On the ground of strained feelings existing between the Velur Devastanam and Sambandamurthi Nainar in connection with the cultivation of five survey numbers in the village of Maruvathur, 24 acres in extent, a preliminary order, dated 13th July, 1951, under section 145 (1), Criminal Procedure Code, was issued calling on both the parties to put in their written statements in

*C.R.C. No. 1227 of 1951. (Cr.M.P. No. 2428 and 2429 of 1951.) — 3rd December, 1951.

regard to the factum of actual possession. The lands were also attached under section 145 (1), Criminal Procedure Code, and the Tahsildar of Sirkali was directed to be the Court agent. This order was passed on 14th July, 1951. The Tahsildar of Sirkali took possession of the lands on 18th July, 1951. On 26th July, 1951, the Tahsildar held an auction in respect of the lease of the lands for fasli 1361 and one Gopala Chettiar was the highest bidder and the lease was granted to him for 290 kalams of paddy and 72 bundles of straw. This Gopala Chettiar is stated to have deposited Rs. 1848-8-0 as security for the due performance of the obligation under the lease. In response to the preliminary order, dated 13th July, 1951, written statements were filed by the parties on 4th September, 1951 and 11th September, 1951. These are the facts constituting the background as to what happened on 19th September, 1951.

On 19th September, 1951, P. W. 1, the Head clerk of the petitioner Devasthanam as well as the counter petitioner (R. W. 1) were examined and the learned Sub-Divisional Magistrate passed the following Order :—

"Both the petitioner and the counter petitioner deposed in Court that there was no breach of peace or clash regarding the lands in dispute. I therefore am satisfied that there existed no dispute likely to cause a breach of peace. Hence under section 145 (5), Criminal Procedure Code, I cancel the preliminary order under section 145 (1), Criminal Procedure Code and withdraw the attachment of the lands and all further proceedings under section 145 are hereby dropped."

The present revision petition is filed on the foot of the following ground, namely, that in cases where parties in response to the preliminary order passed under section 145 (1), Criminal Procedure Code, came and satisfied the Court that there is no likelihood of breach of the peace, section 145 (5) can be resorted to ; but if without doing so they filed their statements and asserted their rights and the case itself was posted to a later date for evidence at that stage there was no question of clause (5) of section 145, Criminal Procedure Code, coming into operation.

This proposition involves two aspects, namely, whether in law the Sub-Divisional Magistrate was entitled to pass the order dropping the proceedings at the stage at which he had done and secondly, whether on the reasons set out by him the proceedings could be dropped as a fact.

Point 1 : On the first point I have come to the conclusion that in law the learned Sub-Divisional Magistrate was fully entitled to drop the proceedings at the stage at which he had done. The object of section 145, Criminal Procedure Code, is to preserve public peace and tranquillity of the realm from riots and commotion. Orders under section 145, Criminal Procedure Code, are merely police orders made to prevent breaches of the peace and they decide no questions of title : *Dinomani Chowdhrani* v. *Brojo Mohini Chowdhrani*[1]. The foundation of the jurisdiction of the Magistrate is the apprehension felt by him that unless action is taken there will be a breach of the peace. It is the Magistrate who should be satisfied that the apprehension is an existing one and an adequate one for taking action to avert the breach of the peace. Mere apprehension of the party or even of the police or by a superior authority, namely, the District Magistrate, is no sufficient ground for taking action : *Behari Majhi* v. *Hari Majhi*[2], *Shibnarayan Das* v. *Sat Yadeo Prasad*[3], *Todar Mal* v. *Emperor*[4], *Baliram Patil* v. *Gangoo*[5]. It follows therefore that when that Magistrate who is responsible for the maintenance of law and order within his own division comes to the conclusion that there was no longer any apprehension of a breach of the peace, it is his duty to drop further proceedings leaving it open to the parties to resort to the appropriate remedies in civil Courts. This can be done at any stage.

And what is more it is not obligatory for a Magistrate to take evidence before dropping proceedings under section 145, Criminal Procedure Code, and need not give an opportunity to the parties to establish the contrary. This has been laid

1. (1901) 12 M.L.J. 83 : L.R. 29 I.A. 24 : I.L.R. 29 Cal. 187. (P.C.).
2. A.I.R. 1932 Cal. 61.
3. A.I.R. 1943 Pat. 44.
4. (1931) 32 Cr. L.J. 309.
5. (1932) 33 Cr.L.J. 937.

down in two decisions of this Court in *Suryanarayana* v. *Ankineed Prasad Bahadur*[1] and in *Narasayya* v. *Venkaiah*[2]. In *Suryanarayana* v. *Ankineed Prasad Bahadur*[1], it was pointed out that whatever the source of the Magistrate's information he might act upon it if he was satisfied that the state of things, which alone would have given him jurisdiction to proceed with the enquiry, no longer existed. The learned Judge (Spencer, J.) relied upon *Manindra Chandra Nandi* v. *Barada Kanta Chowdhury*[3] and the learned Judge further points out that the Magistrate's power contained a full discretion of his power to drop proceedings at any stage and that he declined to interfere with the order of the Magistrate on this point. In the later case *Narasayya* v. *Venkaiah*[2], Justice Krishnan followed the earlier decision and came to the following conclusion :

> "I do not think it is open to a party to come up here and say that the Magistrate had no business to drop proceedings on the ground that there was no likelihood of a breach of the peace without giving him an opportunity to show that there was such a likelihood. It is the Magistrate's duty to be satisfied that there is no breach of the peace in his district. . . . . Clause 5 of section 145 provides for a special case where as the Magistrate is proceeding with the trial of the question of possession, the parties to the proceedings or even other persons who are interested are given the right to show that no dispute likely to cause a breach of the peace exists or has existed. The existence of this clause does not take away the power of the Magistrate himself to drop the proceedings, if he is satisfied that there is no further likelihood of a breach of a peace."

Therefore the first aspect of this case and the point taken fail.

Point 2 :—Turning to the question of the sufficiency of the evidence on which the learned Magistrate has come to the conclusion that there was no likelihood of the breach of the peace, the High Court in revision will not interfere with such an order unless it was obviously unreasonable or unjust, because though the High Court is invested with powers of revision still orders under this section should not be lightly dsisturbed ; it is only in very exceptional cases the High Court will interfere : *In re Lingaraja Misro*[4] and *Hardeo Singh* v. *Ram Charither Singh*[5]. Orders passed by a competent Magistrate are not to be lightly interfered with by the High Court first because the object of such orders is to preserve peace and secondly because the aggrieved party has his remedy by a civil suit : *Krishnappa Naidu* v. *Alamelu Ammal*[6]. Proceedings under this chapter are of a special nature and are such that the Magistrate may be allowed greater liberty in carrying out these provisions than they are allowed in trying ordinary crimes. The provisions of this chapter are concerned with the disputes relating to immoveable property which are likely to cause a breach of the peace and give Magistrates power to deal with matters of a *quasi* civil nature because upon the Magistrate and the police is thrown the burden of maintaining the public peace. In this view it is undesirable that an order in which the Magistrate clearly says that he does not apprehend a breach of the peace and that further proceedings may be safely dropped should be interfered with in revision and the Magistrate be made to feel an apprehension which he does not really feel : *Sudalaimuthu Chettiar* v. *Enan Samban*[7]. In this case on the face of the order it appears to be reasonable and based upon acceptable evidence. Therefore, on the ground of sufficiency of evidence this point taken fails.

In the result the main petition has got to be dismissed and is hereby dismissed.

In regard to the two subsidiary petitions Crl. M. P. Nos. 2428 and 2429 of 1951 for giving directions to the Tahsildar of Sirkali to retain with him the amount of Rs. 1848-8-0 deposited by Gopala Chetty and to continue him as the lessee of the lands and authorise him to harvest the crops and retain the same or its value with him etc., the petitioner can obtain the necessary reliefs by applying to the Sub-Divisional Magistrate because it is now settled law that the Magistrate dropping proceedings under section 145, Criminal Procedure Code, does not become *functus officio* but has jurisdiction to pass further orders in the case for winding up the

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1. (1924) 46 M.L.J. 565 : I.L.R. 47 Mad. 713.
2. (1925) 49 M.L.J. 784 : I.L.R. 49 Mad. 232.
3. (1902) I.L.R. 30 Cal. 112.
4. 17 Cr.L.J. 143 (Madras).
5. 17 Cr.L.J. 286 (Patna).
6. (1916) 5 L.W. 165.
7. 16 Cr.L.J. 767 (Mad.).

proceedings started under section 145, Criminal Procedure Code. See *Suryanarayana v. Ankineed Prasad Bahadur*[1] and *Narasayya v. Venkaiah*[2]. These ancillary petitions are disposed of accordingly.

K. S. ———— *Main petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Madala Peraiah and others .. *Petitioners**

v.

Voruganti Chendriah .. *Respondent.*

Penal Code (XLV of 1860), section 341—Scope of—Wrongful restraint—Gist of offence.

In a wrongful restraint there need not be any stoppage of the movement; it may be directed into a channel different from the direction in which the victim intends to move. Physical presence of the obstructor is not necessary; nor is an actual assault necessary and fear of immediate harm restraining a man out of a place where he wishes to be and has a right to be is sufficient to constitute an offence under this section. The slightest unlawful obstruction to the liberty of the subject to go when and where he likes to go, provided he does so in a lawful manner cannot be justified and is punishable.

Where the complainant was going to his lands with his bulls through a pathway the accused came there with sticks and obstructed him and his bulls and beat and drove away the bulls and the complainant came away fearing that if he proceeded further he would also be beaten, the offence of wrongful restraint is made out.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Kandukur in C. A. No. 68 of 1950 (C. C. No. 1076 of 1949, Stationary Sub-Magistrate's Court, Kandukur).

B. Lakshimnarayana for Petitioners.

M. A. Narasappa Choudri for Respondent.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This is a criminal revision petition filed against the convictions and sentences in C. C. No. 1076 of 1949 on the file of the Stationary Sub-Magistrate, Kandukur, and upheld in C. A. No. 68 of 1950, Sub-Divisional Magistrate's Court, Kandukur.

The facts are : P. W. 1, the complainant, has purchased 6 acres of land from P. W. 7, thereby rounding up an extent of 3 acres 40 cents already owned by him in S. No. 352. It is his case that he has been cultivating all these areas by passing through the plan-marked pathway, in S. No. 351 after crossing S. No. 356, which is a Donka Poramboke. This plan-marked pathway passes through the land of the accused. There has been ill-feeling between these neighbouring land-owners.

On 1st August, 1949, at about 7 A.M. according to the complainant, when he was passing through the Donka S. No. 356 with five ploughs, the thirteen persons accused by him came there with sticks and obstructed him and the bulls and beat and drove away the bulls. On account of this he is stated to have come home fearing that if he proceeded further he would also be got beaten. Therefore he preferred a complaint against these thirteen accused persons.

In the Court of the Stationary Sub-Magistrate, Kandukur, no case was found to have been made out against accused 2 to 10 and 12. Only accused 1, 11 and 13 were found guilty of an offence under section 341, Indian Penal Code, and were sentenced to pay a fine of Rs. 100 each and in default simple imprisonment for $1\frac{1}{2}$ months. The other accused were acquitted.

1. (1924) 46 M.L.J. 565 : I.L.R. 47 Mad. 713.
2. (1925) 49 M.L.J. 784 : I.L.R. 49 Mad. 232.

* C.R.C. No. 684 of 1951. (Cr.R.P. No. 678 of 1951). 3rd December, 1951.

In appeal the learned Sub-Divisional Magistrate, Kandukur, confirmed the convictions and sentences of fine but altered the default sentence into simple imprisonment for one week each.

The point taken before me is that the accused persons by striking the bulls and making them run away did not cause wrongful restraint to the complainant and in support of this the decision in *Gopal Reddi* v. *Lakshmi Reddi*[1] was relied on.

I shall now briefly examine the ingredients of the offence of wrongful restraint under section 341, Indian Penal Code, and examine whether the case relied upon for the revision petitioners is helpful to them.

The offence of wrongful restraint, as has been pithily put, is linear in its scope ; while wrongful confinement is circular in its character. Wrongful restraint is keeping a man out of a place where he wishes to be and has a right to be. The following illustrations given in the Original Draft Code will elucidate the meaning of this section :

(*a*) *A* builds a wall across a path along which *Z* has a right to pass. *Z* is thereby prevented from passing. *A* wrongfully restrains *Z*.

(*b*) *A* illegally omits to take proper order with a furious buffalo which is in his possession and thus voluntarily deters *Z* from passing along a road along which *Z* has a right to pass. *A* wrongfully restrains *Z*.

(*c*) *A* threatens to set a savage dog at *Z* if *Z* goes along a path by which *Z* has a right to go. *Z* is thus prevented from going along the path. *A* wrongfully restrains *Z*.

(*d*) In the last illustration if the dog is not really savage but if *A* voluntarily causes *Z* to think that it is savage and thereby prevents *Z* from going along the path *A* wrongfully restrains *Z*.

From these illustrations it will appear that a person may obstruct another by causing it to appear to that other that it is impossible, difficult or dangerous to proceed as well as by causing it actually to be impossible, difficult or dangerous for that other to proceed. The obstruction must be physical. A verbal prohibition or remonstrance does not amount to such obstruction. The offence is the abridgment of the liberty of a person against his will. Thus, these are the principles which are embodied in the decision relied upon by the criminal revision petitioners, viz., *Gopal Reddi* v. *Lakshmi Reddi*[1] as also the decisions in *Emperor* v. *Rama Lala*[2], *Durga Pada Chatterjee* v. *Nilamani Ghose*[3], In re *Peria Ponnuswami Goundan*[4], *Muhammad Yusuf Sahib*, In re[5] *Muthu Padayachi* v. *Emperor*[6], *Maharani of Nabha* v. *Province of Madras*[7], *Kumbola Guruvadu* v. *Kristna Reddi*[8] and Criminal Revision Case No. 125 of 1899 (Weir's Criminal Ruling Vol. I, p. 340, 341, referred and examined in *Gopala Reddi* v. *Lakshmi Reddi*[1]).

On the foot of these principles when a cart conveying a person was detained while the traveller was allowed to go on his own way or a horse which a person was riding was restrained but without any obstruction to the rider who was allowed to go where he liked if he wanted, it was held that the offence of wrongful restraint had been committed.

The sum and substance of all these decisions is that in a wrongful restraint there need not be any stoppage of the movement ; it may be directed into a channel different from the direction in which the victim intends to move. Physical presence of the obstructor is not necessary ; nor is any actual assault necessary and fear of immediate harm restraining a man out of a place where he wishes to be and has a right to be is sufficient to constitute an offence under this section. The slightest unlawful obstruction to the liberty of the subject to go when and where he likes to

1. (1946) 2 M.L.J. 281.
2. (1912) 15 Bom. L.R. 103.
3. A.I.R. 1935 Cal. 252.
4. A.I.R. 1927 Mad. 506.
5. (1938) M.W.N. 1010.
6. (1934) M.W.N. 620.
7. (1942) 2 M.L.J. 14 : 5 F.L.J. 103 : I.L.R. 1942 Mad. 696.
8. (1915) M.W.N. 203.

go, provided he does so in a lawful manner, cannot be justified and is punishable.

The facts of this case are covered by an exact decision of the Bombay High Court, namely, *Emperor* v. *Lahanu Manaji*[1]. In that case, where the accused who were the co-owners of a well, obstructed another co-owner (complainant) from using the mot to which he had yoked his bullocks, on the slope to the well, on the ground that he had not paid his share of expenses of the well, it was held that the accused were guilty of the offence of wrongful restraint inasmuch as they had obstructed the complainant from proceeding with his bullocks in a direction in which he had a right to proceed with his bullocks.

Two classes of cases, however, constitute an exception to this section. One class of cases is provided for in the Exception to section 339, Indian Penal Code, and the other class of cases in Exceptions which override the penal provisions of the Code. The Exception to section 339 provides that the obstruction of a private way over land and water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence. This plea was put forward and negatived and I agree with the finding of fact. The other class of cases relates to resistance under a claim of right. A person who *bona fide* believing in his right to a property asserts his claim thereto cannot be convicted of this offence. This *bona fide* claim of right was also put forward in the lower Court and was negatived and the finding of fact is correct.

In these circumstances the convictions of these criminal revision petitioners are correct and are confirmed.

The sentences are, however, reduced from Rs. 100 to Rs. 75 each, maintaining the default sentence of the learned Sub-Divisional Magistrate.

This petition is disposed of accordingly.

V.P.S. — *Sentences reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

R. M. Ramachari .. *Petitioner**

v.

M. B. Ramachari and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 526 (6) (a)—Application for transfer—Frivolous and vexatious—Order for payment of costs.

Where a petition for transfer is found to be absolutely devoid of merits and thoroughly frivolous and vexatious it is a fit case for the exercise by the High Court of the provisions of section 526 (6) (a) of the Criminal Procedure Code, in order to put an end to petitions intended only to protract the proceedings and harass the opposite party.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the transfer of the C. C. No. 51 on the file of the Joint Magistrate of Rajahmundry (C. C. No. 338 of 1951 on the file of the Deputy Tahsildar and Sub-Magistrate, Alamoru) to any Court of first class Magistrate in Mathurai for trial.

K. V. Srinivasa Aiyar for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

V. S. Chandrasekharan for Respondent.

The Court made the following

ORDER.—This is a petition filed by one R. M. Ramachari, a resident of Mathurai, for transferring a criminal case filed by him, in the first instance,

1. (1925) 27 Bom. L.R. 1419.

* Cr. M.P. No. 1925 of 1951. 15th November, 1951.

against his agent, another Ramachari, in the Court of the Stationary Sub-Magistrate, Alamoru, subsequently transferred to the file of the First Class Joint Magistrate Rajahmundry.

The facts are :—This petitioner, Ramachari, according to himself, is a partner of a registeed firm of R. M. Ramachari & Co., carrying on handloom cloth business in Mathurai. This petitioner has got a branch at Dwarapudi in East Godavari district. The accused, another Ramachari is said to have been his agent and clerk in charge of the branch at Dwarapudi. In these circumstances, this petitioner filed a complaint against that agent before the Second Class Magistrate at Alamoru in C. C. No. 338 of 1951, for offence of criminal breach of trust and misappropriation under sections 403 and 408, Indian Penal Code. It is significant that this complaint relates to a matter which can be proved only by people resident in Dwarapudi and around, because I find the following list of witnesses attached to the complaint.

1. N. R. Arumugam Pillai, Cloth Merchant, Seethamma Lane, Rajahmundry.
2. Nagalla Subbarao, House owner of complainant's cloth shop, Dwarapudi.
3. S. Papanna Chetty, Cloth Merchant, Rajahmundry.
4. Vedisetty Seshayya, son of Redriah, Chirala.
5. Andi Mudaliar, Cloth Merchant, Dwarapudi.
6. V. Govindaraju, Cloth Merchant, Dwarapudi.
7. Grandhi Suryanarayana, Son of Ramachandrudu, Dwarapudi.
8. Chunduri Venkateswaralu, son of Krishtama, Cloth Merchant, Chirala.
9. Grandhi Rayudu, son of Venkatasubbiah, cloth Merchant, Chirala.

Then in the course of the enquiry, evidence seems to have been adduced that there was falsification of accounts also, apparently to cover up the alleged criminal breach of trust and misappropriation, and obviously on the motion of this complainant, the Stationary Sub-Magistrate, Alamoru has sent up the papers to the Joint Magistrate, Rajahmundry exercising first class powers. This accused has also been got served in Rajahmundry.

Before the trial could take place, and apparently for ulterior objects of his own, this complainant has suddenly found that the interests of both parrties and the ends of justice require that the case should be tried at Mathurai, and he has preferred this application on grounds which can only be described as both vexatious and false. The affidavit in support states that since the offence committed by the accused happens to come also under section 477-A as a major one, a scrutiny of the entries in the account maintained is necessary for the disposal of the matter, and since the accounts and all entries therein are in Tamil only, it will be expedient in the interest of justice that the case should be tried in a Court familiar with the Tamil language. The affidavit further goes on to say that many of the witnesses in the case are residents of places around Mathurai town and it will be convenient for the parties as well as witnesses to attend Court in Mathurai instead of in a distant place. I need not point out that the first ground is a vexatious ground because, if the presiding Magistrate happens to be an officer who does not know Tamil, then there is ample provision for the entries being translated into Telugu or into English with which language that presiding officer is bound to be familiar. Then, as regards the second point, I have purposely reproduced the list of witnesses to show that, far from witnesses residing in Mathurai, they are residents in Rajahmundry, Dwarapudi and Chirala and obviously, this second allegation, is a thoroughly false one.

Then, the learned advocate stated that he filed this petition not only for his own comfort and convenience, but also for that of the accused, and the accused represented by a lawyer in this Court, disowns that soft impeachment and says that he does not want the case to be tried at Mathurai, but is content to have the case tried in Rajahmundry, where he has been got served.

The learned Public Prosecutor naturally opposes the application on the principle that the fact that the presiding officer does not know Tamil (a fact which has

got to be proved) is no ground at all for transfer of the case in a multi-lingual State like the Madras presidency, while the criterion for offences to be tried is the territorial jurisdiction prescribed in the Criminal Procedure Code.

In the result, there are no merits at all in this petition, as it is found to be a thoroughly frivolous and vexatious one, and in dismissing it, I must observe that this is one of those cases where the provisions of section 526 (6) (*a*), Criminal Procedure Code have got to be exercised by the High Court in order to put an end to this type of petitions, intended merely for protracting the proceedings, harass the opposite party and waste the time of the High Court. I, therefore, direct the petitioner under section 526 (6) (*a*) to pay, by way of compensation, to the learned Public Prosecutor and to the accused, represented by an advocate here, a sum of Rs. 50 each, which I consider proper in the circumstances of the case.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

The Public Prosecutor .. *Appellant.**

v.

Murugesan .. *Respondent.*

Madras Prevention of Food Adulteration Act (*III of* 1918), *section* 14—*Prevention of taking a sample—What constitutes.*

It is not necessary that an overt act in the nature of a physicial clash and an effective disabling of the executive officer from taking a sample should be present before an offence under section 14 of the Madras Prevention of Food Adulteration Act is made out.

Where the maistry under the Sanitary Inspector and the malaria cooly of a Panchayat Board were deputed by the Sanitary Inspector to take samples of milk for sale for analysis to detect adulteration and the accused who was carrying milk to a hotel was asked to give a sample, but the accused instead of giving a sample went into the hotel where the milk was handed over to a servant who poured into a milk pan containing other boiled milk the offence of preventing the officer from taking a sample under the Act is made out.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Second Class Magistrate, Tirukoilur in C.C. No. 426 of 1951 on his file.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) in person.

The Court delivered the following

JUDGMENT.—This is a criminal appeal filed by the learned Public Prosecutor against the acquittal of the accused under section 14 (1) of the Madras Prevention of Food Adulteration Act.

The short facts are :

P.W. 1, Hari Rao, the Maistry under the Sanitary Inspector and P.W. 2 Ponnurangam, the Malaria Cooly, of a Panchayat Board, were deputed by P.W. 3, the Sanitary Inspector on the morning of 12th January, 1951 to get hold of persons who were carrying milk for sale and to inform P.W. 3 so that he might take sample of the milk for analysis to detect adulteration. P.W. 1 saw the accused with two chumbus of milk when he was going very near the hotel run by one Balakrishna Pillai near the bus stand at Tirukoilur. P.W. 1 sent word to P.W. 3 through P.W. 2. P.W. 1 too came there when the accused was very near the hotel of D.W. 1, Balakrishna Pillai. P.W. 3 asked the accused to give a sample of the milk for being sent for analysis. The accused did not give the sample of the milk and was going into the hotel. P.Ws. 1 and 3 followed him to the hotel. The accused handed over the milk chumbu to the servant of the hotel who poured them into the milk pan in which the milk was boiling. The accused when questioned stated that he would give the sample of milk later.

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* Cr. Appeal No. 479 of 1951. 26th October, 1951.

These facts were accepted by the learned Second Class Magistrate as having been fully established. He did not believe the defence version, which does not concern us here for the present. The learned Second Class Magistrate came to the conclusion that the facts set out above did not make out the preventing contemplated under section 14 (3). His reasons were that in order to bring the offender under the section, some overt act on his part, which was calculated to prevent the local executive officer from taking the sample was necessary, and that mere words of refusal would not be sufficient to bring the act under that section. He was of the opinion that in this case the prosecution had not proved any overt act on the part of the accused by which the complainant was prevented from taking the sample.

There can be no doubt that the view taken by the Second Class Magistrate is hopelessly wrong. On the facts alleged there can be no doubt that this accused, in the manner set out above and which need not be repeated, has effectively prevented the local executive officer from taking the sample and for this no further overt act is necessary than what has happened. In other words, the learned Second Class Magistrate seems to have thought that unless there was a physical clash and an effective disabling of the executive officer from taking the sample, no offence would be made out, I need not say that this is a very dangerous extension of the plain meaning of the word "prevent", which would certainly take in an act ascribed to the accused in this case.

But the further question which remains is whether I should interfere in appeal and call for the records and put the accused to the trouble of appearing before this Court and deal with the matter according to law.

The circumstances of the case are too trivial to merit such an elaborate procedure, and what is more, the learned Public Prosecutor was more bent upon having the legal position cleared up rather than upon prosecuting further this offender.

Therefore this criminal appeal is dismissed with these observations, which would prevent further mischievous interpretation of this nature in future.

V.P.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Vutukuri Bala Nagamma .. *Appellant.**

v.

Vutukuri Hanumanthu and others .. *Respondents.*

Hindu Law—Will—Endowments to temple—Trustee if acquires an estate of inheritance—Devolution of the Office of the managing trustee of a temple—Principles applicable.

The general and accepted rule of construction of a will is that the express intention of a testator should be gathered from a reading of the entire will. If the testator appointed a person as sole trustee of a temple without words of limitation and there is no indication in the document to the contrary the grant conveys an estate of inheritance. But the rule is not inflexible and in a case where the will contains other directions which are inconsistent with such intention, the Court should give effect to his real intention.

Where a testator provided for three classes of trustees—managing trustee, trustees and trustee members, and the mode of devolution in the case of managing trustee, and the provisions of the will show that the testator had no confidence in women, it could not be said that his intention was that the wife of any of his sons should take part in the management of the endowments to the temple.

Case-law discussed.

B. V. Ramanarasu for Appellant.

K. Bhimasankaram for Respondent.

Appeal against the decree of the Court of the Subordinate Judge, Guntur in A.S. No. 246 of 1946, preferred against the decree of the Court of the District Munsif, Gurzala in C.S. No. 262 of 1945.

The Court delivered the following

JUDGMENT.—This second appeal is against the decree and judgment of the Court of the Subordinate Judge of Guntur confirming that of the District Munsif

*S.A. No. 861 of 1948. 2nd November, 1951.

of Gurzala in O.S. No. 262 of 1945, a suit filed by the managing trustee of Sree Sitaramaswamivaru for delivery of possession of the plaint schedule property to the plaintiff or to the plaintiff and defendants 2 to 6 and subsequent mesne profits.

Hanumanthu, the plaintiff, Balayya, the husband of the first defendant China Palayya and Kanaka Palayya, defendants 2 and 3 are the divided sons of one Veerayya. Defendants 4 and 5 are the sons-in-law of Veerayya. Defendant 6 is the grandson of Veerayya by his daughter. Veerayya constructed a temple for God Sitaramaswamivaru and executed a will, Exhibit P-1, dated 22nd August, 1934 endowing certain properties to the temple and also prescribing the machinery for its management. Under that will, his four sons were constituted trustees and his two sons-in-law and the grandson were appointed trustee members. Palayya, his eldest son, was appointed managing trustee. After the death of Veerayya, the properties endowed were managed in accordance with the directions given in his will. Palayya executed another will, Exhibit P-3, dated 20th August, 1941 endowing other properties and also directing the person appointed as managing trustee for God Sree Sitaramaswamivaru after his lifetime to manage the properties. The plaintiff, the present managing trustee, filed the aforesaid suit for delivery of possession of the plaint schedule property and for mesne profits. The suit was decreed by the Courts below.

It is not necessary to particularise all the contentions raised by the defendants and the findings of the Courts as Mr. Ramanarasu confined his argument only to one question. He argued that as Veerayya appointed the first defendant's husband as one of the trustees without words of express limitation, her husband acquired an estate of inheritance. I shall now proceed to consider the cases cited by him in support of his argument. In *Tripurai Pal* v. *Jagat Tarini Dasi*[1], the facts were : A testator after declaring the properties to be debutter for the maintenance of the family idol stated in his will that his son, on attaining majority, would personally conduct the work of the *sheba*, and if he died his (the testator's) widow would be the *shebait* and that after her, his daughters by her would be *shebaits*. The Judicial Committee in a short judgment held that under the will there was an absolute gift of the shebaitship to the son and it was not cut down by anything that followed in the will. On the construction of that will, their Lordships held that the son got an estate of inheritance in the shebaitship. This judgment was construed and relied upon by a Bench of this Court consisting of Madhavan Nair and Stodart, JJ., in the case of succession to the trusteship—vide *Putti Ramachar* v. *Venkatarao*[2]. The right to succeed depended upon the construction of the will which was in the following terms :

> "I have set apart the undermentioned lands for charity, for the cost of building Hanumantharayan's temple, for the worship and the daily upkeep of the same. For the purpose of conducting this charity my second son *V* has been appointed to the management . . . . Whereas I have appointed *V* my second son as manager to administer the charities out of the dedicated properties, if the said charities be not conducted properly the leading persons in the village shall intervene and conduct the said charity properly. My sons *K*, *V* and *R* shall have no right whatever in the properties dedicated to the said charities."

The learned Judges held that the will conferred heritable trsuteeship on *V* though in appointing him to the office, the testator did not make any express provision for the succession after the son's death. It is true that the learned Judges accepted the respondents' case that where the deed conferred trusteeship on the founder's son without further words, it does by implication make provision for the appointment of trustees to succeed him. But the judgment cannot be understood to mean that the learned Judges overruled the general and well accepted rule of construction that the intention of the testator should be gathered from a reading of the entire document. Indeed, when *Gopal Lal Sett* v. *Purnachandra Basak*[3] was cited, they distinguished that case on the ground that they did not know more of the details of the will by which the trust was founded. I would have followed that judgment,

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1. (1912) I.L.R. 40 I.A. 37 : 40 Cal. 274 (P.C.).
2. (1938) 2 M.L.J. 623.
3. (1921) 43 M.L.J. 116 : 49 I.A. 100 49 Cal. 459 (P.C.).

as I should do, if in this case the testator conferred the right of trusteeship on his son alone without any words of limitation. The decision of the Judicial Committee in *Gopal Lal Sett* v. *Purnachandra Basak*[1] is clear authority for the position that it is not an inflexible rule of law or construction that whenever a trusteeship is conferred upon a person without words of limitation, the said person will get an estate of inheritance. For, in that case, the Hindu testatrix appointed her grandson to perform the worship of certain family idols and directed that he should be the person in charge of the worship. Their Lordships held that no heritable shebaitship was created. Mayne on Hindu Law, 10th edition, summarises the law on the subject at page 940 as follows :

> "The devolution of the office of shebait of an idol or of Dharmakartha of a temple or manager of a charitable endowment, upon the death or termination of office of the incumbent depends upon the terms upon which it was created, or usage of each particular institution, where no express deed of trust or foundation exists. Where nothing is said in the grant as to the succession, the right of management passes by inheritance to the natural heirs of the donee, according to the rule, that a grant without words of limitation conveys an estate of inheritance, unless such devolution is inconsistent with, or opposed to the purpose, the founder had in view in creating the trust or where the office is descendible to a single heir."

The following principles may be gathered from the aforesaid discussion of the case law : The general and accepted rule of construction, namely, that the express intention of a testator should be gathered from a reading of the entire will is paramount. But if the testator appointed a person as sole trustee without words of limitation and there is no indication in the document to the contrary, the said grant conveys an estate of inheritance. But the rule is not inflexible and in a case where the will contains other directions which are inconsistent with such intention, the Court should give effect to his real intention.

Applying these principles, I find it very difficult to hold on a fair reading of the entire will, Exhibit P-1, that the testator intended to confer on his eldest son an estate of inheritance. Under the will the testator made a scheme providing for checks and counter-checks. He created three classes of trustees—managing trustee, trustees, and trustee members. The mode of devolution in the case of managing trustee was also provided by him. If the eldest son Palayya should be removed from the managing trusteeship, one of his other three sons should be appointed managing trustee. The provisions of the will also indicate that the testator had no confidence in women for he preferred his sons-in-law and his grandson to his daughters. It could not have been his intention that the wife of any of his sons should take part in the management of the endowments to the temple. This is not a simple case of a testator making an absolute gift of shebaitship or trusteeship to one of his sons without any words of limitation. I would therefore hold on a construction of the provisions of the will that Palayya did not get an estate of inheritance under the will. The judgment of the lower Court is therefore correct. No other point was raised. This second appeal fails and is dismissed with costs.

No leave.

V.P.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

N. C. Ganapathi Chettiar .. *Petitioner**

v.

Seth Chunilal .. *Respondent.*

Presidency Small Cause Courts Act (XV of 1882), section 38—Order directing plaint to be returned for presentation to proper Court—Right to new trial.

When a Presidency Small Cause Court orders a plaint to be returned for presentation to the proper Court having jurisdiction, the order will not amount to an order entitling the party

1. (1921) 43 M.L.J. 116 : L.R. 49 I.A. 100 : I.L.R. 49 Cal. 459 (P.C.).

*C.R.P. No. 1145 of 1950. 26th October, 1951.

for a new trial under section 38 of the Presidency Small Cause Courts Act. Every order in a suit, even if passed after contest, will not be an 'order' in respect of which a new trial can be claimed under section 38 of the Act. Further, the mere returning of a plaint for presentation to another Court will not be "disposing of the suit."

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the Court of Small Causes, Madras, in N.T.A. No. 403 of 1948 in suit No. 2627 of 1948.

M. V. Ganapathi for Petitioner.

P. V. Subrahmanyam for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises an interesting question of law *viz.*, whether when a Presidency Court of Small Causes orders a plaint to be returned for presentation to the proper Court having jurisdiction, the order in question will amount to an order entitling the party for a new trial under section 38 of the Presidency Small Cause Courts Act.

The facts are briefly these: The petitioner, Ganapathi Chettiar, a merchant of Erode, had filed S.C.S. No. 2627 of 1948 in the Court of Small Causes at Madras for refund of an advance of Rs. 400 paid by his son, on his behalf, to one Seth Chunilal, a merchant or commission agent at Agra, for purchase of pulses, under a contract, Exhibit D-1, dated 2nd March, 1948, on the ground that the pulses supplied were of inferior quality and he had repudiated the contract. The learned Judge of the Court of Small Causes, after hearing both sides, and discussing many contentions and issues, finally passed an order, on issue 3, returning the plaint for presentation to the proper Court, *viz.*, the Court at Agra, holding that his Court had no jurisdiction to try this suit, as no part of the cause of action had arisen here. Against this, the petitioner filed New Trial Application No. 43 of 1948. The Chief Judge and another Judge of the Court of Small Causes heard the application, and, on a preliminary point taken by the defendant before them, held that the petition would not lie under section 38 as it was conceded before them that the order of the Small Cause Court would not amount to a "decree", and as they considered that it would not also be an "order", relying on the rulings in *Chinnathambi Mudaliar* v. *Veerabadriah Naidoo*[1], and *Haji Mohamed Din* v. *Allan*[2]. So they dismissed the New Trial application. Hence, the Civil Revision Petition.

Mr. Ganapathi, for the petitioner, urges that the Full Bench of the Court of Small Causes erred in their view in holding that the order of the Small Cause Judge would not be an "order", under section 38 within the meaning of the Calcutta ruling quoted by them, though it might not be a "decree". He urges that the order in question was an order which in some way or other "disposed of the suit" and so would come within the meaning given to the word "order" in the Calcutta ruling, as the order of the Small Cause Judge had "disposed of the suit" so far as his Court was concerned, by taking it off his file. The learned counsel for the petitioner admitted that the ruling in *Chinnathambi Mudaliar* v. *Veerabadriah Naidoo*[1], was against him, and that that ruling bluntly says that the word "order" in section 38 means "an order which has the effect of a decree", and that he was unable to quote before me a single ruling of this Court, in all the 100 years of the existence of the Presidency Small Cause Court, Madras, where an order of a Presidency Small Cause Court Judge returning a plaint has been held to be an "order" within the meaning of section 38 or of the corresponding section which existed before the present Presidency Small Cause Courts Act. The fact that the learned counsel for the respondent could not give a second ruling to the contrary (besides that in (1902) I.L.R. 26 Mad. 163) is, no doubt true, but is not so significant. Where a right does not exist, we will not find a ruling in favour of it, and we will find only a ruling or two the other way. Thus, a search in the Law Reports for a ruling giving a casual concubine a right of maintenance against her paramour will prove in vain, and there will be

1. (1902) I.L.R. 26 Mad. 163. 2. I.L.R. (1938) 2 Cal. 637.

only a ruling or two the other way, it being so obvious. The only ruling of this Court on the point involved in this case is the ruling in *Chinnathambi Mudaliar* v. *Veerabadriah Naidoo*[1], which is directly against the petitioner as even he admits that the order of the Small Cause Court Judge is not a decree and has not the effect of a decree. Merely returning a plaint for presentation to another Court will, in my opinion, also not be "disposing of the suit", within the meaning of the ruling in *Haji Mohamed Din* v. *Allan*[2], any more than removing a library from downstairs to upstairs of the same building, or to an adjacent building, will be "disposing of" the library. Only when the merits of the suit claim are gone into and an order passed can the order come within the meaning of the word "order" in section 38. Surely, the phrase "new trial" itself implies an old trial and disposal on merits.

The learned counsel for the petitioner relied on the wording of section 25 of the Provincial Small Cause Courts Act, and contended that the orders, which could be brought up for revision under section 25 of the Provincial Small Cause Courts Act could also be brought up for new trial under section 38 of the Presidency Small Cause Courts Act. I cannot agree. The two Acts and sections are different, and section 25 of the Provincial Small Cause Courts Act, dealing with revisions to this Court, cannot be relied on for bolstering up this new claim for a new trial under section 38 of the Presidency Small Cause Courts Act.

Then, the learned counsel for the petitioner urged that section 38 simply mentions two conditions for claiming a new trial, *viz*., that the suit should have been contested, and that the order in respect of which the new trial is sought should be an "order" in the suit after contest, and that the application for new trial should be filed within the time prescribed, and that it is illegal and unreasonable to add to these conditions by virtue of the two rulings mentioned above. I cannot agree. Every order in a suit, even if passed after contest, will not be an "order" in respect of which a new trial can be claimed under section 38, and the two rulings merely interpret the meaning of the word "order" in section 38. Merely reading the wording of a section and putting the grammatical meaning on it, ignoring the interpretation put on it by High Courts, as in the Calcutta and Madras rulings quoted above, will not do, as law is a learned profession, and the words in Acts are words of art requiring to be interpreted. Every section and every material word in a section has to be construed in accordance with the authoritative interpretation put upon it by learned Judges of competent Courts after hearing the arguments of the learned counsel appearing in those cases. It is no use bringing a dictionary to a Court and reading out from it the meaning of the English words used in the Acts, and opposing them to the authoritative meanings given by competent Courts. Besides if the learned counsel's arguments were right, even an "order refusing an adjournment" in a smal cause suit, passed after contest, *i.e*., after hearing both sides, will entitle the aggrieved party to claim a new trial; I need not discuss the matter further. In my opinion, the lower Court's order was correct though it is supported only by one ruling directly on the point. This petition deserves to be and is hereby dismissed, but, in the circumstances, without costs.

K.C. *Petition dismissed.*

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1. (1902) I.L.R. 26 Mad. 163.

2. I.L.R. (1938) 2 Cal. 637.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

Sri Rajah Ravu Sweta Chelapathi Ramakrishna Ranga Rao Bahadur, Rajah of Bobbili .. *Petitioner**

v.

The State of Madras represented by the Collector of Vizagapatam .. *Respondent.*

Madras Estates Land (Reduction of Rent) Act (XXX of 1947)—Validity—Scope and effect—Government of India Act (1935), section 299 (2) and Schedule VII, List II, Entry No. 21 and Constitution of India, 1950, Articles 13, 14 and 19—Madras Act VII of 1951 amending Act XXX of 1947—Validity.

The mere reduction of rent is not acquisition of property within the meaning of section 299 (2) of the Government of India Act, 1935. The effect of Madras Act XXX of 1947 may be summed up thus : The landlord continues to be the owner of the estate as before, his title being left untouched. As for possession it was the tenant who was entitled to it, the right of the landlord being only to recover rent and that right again is left unaffected by the legislation. The only change that has been effected is that the collection of rent is to be made not by the landlord but by the Government. Even assuming that section 299 (2) of the Government of India Act, 1935, would cover cases of possession there is no such taking of possession in the present case. The right to receive rent is wholly left in tact and has not been taken away. The right to receive rents is nothing more than a power and section 299 (2) of the Government of India Act, 1935, is limited to acquisition of land or interests in land and not to grants of powers. The right is not an interest in immoveable property.

Madras Act XXX of 1947 is not bad as infringing the requirements of section 299 (2) of the Government of India Act, 1935. Nor is the Act beyond the competence of the Provincial Legislature. Entry No. 21 of List II of Schedule VII to the Government of India Act, 1935, is wide enough to cover the Madras Act XXX of 1947.

Even if section 3 (4) of the Act be *ultra vires* the other provisions relating to reduction of rent would be valid.

The Act has not become void under Article 13 of the Constitution as being inconsistent with the fundamental rights declared in Article 31 (2), Article 19 and Article 14. The Act is saved by Article 19 (5) as a reasonable limitation on the rights of the proprietor made in the interests of the public.

Madras Act XXX of 1947 was valid when it was passed and has not become invalid under the Constitution of India, 1950. Madras Act VII of 1951 amending Madras Act XXX of 1947 is also valid.

Petitions under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *Mandamus* directing the State of Madras to rescind the Notification No. 2559, published at page 1232 of Part I of the *Fort St. George Gazette*, dated 2nd May, 1950, in respect of the hamlet of Janardhanarangarayapuram, or Janardhanapuram Agraharam in Bobbili Taluk, Visakapatnam District and also to forbear from collecting rents or taking any proceedings under the said notification in respect of the said hamlet or in the alternative, to issue a writ of *certiorari* calling for the records of the proceedings taken under the Madras Act XXX of 1947 in respect of the said hamlet and to quash the said notification of the proceedings therein.

K. Umamaheswaram for *Alladi Kuppuswami, R. Kesava Aiyangar* and *K. Parasaran, V. Vedantachari, G. Venkatarama Sastri, C. V. Dikshitulu, N. Rajeswara Rao* and *K. V. R. Sarma* for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) for the State Counsel (*John and Row*) for the State.

The Court delivered the following

JUDGMENTS : *The Chief Justice*.—In this batch of applications filed on behalf of several landholders in the State, a common question arises as to the validity of Madras Act XXX of 1947 and of Madras Act VII of 1951 which amended the former Act in certain particulars. Individual applications also raise other questions, but it was considered convenient to hear and dispose of the main question before dealing with other subsidiary questions. Madras Act XXX of 1947 received the assent of the Governor on the 6th January, 1948. It is called the Madras Estates Land (Reduction of Rent) Act, 1947. The descriptive title runs as follows :

* C.M.Ps. Nos. 894 and 895 of 1951. 14th September, 1951.

" An Act to provide for the reduction of rents payable by ryots in estates governed by the Madras Estates Land Act, 1908, approximately to the level of the assessments levied on lands in ryotwari areas in the neighbourhood."

The following is the preamble to the Act :

" Whereas the rents now payable by ryots in estates governed by the Madras Estates Land Act, 1908, are in many cases substantially higher than the assessments levied on lands in ryotwari areas, in the neighbourhood ;

and whereas it is expedient to provide for reduction of such rents approximately to the level of the ryotwari assessments in the neighbourhood."

The Act applies to all estates as defined in section 3, clause (2) of the Madras Estates Land Act, 1908. These estates include zamindaries and major inams. Section 2 of the Act provides for the appointment of a Special Officer for the purpose of recommending a fair and equitable rate of rent in the ryotwari lands in such estate or estates in respect of which he is appointed. He has to first determine in respect of each village in an estate the average rate of cash rent per acre prevailing at the commencement of the Act for each class of ryoti land in that village such as wet, dry and garden. Where no cash rents are prevalent in the village in respect of any class of land, the officer has to determine the average rate of cash rent per acre prevailing for such class of land in the nearest village in the estate for which cash rents are prevalent for such class of land and in which conditions are generally similar to those obtaining in the principal village, or where there is no such village in the estate in the nearest village in the nearest estate in respect of which village both the above requirements are satisfied. The Special Officer has then to determine the average rate of assessment per acre prevailing at the commencement of the Act in respect of each of the classes of land in the nearest ryotwari area in which conditions are generally similar to those obtaining in the estate village. He has then to compare the average rates of cash rent prevailing in the estate village or as determined in the manner aforesaid with the average rates of assessment in the nearest ryotwari area and after making due allowance for any difference in the conditions prevailing in the two cases determine the extent, if any, to which the rates of rent payable for each class of ryoti land in the estate village should be, in his opinion, reduced. He shall then fix the rates of rent payable for each such class of land after such reduction. Explanation I is important, as a point was made on its terms :

" The Special Officer shall have power only to determine that the rents payable for any class of ryoti land in the principal village shall be reduced ; and he shall have no power to determine that such rents shall be enhanced."

Explanation II declares that the extent of reduction shall also apply where rent in the village is paid in cash or on the estimated value of the share of the crop and in cases where rent is payable partly in kind and partly in cash. When the Special Officer has completed his task in any estate, he will submit his recommendations to the Provincial Government through the Board of Revenue specifying the extent if any to which the rents for each class of ryoti land in each village or group of villages in the estate should be reduced and the rate of rent payable for each such class after such reduction. The Provincial Government after considering the recommendations of the Special Officer and the remarks of the Board of Revenue thereon shall by order published in *Fort St. George Gazette* fix the rates of rent payable in respect of each class of ryoti land in each village in the estate. It is specially provided, however, that where the rate of rent fixed in respect of ryoti land of any class exceeds the rate of rent payable in respect thereof at the commencement of the Act only the latter rate of rent shall be payable in respect of such land. The order of the Provincial Government shall take effect from the commencement of the fasli year 1357. Section 3 (4) is another important provision which figures prominently in the arguments before this Court and may be set out in full.

" After such an order has taken effect in respect of any estate or portion of an estate, the rents due in respect of ryoti lands in such estate or portion with effect from the commencement of the fasli year 1357 as well as the rents which have fallen or may fall due in respect of such lands for any fasli subsequent to fasli 1357 until the commencement of the fasli year in which the estate may be finally taken over by the Provincial Government shall be recovered by the Provincial Government as if such rents

were arrears of land revenue due to them: and the amount so recovered in respect of each fasli after deducting therefrom the cost of such recovery as determined in accordance with such rules as may be made by the Provincial Government in that behalf, and also the peshkush, cesses, and other moneys due from the landholder to the Provincial Government and constituting a charge on the estate shall be paid to the landholder."

Once an order is published under section 3 (2) in respect of any estate or portion thereof, a ryot is not bound to pay rent for any ryoti land held by him at a rate exceeding that fixed by the order, notwithstanding anything contained in the Madras Estates Land Act, 1908. Sections 5 and 6 deal specially with the estates endowed for religious, educational and charitable institutions. Section 7 confers power on the Provincial Government to make rules to carry out the purpose of the Act. Section 8 declares that the validity of the following orders and proceedings shall not be liable to be questioned in any Court of law:

"(i) any order made under section 3, sub-section (2);

(ii) any recovery of rent affected by the Provincial Government under section 3, sub-section (4), or any payment made by them to the landholder under the same sub-section;

(iii) any determination of net income or average net income made under section 5, sub-section (2)."

The Amending Act (No. VII of 1951) received the assent of the President on the 17th April, 1951. Sections 2 and 3 of this Act are the most important. By section 2, the following words were added both in the long title and in the second paragraph of the preamble at the end:

"and for the collection of such rents exclusively by the State Government."

Section 3 amended section 3 of the original Act as follows:

"(i) in sub-section (4) after the words "finally taken over by the Estate Government," the words, brackets and figure "and any interest payable on such rents under sub-section (6)" and after the words "as if such rents", the words "and interest" shall be inserted;

(ii) to the same sub-section the following Explanation shall be added, namely:

Explanation—the Provisions of this sub-section shall apply to an estate, whether the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, applies to it or not."

After sub-section (4) three new sub-sections were added. Of these sub-sections sub-section (7) is material. It runs thus:

"The landholder shall not be entitled to collect, and the provisions of Chapters V and VI of the Madras Estates Land Act, 1908, shall cease to apply to, any rents or interest recoverable by the State Government under sub-section (4)."

Section 4 of the Amending Act provides for the dismissal of all suits and proceedings pending at the commencement of that Act in which the landholder seeks to establish against the State Government his right to collect or to recover from a ryot the rents to which the provisions of section 3 (4) of the Act shall apply. There is finally a provision [section 4 (2)] which enables the Court on the application of any person affected by such decree to vacate a decree or order passed before the commencement of the Act which is inconsistent with the provisions of section 3, sub-sections (4), (5) and (6) of the Act as amended, and after vacating the decree the Court shall pass a fresh decree or order which shall be in conformity with the provisions aforesaid.

It is obvious that the Amending Act by itself can have no place in the statute book and cannot remain in force if for any reason it is held that the original Act is invalid. There is one difference between the original Act and the Amending Act, and that is that while the former Act was passed while the Government of India Act, 1935, was in force, the later Act was passed after the coming into force of the Constitution of India. The validity of the original Act was impugned by the petitioners firstly on the ground that it was void even when it was passed, because it contravened certain provisions of the Government of India Act, 1935, and secondly, on the ground that in any event after the Constitution came into force, the Act became null and void as being inconsistent with certain of the Articles in Part III of the Constitution.

The first ground of attack is that the Act substantially reduces the rents payable to the landholders and also takes away from them the right to collect the rents and therefore the Act relates to acquisition of land and as the Act does not provide for the payment of compensation to the landholders, it is in contravention of section 299 (2) of the Government of India Act, 1935, which says :—

> "Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land, or any commercial or industrial undertaking, or any interest in, or in any company owning an commercial or industrial undertaking, unless the law provides for the payment of compensation for the property acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which it is to be determined."

The next ground is that if it be held that the Act did not relate to compulsory acquisition, then, the Act did not fall within the legislative competence of the Province, as the subject-matter is not covered by any of the entries in the provincial or concurrent lists. The only entry which could be pressed into service, leaving apart Entry No. 9 of the provincial list, is Entry No. 21. Even if this can comprise the provisions relating to reduction of rents, it cannot include within its ambit the provision which confers on the Government the exclusive right to collect the rents and deprives the landlord of such right.

These contentions are based on the Government of India Act, 1935. The contentions based on the provisions of the Constitution of India are (i) that the Act infringes the fundamental right declared in favour of every citizen in and by Article 19 (1) (*f*); (ii) that the Act contravenes Article 31 (2) of the Constitution.

It was then argued—and this argument was the same whether the Government of India Act applied or the Constitution of India—that in case it is found that either of the two main provisions of the Act is invalid, namely, either the reduction of rents or the taking over of the right to collect rents, then the Act in its entirety should be declared *ultra vires* and void : the offending provisions alone cannot be discarded and the remaining provisions be allowed to stand.

The Bill which ultimately became law as Act XXX of 1947 was first published in the *Fort St. George Gazette*, dated 30th September, 1947, as Bill No. XXIV of 1947. Along with this there were two other Bills published, namely : the Madras Estates Communal and Forest and Private Lands Prohibition of Alienation Bill (subsequently enacted as Act XIV of 1947) and (2) Madras Estates (Repeal of Permanent Settlement and Conversion into Ryotwari) Bill (No. XXXVII of 1947) which was afterwards passed as Act XXVI of 1948. The statement of objects and reasons for Bill No. XXIV of 1947 (which eventually became Act XXX of 1947) was as follows :

> "It is the policy of the Government to replace the amindari by the ryotwari system at the earliest possible date. It will however take some time to pass the requisite legislation on the subject and to bring it into force in all the estates in this province.
>
> The agrarian situation in estates, especially in the Circars, is worsening day by day and there is a growing agitation for the reduction of the high rents which prevail now. The Government consider that some immediate relief should be given to ryots and the object of this Bill is to provide for the reduction of rents in estates roughly to the level of the assessment prevailing in the neighbouring ryotwari areas. After the assessment has been finally fixed, the rights *inter se* of the landholders and ryots in respect of the intervening period commencing with the current fasli will be suitably adjusted."

It will be seen that eventually there were changes in the enactments as actually passed from the original provisions. Whereas Bill No. XXXVII contemplated an Act which applied to all estates to which the Bill No. XXIV of 1947 applied, actually when the Act came to be passed, there was an important difference. Act XXVI of 1948 was not made applicable to inams falling within section 3 (*d*) of the Madras Estates Land Act.

We shall now take up the several contentions on behalf of the petitioners. Mr. K. Umamaheswaram who appeared on behalf of some of the landholders put forward his case as regards section 299 (2) of the Government of India Act, 1935 on an alternative basis. He first contended that the reduction of rents and the taking over of the rights of collection by the Government both amount to compulsory acquisition, and in the alternative that in any event the latter at least amounted

to such acquisition. Learned counsel relied on decisions of the Supreme Court of the United States and several other decisions of other Courts including the Supreme Court of India. In *Pennsylvania Coal Company* v. *Mahon*[1] it was held that a statute prohibiting the mining of coal under private dwellings or streets of cities in places where the right to mine such coal is reserved in the grant is unconstitutional as taking property without due process of law. This case is not of much assistance, because it was admitted that the statute did destroy previously existing rights of property and contract. The only question was whether the police power could be stretched so far as to justify the legislation. The Supreme Court held that it could not be. Mr. Justice Holmes delivered the opinion of the Court and he summed up the true position thus :

> "Government could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognised, some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the dimunution. When it reaches a certain magnitude, in most, if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the Legislature has gone beyond its constitutional power."

The general rule was that "while property may be regulated to a certain extent, if the regulation goes too far, it will be recognised as a taking." The following observations have been oft-repeated in America and have been quoted by our own Supreme Court :

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Ultimately, however, the question was one of degree and could not be disposed of by general propositions. Mr. Justice Brandesis dissented. He pointed out that every restriction upon the use of property imposed in the exercise of police power deprives the owner of some right and is in that sense an abridgment by the state of rights in property without making compensation. Of course the restriction could be lawfully imposed only when its purpose was to protect the public interests. But the purpose of the restriction, he observed,

> "does not cease to be public because incidentally some private persons may thereby receive gratuitously valuable special benefits."

Dealing with the point emphasised by Mr. Justice Holmes that the main consideration for determining whether the limits of the police power had been exceeded was the extent of the resulting diminution in value, the learned Judge laid stress on the fact that values are relative. On the facts of the case before him, he was of the opinion that it had not been proved that there was an unreasonable exercise of the police power. *In United States* v. *Causby*[2] the facts were peculiar and as follows. The plaintiff in the case owned a dwelling house with a compound and outhouses which were used for raising chickens near an airport. The end of one of the airport's runaways was very near the plaintiff's barn and house. Various aircrafts of the United States used to fly over the plaintiff's property at a height below the prescribed minimum and interfered with the normal use of the plaintiff's chicken farm. There was also a great inconvenience to the plaintiff as the plaintiff and members of his family were frequently deprived of their sleep and the family became nervous and frightened. On the basis of those facts, it was found that the plaintiff's property had depreciated in value. The question was whether there was such a taking of the plaintiff's property as to give him a constitutional right to compensation. It was held by the Supreme Court of the United States that there was. It was held that the damage to the property of the plaintiff in the case was not incidental and consequential from a legalised nuisance and therefore there would be a taking of an easement of flight. Here again the question was one of fact, because the normal inconveniences which the flight of aircraft may cause

1. 260 U.S. 393 : 67 Law Ed. 322.

2. 328 U.S. 256 : 90 Law Ed. 1206.

will not be compensable, but if the flights were so low and frequent as to have a direct and immediate interference with the enjoyment and use of private land, then there would be a taking.

Besides citing these two cases, learned Counsel for the petitioners also cited certain passages from text books. In Corwin's "The Constitution and what it means today," the author sets out when property can be deemed to be taken. At page 174, he says :

"Property is 'taken' generally speaking, only when title to it is transferred to the Government or the Government takes over or assumes to control its valuable uses, or when, in the case of land, it commits a deliberate and protracted trespass, as by the repeated and persistent discharge of heavy guns across the grounds of a summer resort, with the natural result of frightening off the public; or the frequent flight at low altitudes of Army and Navy planes over a commercial chicken farm, with the natural result of destroying the value of the property for that use."

Willis in his Constitutional Law after referring to the divergence of opinion as to what will amount to taking of private property for a public use says that a newer view point on the subject is not to take a too narrow and mechanical view as to what amounts to "taking." "Ownership relates to rights, powers, privileges, and immunities concerning either land or chattels." Whenever any of these incidents of ownership are taken or destroyed, there would be taking of property according to the broader view point. The broader rule is thus stated :

"There is a taking whenever any incident of property, whether a right, power, privilege, or immunity of ownership, is taken from the owner."

Learned Counsel relied upon the observations made in the *Sholapur Mills Case, Chiranji Lal Chowdhry* v. *Union of India*[1] that acquisition of property need not mean necessarily an acquisition of the totality of interests of the owner in that property. Mukherjee, J., though he discussed the question, did not think it necessary to decide whether the word "property" as used in Article 31 (2) of the Constitution (corresponding to section 299 (2) of the Government of India Act, 1935) connotes the entire property, that is to say, the totality of the rights which the ownership of the objects connotes. But His Lordship was evidently not inclined to accept the broad contention of the learned Attorney-General that so long as the owner is not deprived of all the rights in and to the property, and some rights, however insignificant they might be still remain in the owner, there cannot be any dispossession as contemplated by that Article. The test would be as to

"whether the owner has been dispossessed substantially from the rights held by him or the loss is only with regard to some minor ingredients of the proprietary right."

Das, J. was more pronounced in his opinion. He said :

"In my judgment the question whether the Ordinance or the Act has deprived the shareholder of his 'property' must depend, for its answer, on whether it has taken away the substantial bulk of the rights constituting his 'property'. In other words, if the rights taken away by the Ordinance or the Act are such as would render the rights left untouched, illusory and practically valueless, then there can be no question that in effect and substance the 'property' of the shareholder has been taken away by the Ordinance or the Act."

But their Lordships referred to a well known passage from the judgment of Rich, J., in the *Minister of State for the Army* v. *Dalziel*[2] which runs thus :

"Property, in relation to lands, is a bundle of rights exercisable with respect to the land. The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum to suggest that the Legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating."

The judgment of the High Court of Australia in *McClintock* v. *The Commonwealth*[3] was also relied by the learned Counsel for the petitioners. In that case growers of pineapples were directed by orders made under the National Security (General) Regulations to deliver a prescribed percentage of their pineapples to a specified representative committee as agent for a department of the Commonwealth. Pay-

1. (1951) S.C.J. 29.
2. (1943-44) 68 C.L.R. 261.
3. 75 C.L.R. 1.

ment for pineappeles so delivered was to be made at rates fixed from time to time by another committee. This provision was impugned on the ground that there was acquisition of property without providing just terms for such acquisition. The action was dismissed by the Supreme Court of Queensland, on the ground that although the order was invalid because they did not provide just terms, the plaintiff had delivered his pineapples voluntarily and therefore was not entitled either to compensation or damages. We are not concerned with the decision in this case which has no direct bearing on the questions which fall to be decided in this, but Mr. Umamaheswaram relied on the following passage in the judgment of Starke, J., :

> "The effect of Order No. 1 and the directions given under it is to require the grower to pick and deliver his pineapples as directed and fixes the price which is to be paid therefor. It certainly regulates the distribution and sale of the pineapples and controls the prices at which they may be sold. In operation, it compels a grower to deliver his pineapples to canners at a fixed price. Such a transaction is a forced sale and result in the acquisition of property by some canner. And, therefore, the legislation, regulation and order must be founded on the constitutional power to make laws with respect to the acquisition of property."

In my opinion much assistance cannot be derived from the American cases cited to us and similar cases not cited. The Fifth Amendment to the American Constitution declared *inter alia* that no person shall be deprived of life, liberty or property without due process of law and that private property shall not be taken for public use without just compensation. Due process of law as a matter of substance has not been understood and interpreted as forbidding all social control. It protects personal liberty including property rights against social control, unless such social control is in the constitutional exercise of either the police power or the power of taxation or the power of eminent domain. Police power is the power vested in the Legislature of the State to make reasonable laws for the good and welfare of the people and designed to promote public convenience and general prosperity as well as to make regulations designed to promote public health, public policy and public safety and to preserve public order. Taxation is the legal capacity of a Government to impose charges upon persons or their property, to raise revenue for Governmental purposes. Under the due process clause, personal liberty is protected against taxation only when such taxation is unreasonable (in the eyes of the Supreme Court). As a general rule, taxation is reasonable when it is for a public purpose. Eminent domain is the legal capacity of a sovereign or a Governmental agent to take private property for public use upon the payment of just compensation. Like police power and taxation, eminent domain is "the offspring of political necessity." There are times when it is difficult to draw a clear line of distinction between the exercise of police power and the exercise of the power of eminent domain, though the distinction becomes very important on account of the fact that in the case of the former no compensation is required ; whereas in the latter cases, compensation is required.

The express limitation contained in the Fifth Amendment prohibits the "taking" of private property for a public use without just compensation. Property would obviously comprise not only land and buildings but also rights in and to property just as water rights, easements, etc. As the passage cited earlier on from Willis indicates, even in America there has been a divergence of opinion as to the interpretation of the word "taking." Of course where physical property is taken or there is a physical occupation of property, there can be no doubt, though all the incidents of ownership are not taken. It has been held that there is a "taking" where some incident of ownership is taken, but there are also many instances of taking to be found in American reports when there is no direct appropriation. In many cases a very extended meaning is given to the word "taking." To give an example the installation by railway of a fanning system in a tunnel which causes the emission of gas and smoke to the injury of the owners located near by the railway has been held to amount to taking. *Pennsylvania Coal Company* v. *Mahon*[1] above referred and cited by the petitioners is a similar example, while the case in *United States* v. *Causby*[2]

1. 260 U.S. 393 : 67 Law Ed. 322.
2. 328 U.S. 256 : 90 Law Ed. 1206.

is an extreme instance of the application of the broad rule as to when taking occurs within the meaning of the Fifth Amendment.

In my opinion, I do not think we shall be justified in importing all these rules into a discussion as to the interpretation of the word "*acquisition*" in sectilon 299 of the Government of India Act, 1935. In my opinion, though every instance of acquisition of property would be an instance of taking of property, the converse is not true. Every instance of taking as understood by later American decisions would not amount to acquisition within the meaning of that term in section 299. Even giving the word "property" or "land" the widest connotation, I think, there should be an element of transference before it can be said that there is an acquisition of any interest in land or in property. Even in America, the earlier view was narrow and a strict conception of "taking" was adopted and it was held that it required a physical invasion of the property affected by the appropriation, an actual seizure of the premises or a permanent ouster of the owner or such an interference with the rights of an owner as to deprive him of control of his property. But later authority abandoned this strict construction. Nichols in his "The Law of Eminent Domain" 1950 Edition sums up the later view thus :

> "The modern and prevailing view is that any substantial interference with private property which destroys or lessens its value, or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a 'taking' in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed."

Thus it has been held that a legal restriction upon the use of the land will constitute a taking although the title is unaffected and the land is physically untouched, and likewise when the owner's enjoyment of the land is physically interfered with, although his legal rights remain unimpaired. Nichols says the same thing in another place in the following terms :

> "It is well settled that a taking of property within the meaning of the Constitution may be accomplished without formally divesting the owner of his title to the property or of any interest therein. Any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision. It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation."

I am clearly of opinion that this extended connotation of the word "taking" cannot be given to the term "acquisition" in section 299. "Acquisition" is the nominative of the verb "acquire" which means "gain by oneself and for oneself." When one speaks of acquiring the property of another, there are two ideas, namely, the idea of one gaining some thing which the other is deprived of. There is a divesting and a vesting of property or any interest in property, whether tangible or intangible.

The Australian cases do not in any way help the petitioners to compel us to adopt the American view. The relevant provision in the Australian Constitution, namely, section 51, placitum 31 contains the expression "acquisition of property". The decision in the *Minister of State for the Army* v. *Dalziel*[1], is quite consistent with my construction of the word 'acquisition." In that case Dalziel was a weekly tenant of certain vacant land upon which he carried on the business of a parking station for motor cars. The Minister for the Army purporting to Act under Regulation 54 of the National Security (General) Regulations took possession of this land for defence purposes. The taking of possession was for an indefinite period and it was exclusive. In these circumstances it was held that there was an acquisition of property. Rich, J., in the leading judgment of the Court observed :

> "The language used is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property . . . . . Not only is a right to possession a right of property but where the object of proprietary rights is a tangible thing it is the most characteristic and essential of those rights."

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1. (1943-44) 68 C.L.R. 261.

The view which I have been adumbrating, namely, that the word "acquisition" in section 299 of the Government of India Act imports the idea of transference of rights in property receives support from the following observations of Spens, C.J., in *Kunwar Lal Singh* v. *Central Provinces and Berar*[1] :

"It further seems to us that the word 'acquisition' implies that there must be an actual transference of, and it must be possible to indicate some person or body to whom is or are transferred, the land or rights referred to."

In that case there was an increase of assessment of land revenue and it was held that such increase would not involve the acquisition of any right in or over immovable property, though the position of the landholder would certainly be made worse by the increase of the revenue payable by him, because by a mere increase of the revenue there was no interference by the Government of any land or rights in or over immovable property which remained in the same possession and ownership as immediately before the increase of the assessment. A case very much in point is that relating to the constitutional validity of the United Provinces Tenancy Act (XVII of 1939) in *Jagannath Baksh Singh* v. *United Provinces*[2]. That Act *inter alia* cut down the absolute rights claimed by the talukdars to be comprised in the grant of their estates as evidenced by sanads issued to them. It was contended that the case fell within section 299 (2) of the Government of India Act, 1935, and a Provincial Legislature had no power to pass a law auhorising the compulsory acquisition for public purposes of any land unless the law provided for the payment of compensation for the property acquired. The contention was rejected by the Federal Court. Gwyer, C.J. said (at page 118) :

"The answer to this is that a law which regulates the relations of landlord and tenant and thereby diminishes the rights which the landlord has hitherto exercised in connection with his land does not authorise the compulsory acquisition of the land for public or any other purposes ; and therefore the question of compensation does not arise."

The case went up to the Privy Council, in *Thakur Jagannath Singh* v. *The United Provinces*[3], and the view of the Federal Court was approved. Speaking of the general scope of the Act, Lord Wright said :

"It regulates and secures the rights of the tenants in various respects on lines sufficiently familiar in modern agricultural legislation. It is not contested that in doing so, it impinges on the powers which, but for such a measure, the taluqdars might have exercised within their estates."

The contention based on section 299 was disposed of thus :

"The appellant relies on certain express provisions of the Government of India Act. Thus he relies on section 299 of the Act, which provides that no person shall be deprived of his property in British India save by authority of law, and that neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition of land for public purposes save on the basis of providing for the payment of compensation. But in the present case there is no question of confiscatory legislation. To regulate the relations of landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connection with his land, is different from compulsory acquisition of land."

In *M. D. Sir Kameshwar Singh* v. *State of Bihar*[4], a Full Bench of the Patna High Court had recently occasion to examine the validity of a Bihar Act very similar in scope to the Act now under consideration, namely, the Bihar State Management of Estates and Tenures Act, 1949. It is not necessary to set out the several provisions of that Act. It suffices to state that by that Act the management of certain estates were vested in a manager who was to be an officer, not below the rank of a Deputy Collector. The consequences of placing an estate under the management of the Government were, among others, (*a*) the proprietor shall cease to have any power of management, (*b*) the manager shall take charge of the estates together with buildings, papers and other properties appertaining to the estates (*c*) the proprietor shall be incompetent to mortgage or lease the estates or tenures or any portion thereof (*d*) all rents and profits arising from the estate including arrears of rents and profits shall be payable to the manager. After making certain disbursements the

1. (1944) 1 M.L.J. 510 at 515 : 7 F.L.J. 178 (F.C.).
2. (1943) 2 M.L.J. 114 : 6 F.L.J. 55 (F.C.).
3. (1946) 2 M.L.J. 29 : L.R. 73 I.A. 123 : (1946) F.L.J. 88 (P.C.).
4. (1950) I.L.R. 29 Pat. 790 (S.B.).

manager is directed to pay to the properietor the surplus, if any, remaining out of the moneys collected by him at the end of each financial year. Of the several questions raised in that case one was whether the Act contravened section 299 (2) of the Government of India Act, 1935, because there was an acquisition of property without payment of compensation. Two of the three learned Judges who constituted the Special Bench took the view that the provisions of the Act did not involve an acquisition of land and therefore no question of compensation arose. Shearer, J., found himself unable to accept the argument of Mr. P. R. Das that by the taking over of the management of the estate there was an acquisition. He points out that the proprietor is the main owner of the estate and is alone to be competent to sell or make a gift of it and he is to continue to derive a considerable although, perhaps, a much reduced, income from it. Sinha, J., dealing with this contention said :

> "As already pointed out the impugned Act is a mixture of restraints on the power of alienation of land by a proprietor or a tenure holder, a suspension of his rights of management without acquisition of any rights by the Government to be exercised for the benefit of the public or for the benefit of any particular section of the public."

According to him the pith and substance of the Act was to deprive proprietors of their valuable right to manage their property, but it was not acquisition of any rights in property by the Government (*see* pages 891 and 892).

Now let us look at the Act now impugned. It provides (*a*) for the reduction of rents and (*b*) for the collection of the reduced rents by the Government. I have no hesitation in holding that by reducing the rent payable by a tenant to a landlord, there cannot be an acquisition by the Government of any right or property of the landlord. Undoubtedly, a reduction of rent would adversely affect the landlord. It would deprive him of a part of the benefit which he had been deriving from his property. But that element alone would not render the legislation confiscatory or expropriatory. There is no transference of any right of the landlord to the Government. There is no vesting in the Government of any right of the landlord. The provision merely regulates the relationship between the landlord and the tenant. The landlord is entitled to collect from his tenant only the lawful rent and the Act determines what that lawful rent is. I think that this part of the petitioners' contention is concluded by the decision of the Federal Court in *Jagananth Baksh Singh* v. *United Provinces*[1], affirmed on appeal by the Privy Council in *Thakur Jagannath Baksh Singh* v. *The United Provinces*[2].

Does then the provision relating to the collection of rents by the Government amount to an acquisition? Obviously one of the rights of a landlord in respect of the land which he owns is the right to collect and appropriate the rents and profits from it. If this right is taken over by the Government it may be said that the Government has acquired that interest, but have the Government done so? I think not. All that section 3 (4) of the Act provides is that after a particular date the collection of the rents shall be by the Provincial Government. This collection must be deemed to be made only on behalf of the landholder, because the Government does not have any beneficial interest in the amount collected, except of course, to pay themselves the cost of the collection. The balance of the rents is payable to the landholder. The Government is, as it were, a statutory agent of the landholder for collection. When the landholder appoints an agent to collect the rent from the tenants of his estate, there is no transference of any property right from the landholder to the agent. There is no divesting of any right of the landholder and no corresponding vesting of the same in the agent. In the same way I think that there is no vesting of any property right in Government simply because under the provisions of the Act, the Government alone can recover the rents due to the landholder.

For these reasons I hold that the Act does not in any particular involve an acquisition of land including by that term any interest in land and the Act therefore does not contravene the provisions of section 299 (2) of the Government of India Act, 1935.

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1. (1943) 2 M.L.J. 114 : 6 F.L.J. 55 (F.C.). (1946) F.L.J. 88 (P.C.).
2. (1946) 2 M.L.J. 29 : L.R. 73 I.A. 123 :

The next contention on behalf of the petitioners related to the competence of the Provincial Legislature to pass the impugned enactment. The only entries which could possibly cover the subject-matter of the Act are Entries Nos. 9 and 21 of List II, Provincial Legislative List of Schedule VII of the Government of India Act, 1935. Item 9 is "Compulsory acquisition of land." As I have held that the Act does not involve any acquisition, it follows that Entry No. 9 can have no application. That leaves us with Entry No. 21 which runs as follows :

> "Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonisation; Courts of wards; encumbered and attached estates. treasure trove."

It was not disputed that so far as the provisions relating to reduction of rent are concerned, they would fall within Entry No. 21. Regulation of rent payable by the tenant to the landlord would certainly come within the expression "the relation of landlord and tenant." There was an attempt made by one of the counsel who appeared for some of the petitioners to contend that the relationship between the landholder and the ryot in an estate is not that of landlord and tenant and he called in aid the observations made in several of the early cases in Madras, namely, *Venkata Mahalakshmamma* v. *Ramajogi*[1], *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*[2] and *Lakshminarayana Pantulu* v. *Venkatarayanim*[3], that the landholder and the ryot own two distinct interests in land, the melwaram and the kudiwaram, and in one sense, even the tenant is a proprietor. In *Lakshminarayana Pantulu* v. *Venkatarayanim*[3] the ryot is referred to as a "peasant proprietor." Whatever may be the legal conception in this matter and there has not been uniformity as to this, I think the words "landlord and tenant" in Entry No. 21 are used in their widest sense and so long as the ryot is under an obligation to pay rent either in cash or in kind to the landholder and so long as the estate stands registered in the name of the landholder, it is not inappropriate to describe their relationship as that between landlord and tenant.

It was, however, pressed strongly upon us that the provisions relating to the Government taking over the collection of the rents would not fall within the scope of Entry No. 21. Reliance was placed on the judgment of the Full Bench of the Patna High Court in *N. D. Sir Kameshwar Singh* v. *State of Bihar*[4]. It was there held that Entry No. 21 would not cover the provisions of the Bihar State Management of Estates and Tenures Act which deprived proprietors and tenure-holders of their rights to mangage their property. After referring to a ruling of the Judicial Committee in *Megh Raj* v. *Allah Rakhia*[5], in which their Lordships pointed out that the words "that is to say" following the opening word "land" in Entry No. 21 are not words of limitation but of explanation or illustration of the wide meaning which the Legislature intended to give to the word "land," the learned Judges held that the subject matter of the impugned Act, namely, the taking over and managing the estates by Government officers is not to be found in any of the items of the legislative lists. The reasoning of Shearer, J., is as follows :

> "It seems to me impossible to say that the subject-matter of the enactment is 'the relation of landlord and tenant', still less, that it is 'rights in or over land'. When the attention of the learned Government Pleader was drawn to the latter words in Item 21, Mr. Lalnarayana Sinha said that the right of the plaintiff to manage his property, to collect rent from his raiyats and to make a valid mortgage or lease were taken away by the impugned Act. These, however, are not strictly speaking, rights in property, but are powers incident to ownership . . . . . There can, I think, be no doubt whatever that the draftsman used the words "rights in land" as connoting an interest or estate in land, and not a mere power incident to the right of ownership, and used the words 'rights over land, as con oting an easement, such as right of way or some other incorporeal right."

Sinha, J., said (at page 846) :

> "The provisions of Item 21 of List II do not include the power to take over management of property of such persons as do not come within any of the disabilities imposed by the Court of Wards Act or the Chota Nagpur Encumbered Estates Act, as indicated above."

1. (1892) I.L.R. 16 Mad. 271.
2. (1897) 7 M.L.J. 251 : I.L.R. 20 Mad. 299.
3. (1897) 8 M.L.J. 43 : I.L.R. 21 Mad. 116 (F.B.).
4. (1950) I.L.R. 29 Pat. 790 (S.B.).
5. (1947) 2 M.L.J. 1 : L.R. 74 I.A. 12 : (1947) F.L.J. 28 (P.C.).

Das, J., took a slightly different view. He thought that Item 21 of List II is limited by Item 2 of that List and Items 4, 8, 9 and 10 of List III would cover some of the provisions of impugned Act. Sinha, J., was prepared to hold that Item 21 may cover some of the provisions of the Bihar Act in so far, for instance, as it dealt with collection of rents. But according to him, Item 21 would not cover deprivation of the proprietors' right to manage their property, irrespective of whether they were disqualified persons.

The decision of Bhagwati, J., in *Ten Bug Taim* v. *Collector of Bombay*[1], was also relied on by the petitioners' Counsel. The learned Judge held that the requisition of immovable property under section 2 (2) (xxiv) of the Defence of India Act read with Rule 75-A of the Defence of India Rules, would not be covered by Entry No. 21. He considered that the rights which were created in the Government by the requisition of land did not create in the Government any interest in the land. They only created rights to temporary use and possession of land akin to the rights of a licensee. The learned Judge therefore concluded as follows :

> "These rights of temporary use and possession which are created in the Government are not, in my opinion, ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in the expression 'rights in or over land' and which are by reason of the amplification of the general topic or category of legislation 'land' mentioned in Item 21 deemed to be comprised within that topic or category of legislation 'land' as already indicated above. I have, therefore, come to the conclusion that the requisition of immovable property which is the subject matter of these proceedings is not included in Item 21 in list II of the Seventh Schedule to the Government of India Act."

I do not think that either of these two rulings has any application to the case before us. Section 3 (4) of the Act in question only provides for one method of the collection of the rents due from the tenant to the landholder. Except collecting rents the Government do not, unlike in the Bihar Act, take over possession or management of the estates. A provision making the provisions of the Revenue Recovery Act applicable to the collection and recovery of rents in an estate would obviously fall within the scope of Entry No. 21. Such a provision would be covered by the expression "the collection of rents." The fact that this method of collection is made the only method would not take away the subject-matter from the purview of that entry. If the Act had said that immediately there is an arrear of rent, the landholder shall notify the fact to a prescribed Revenue Officer, who shall thereupon proceed to recover the rent as if it was an arrear of land revenue, I do not think it can be contended with any justification that the provision would not be covered by the expression "the collection of rents." Section 3 (4) of the Act is substantially such a provision. I do not see why the expression "the collection of rents" should be confined to the collection of rents by the landlord alone. It can as well cover collection by agents on behalf of the landlord, and the Government under section 3 (4) of the Act is no more than a statutory agent. In my opinion, the impugned Act even in so far as it provides for the compulsory collection of rents by the Government is covered by Entry No. 21 of the Provincial List and therefore the Provincial Legislature was competent to enact it.

In this view it is not necessary to deal at any length with the contention of Mr. Kesava Aiyangar that in case it be held that the provisions relating to the collection of rents are declared invalid, the entire Act should be declared invalid because these provisions cannot be severed from the provisions relating to the reduction of rent. He contended that the reduction of rents and the collection of such reduced rents by the Government were parts of the same scheme and based upon the same policy of the Government of converting the zamindari and inam tenure into ryotwari tenure and therefore if one integral part of the scheme failed, the entire thing must fail. The law relating to severability is discussed in the judgment of the Privy Council in *Attorney-General for Alberta* v. *Attorney-General for Canada*[2]. When a part of an enactment is declared invalid, the real question in the words of Viscount Simon in that case :

> "Whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the

1. A.I.R. 1946 Bom. 216. 2. (1947) A.C. 503.

whole matter, it can be assumed that the Legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

In *Attorney-General for Saskatchewan* v. *Attorney-General for Canada*[1], the test laid down in *Attorney-General for Alberta* v. *Attorney-General for Canada*[2], was applied. Applying this test, I do not find any difficulty in holding that even if the provisions relating to the collection of rent by the Government are declared invalid for any reason, the remaining provisions relating to the reduction of rent can stand by themselves.

The impugned Act must therefore be held to have been validly passed. The question then arises whether on the coming into force of the Constitution, the Act in its entirety or any part of it has become void under Article 13 (1) of the Constitution as being inconsistent with the provisions of Part III thereof. Mr. Umamaheswaram for some of the petitioners first contended that the provisions of the Act both in respect of the reduction of rents and the taking over by the Government of the collection of rents were inconsistent with Article 19 (1) (*f*) of the Constitution which declared the right of every citizen "to acquire, hold and dispose of property." As the exercise of this right is subject to the provision in Article 19 (5), he also contended that the restrictions imposed on the landholders by the Act are not reasonable and not in the interest of the general public. Admittedly nothing in the Act to any extent takes away or abridges the rights conferred by Article 19 (1) (*f*) to acquire and dispose of property. It therefore remains to be considered whether the Act or any part of it affects materially the right of the petitioners to 'hold' the property. I think the proper meaning to be attached to the word 'hold' there is to 'enjoy.' Enjoyment of property consists in actual occupation and possession of it and will also comprise the perception of the rents and profits from it. Now in the case of these landholders in respect of ryoti land which is the only kind of land directly sought to be affected, the only way in which they can be said to hold the property is by appropriating the rents payable to them thereon. It may therefore be contended that inasmuch as the Act reduces substantially the rents and also takes away from the landholders the right to collect the rents, the Act does diminish their rights. But that is only a superficial aspect of the scope of the Act. The landholder will be entitled duly to collect such rent as is lawful and in the exercise of the admitted right conferred on the Provincial Legislature to regulate the relation between the landlord and tenant, an enactment could declare what that lawful rent is or provide for its determination. It is not as if there is an inviolable and absolute right in the landholder to collect any particular rent. It may be a matter of contract or of usage, but the Legislature could always provide for the ascertainment of a fair and a proper rent, notwithstanding any contract or usage. What the Act purports to do is to reduce the rents payable by ryots in estates governed by the Madras Estates Land Act approximately to the level of the assessment levied on lands in ryotwari areas in the neighbourhood. Of course the Legislature presumes that the ryotwari assessment is fair and reasonable and evidently for the reason that ryotwari lands are held directly under the State. If therefore, rents substantially higher than the corresponding ryotwari assessments are being collected, it may be said that the landholder is collecting rents which are neither fair nor reasonable. If the object of the legislation is to prevent the landholder making an excessive use of his right, it would be open to the Legislature to make such use unlawful. It is on this principle that forced exactions ostensibly based on contract and usage have been abolished in recent tenancy legislation. That depriving the landholder of his right to collect the rents would amount to an interference with his right to hold the property looks plausible, yet on a closer examination, it appears to me that there is really no abridgment of any property right by reason of the Government taking over exclusively the collection of rents. In the *Sholapur Mills Case*[3], his Lordship Mukherjea, J., pointed out the difference between rights which would be comprised in the term "property" and privileges

1. (1949) A.C. 110.
2. (1947) A.C. 503.
3. (1951) S.C.J. 29.

which are appurtenant to or flow from the ownership of property but by themselves and taken independently could not be reckoned as " property " capable of being acquired, held or disposed of as is contemplated by Article 19 (1)(*f*) of the Constitution. In that case before the Supreme Court, the petitioner undoubtedly was precluded from exercising his right of voting at the election of directors, from getting a resolution passed by the share-holders without the sanction of the Central Government and from instituting any winding up proceedings in a Court of law; but these disabilities were not restrictions on the rights of the share-holder. Das, J., described these disabilities as curtailment of incidental privileges not amounting to deprivation of any property.

The decision of the Special Bench in *M. D. Sir Kameshwar Singh* v. *State of Bihar*[1], was relied on by Mr. Umamaheswaram. I do not think that the Bihar Act and the Act now impugned are in *pari materia*. It is impossible to say what the learned Judges would have held if the provisions of the Bihar Act had been exactly similar to the provisions of our Act. I shall only cite one passage from the judgment of Shearer, J., by way of illustration. The learned Judge said :

> " If the object of the impugned Act had merely been to confer power on the executive to take over the management of estates and tenures in order to prevent waste or the disappearance of village papers or the like during some comparatively short interval, which was expected to elapse before the estates or tenures could be acquired permanently by the State, the Act might, possibly, have been supported."

Now, section 3 (4) of our Act expressly refers to the contemplated taking over of the estates finally by the Provincial Government.

Even assuming that the provisions of the impugned Act do restrict the exercise of the petitioners' enjoyment of their property, I am prepared to hold that they can well be supported as reasonable restraints imposed in the interests of a large section of the public and therefore saved by Article 19 (5) of the Constitution. In this State, agricultural tenants form a very large part of its people and any legislation undertaken with the object of ameliorating their condition must be held to be in the interests of the general public. *Prima facie* reduction of the prevailing rents to the ryotwari level cannot be said to be unreasonable. Whether in a particular case the actual reduction effected is so drastic and there are other circumstances which lead to the inference that the landholder is practically deprived of all enjoyment of his property, then it may be in that case there has been an unreasonable restriction; but the Act as such cannot be declared to be void as necessarily being inconsistent with the provisions of Article 19 (1) (*f*) read with Article 19 (5).

Mr. Umamaheswaram referred us to observations in the judgments of the Supreme Court of India dealing with the test to find out what restrictions can be deemed to be reasonable. In *Chintamanrao* v. *The State of Madhya Pradesh*[2], his Lordship Mahajan, J., delivering the judgment of the Court said :

> " The phrase " *reasonable restriction* " connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public."

His Lordship the Chief Justice of India in *Dr. N. B. Khare* v. *State of Delhi*[3], said :

> "In my opinion, Clause (5) must be given its full meaning. The question which the Court has to consider is whether the restrictions put by the impugned legislation on the exercise of the right are reasonable or not. The question whether the provisions of the Act provide reasonable safeguards against the abuse of the power given to the executive authority to administer the law is not relevant for the true interpretation of the clause . . . . . . The law providing reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not necessarily exclude from the consideation of the Court the question of reasonableness of the procedural part of the law."

It was asked how the collection of rents by the Government is in the interests of the general public. It was evidently considered to be because the Legislature appre-

1. (1950) I.L.R. 29 Pat. 790 (S.B.).
2. 1950 S.C.J. 571.
3. 1950 S.C.J. 328.

hended that in spite of the reduction of rents by the State, the landholders might continue to collect at higher rates using their influence and power. While the application of the Revenue Recovery Procedure would result in prompt and satisfactory collection beneficial to the landholder, the collection by a disinterested agency as the Revenue Department of Government would avoid the danger of exaction. Applying these tests, I do not find anything unreasonable in the substantive or procedure provisions of the impugned Act.

It was then contended that the provisions of the Act are inconsistent also with Article 31 (2) of the Constitution. But as this is substantially similar to section 299 (2) of the Government of India Act, 1935, no further argument was addressed by Counsel for the petitioners. But I would like to deal briefly with an argument put forward by the learned Advocate-General, though it is not necessary to pronounce finally on it. He argued that Article 31 (1) which provides that no person shall be deprived of his property save by authority of law implies that any person may be deprived of his property by the authority of law. "Law" meant "enacted law." Therefore, if the deprivation of property by any law did not amount to taking possession or acquisition covered by Article 31 (2) then, such law would be valid under Article 31 (1) and Article 19 (1) (*f*) would not have any operation in such a case. It is only so long as a person has any property that the right declared by Article 19 (1) (*f*) could be exercised. If the person has been deprived of the property lawfully, it cannot be said that there has been an infringement of the exercise of any of his rights under Article 19 (1) (*f*). There is one passage in *Chiranjit Lal Chowdhury* v. *The Union of India*[1], in the judgment of Das, J., which might lend support to this contention. His Lordship referring to what he had said in *Gopalan's case*[2], observed :

> "The right to property guaranteed by Article 19 (1) (*f*) would likewise continue until the owner was, under Article 31, deprived of such property by authority of law."

I am afraid that the argument when logically pushed to the extreme would be subversive of all private right of property. If any law which deprived a person of property would be quite valid even without payment of compensation so long as such deprivation did not amount to taking possession or acquisition falling under Article 31 (2) and nothing in Article 19 (1) (*f*) or Article 19 (5) would apply to such an enactment, then there is nothing to *restrain the State from depriving persons of property at their will and pleasure*. Everything then would depend on the reasonableness of the Legislature and the position would be equated to that which obtains in England. I do not think it necessary, having regard to my findings on the other questions to decide finally on the tenability of this contention.

Mr. Kesava Ayyangar, learned counsel for some of the petitioners, also addressed us an argument founded on Article 14 of the Constitution. He contended that there was discrimination between landholder and tenant, because though the tenant was to get the benefit of a reduction, when the rent being paid by him exceeded the ryotwari rate, the landholder was not entitled to have an enhancement of rent in cases where the rents payable were less than the ryotwari rates. He drew our attention to Explanation 1 to section 3 of the Act which has already been extracted. Though at first sight it might appear to be making a discrimination, it is really not, when the scope and intendment of the Act are taken into account. The preamble to the Act says that rents now payable by ryots in estates are in many cases substantially higher than the assessments levied on lands in ryotwari areas in the neighbourhood and it is expedient to provide for the reduction of such rents approximately to the level of the ryotwari assessment. Any provision for enhancement of rent would be completely out of place in an enactment like this. There is nothing in the Act which makes a distinction between one landholder and another or one tenant and another. The Act is only an illustration of the constitutional practice of classification which is reasonable and permissible. The Act is not void on the ground that it contravenes Article 14.

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1. 1951 S.C.J. 29 at 57.   2. (1950) 2 M.L.J. 42 : 1950 S.C.J. 174.

The contention of Mr. Vedantachariar, another counsel for the petitioners, deserves separate consideration. His contention was first pitched at a higher key. He attempted to demonstrate that the inevitable result of the scheme of the Act with reference to reduction of rent was a total deprivation of the benefits of enjoyment of the property by the landholder. He wanted the Court to take into account the peishkush which had been fixed at a very high figure in most cases, the cesses and other outgoings payable by the landholder, the expenditure on irrigation works which are statutorily incumbent on him. In addition to these financial obligations he laid stress on the fact that the basis of ryotwari assessment differed radically from the basis of the rent in estates. The ryotwari rent would necessarily be much lower than the rents in estates. While on one hand the commitments and obligations of the landholder remain constant, his income is so much reduced that nothing or very little would be left as surplus. He submitted that if 16 annas in the rupee belonging to the landholder is taken away from him by the Act, then it would amount to an unreasonable restriction and contravene Article 19 (1) (*f*) read with Article 19 (5). It will also contravene Article 31 (2) as it would virtually amount to an acquisition of property without compensation. He relied upon the decisions of the American Supreme Court which recognised the right of judicial review of the actual application of a statutory provision or order to concrete cases to give relief if the guarantee of equal protection of the laws or the due process clause had to be given effect to. In *Reagan* v. *Farmers' Loan and Trust Co.*,[1], it was held that the fixing and enforcement by a rail road commission of unjust and unreasonable rates for transportation by rail road companies is an unconstitutional denial of the equal protection of the laws. The Legislature of the State of Texas passed an Act to establish a rail road commission with power and authority vested in them to adopt all necessary rates, charges and regulations to govern and regulate rail road freight and passenger tariffs, etc. The rail road commission proceeded to establish certain rates for the transportation of goods over the rail roads in the State. The International and Great Northern Railroad Company and the debenture trustees—under a trust deed executed by the said railroad company—challenged the validity of the tariff fixed by the commission on the ground that the rates were unreasonable and unjust and worked a destruction of the company's rights of property. Mr. Justice Brower delivering the opinion of the Court observed :

> "The Courts are not authorised to revise or change the body of rates imposed by a Legislature or a commission : they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and shippers ; they do not engage in any mere administrative work ; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

In that case facts were disclosed regarding the indebtedness of the company, its capital, its earnings in previous years, its operating expenses exclusive of taxes, etc., and it was shown that the actual reduction by virtue of the new tariff in the receipts made it impossible to work the company at a profit. Though an absolute rule could not be laid down in every case that a failure to bring some profit to those who have invested their money in the company is conclusive that the tariff is unjust and unreasonable, yet justice demanded that everyone should receive some compensation for the use of his money or property if it be possible without prejudice to the rights of others. The Court therefore issued an injunction restraining the Railroad Commission from enforcing the rates already established.

In *Covington and L. Turnpike Railroad Company* v. *Sandford*[2] there is a full discussion of the principles which should apply to a judicial review of statutes and administrative orders reducing the income of persons including corporations. It was decided by the Supreme Court of the United States in that case that a statute reducing the tolls that may be charged by a turnpike company and requiring it to conform to a tariff of rates that is unjust and unreasonable which prevents it

1. 154 U.S. 361 : 38 Law Ed. 1014.
2. 164 U.S. 578 : 41 Law. Ed. 560.

"out of its receipts, from keeping its road in proper condition for public use or from earning any dividends is unconstitutional as a deprivation of property without due process of law"

and was a denial of the equal protection of the laws. While one limit of the rule is that merely because a company is not allowed to charge as high rates as they have been accustomed to charge or as high rates as are charged by other companies differently located, it cannot be said that equal protection of the laws has been denied; the other limit of the rule is that the company can demand the right to receive such compensation as will be just both to itself and to the public under all the circumstances of the case. Mr. Justice Harlan who delivered the opinion of the Court cited the following passage from *St. Louis and S. F. R. Co.* v. *Gill*[1]:

"there is a remedy in the Courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying on business, and that especially may the Courts of United States treat such a question as a judicial one and hold such acts of legislation to be in conflict with the Constitution of the United States as depriving the companies of their property without due process of law, and, as depriving them of the equal protection of the laws."

As Chief Justice White said in *Stone* v. *Farmer's Loan and T. Co.*,[2] the power to regulate is not a power to destroy and "limitation is not the equivalent of confiscation."

The same principle we find applied in *Chicago M. & ST. P. R. Co.* v. *State of Minnoestta*[3], and *Smith* v. *Ames*[4]. I see no reason why this salutary principle enunciated in several American decisions should not be applied in this country in construing Articles 14, 19 and 31 of the Constitution. Even applying this principle, I am, however, not persuaded by Mr. Vedantachariar to hold that the provisions of the Act as such inevitably transgress the limits allowed to the Legislature by conflicting with the provisions of Part III of the Constitution. The impugned Act governs several zamindaries differently situated and held under different enagagements with the Government. The sources of income of one zamindari are not necessarily the same as those of the other zamindaries. Besides, zamindaries, major inams are also covered by the Act. Different considerations would arise in the case of these inams many of which are either revenue free or are subject only to a nominal quit rent or jodi. Mere hypothetical calculations of the kind which Mr. Vedantachariar wanted to make cannot form the basis of a generalisation covering all the estates to which the Act applies. As the learned Advocate-General, rightly pointed out, the income from the ryoti lands is not the only source of income for the landholder. Home-farm lands, minerals, forest produce are some of other sources of income. These sources vary largely with each estates. I am therefore not prepared to hold that the Act itself is void, on the ground it virtually deprives the landholder of all beneficial enjoyment of his property.

As pointed out in *Covington and L. Turnpike Road Co.* v. *Sandford*[5], each case must depend upon its special facts:

"And when a Court without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the Legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the Legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. What those other circumstances may be, it is not necessary now to decide. That can be best done after the parties have made their proofs."

We have only to substitute the word "rents" for "rates" and "landholders" for "corporation controlling a public highway" in the above passage, when it can appropriately be applied to the cases before us. The decision of the question would ultimately depend upon the circumstances of each estate. Rents which may be reasonable and just with respect to one estate may be unreasonable and unjust

1. 156 U.S. 6 39 Law. Ed. 567.
2. 116 U.S. 307.
3. 134 U.S. 418 : 33 Law Ed. 970.
4. 169 U.S. 466.
5. 164 U.S. 578 : 41 Law. Ed. 560.

with respect to another. It is necessary therefore, before any landholder can be given relief on the principle above mentioned, that he should allege and prove facts which conclusively show that as a result of the reduced rates of rent fixed under the Act, he has been totally or substantially deprived of the net income available to him. Each case must properly be presented in the pleadings and there must be opportunity to the Government to traverse the allegations in such cases. In the absence of a detailed statement of the relevant facts, an application founded on mere general allegations must be dismissed.

It is contended on behalf of the petitioners that the impugned Act was really in the nature of a colourable device to achieve something which the Legislature could not achieve directly, namely, to acquire, the entire interest of the landholder but without paying compensation. The decision of the Judicial Committee of the Privy Council in *Attorney-General for Alberta* v. *Attorney-General for Canada*[1] was relied on in support of this contention. The rule is thus stated by Lord Maugham, L.C.:

> "It is not competent either for the Dominion or a Province under the guise or pretence, or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other."

Having regard to the view which I have already expressed that there is no acquisition by the State of landholder's interest. I must reject this contention. The Government under the provisions of the impugned Act do not obtain any benefit by the reduction of rents. Even in cases in which the net balance of the landholder's income is *nil* or negligible, the State itself does not gain thereby. In such circumstances, it cannot be said that there has been an acquisition by the Government. So, it cannot be said that the Legislature has adopted a device to escape from the provisions of Article 31 (2) by calling the same Act by a different name. As I have already held that the reduction of rents and the taking over of the collection of the rents by the Government do not amount to taking up possession or acquisition of the landholder's property the Act would not fall within the scope of Article 31 (2) in any instance. There is therefore no attempt by the Legislature in trying to do indirectly what it cannot do directly.

In the result I hold that the impugned Act, the Madras Act, XXX of 1947, did not become void after the coming into force of the Constitution. It equally follows that the Amending Act, Act VII of 1951 is also not void.

Venkatarama Aiyar, J—These petitions raise the question of the validity of the Madras Estates Land (Reduction of Rent) Act, Act XXX of 1947, which came into force on 6th January, 1948. In furtherance of a comprehensive scheme of land reform the Government of Madras introduced three bills of an allied character on 13th September, 1947. The first of them called the Madras Estates Communal Forest and Private land (Prohibition of Alienation) Bill, 1947, became law as Act XIV of 1947, on 25th October, 1947. This Act prohibited the landholders from alienating communal forest and private lands. The second Bill No. XXIV of 1947, the Madras Estates Land (Reduction of Rent) Bill became law as Act XXX of 1947 and this is the legislation which is now impugned as *ultra vires* and void. By this Act the rates of rent payable by the ryots in estates became reduced to those prevailing in ryotwari areas and there are also provisions providing for collection of rent, through Government Agency. Lastly there was a Bill No. XXXVII of 1947, called the Madras Estates (Repeal of Permanent Settlement and Conversion into Ryotwari) Act of 1947 which became law on 19th April, 1948, as the Madras Estates (Abolition and Conversion into Ryotwari) Act, Act XXVI of 1948. Under this Act all the notified estates were to vest in the Government and the ryoti lands were to be held by the ryots and private lands by the landholder, as under ryotwari settlement. In their original draft both Bill No. XXIV of 1947 and Bill No. XXXVII of 1947 were intended to comprehend all the estates which came within the definition to section 3 (2) of the Madras Estates Land Act, 1908. But actually

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1. 1947 A.C. 503.

while Bill No. XXIV of 1947 included, as passed, all the estates falling within section 3 (2) of the Madras Estates Land Act. Bill No. XXXVII of 1947 underwent a change in its passage through the Legislature. The estates which became such by virtue of the Amendment Act of 1936 were excluded from the operation of Act No. XXVI of 1948. When Act No. XXX of 1947, was passed the intention was that all the estates covered by that legislation should be taken over by the Government (*vide* section 3, Cl. 4) but as Act XXVI of 1948 was not co-extensive in its operation with Act XXX of 1947 and as there were estates which would come under Act XXX of 1947 but could not be taken under Act XXVI of 1948, a further amendment was made to Act XXX of 1947, by Act VII of 1951 in which *inter alia* the following explanation was added to section 3 (4):

"*Explanation*: The provisions of this sub-section shall apply to an estate, whether the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 applies or not."

There are other provisions in this Act to which I shall advert in due course but suffice it to note at this stage that the declared object of all these Acts is to effect agrarian reforms of a far-reaching character on the basis of the principles, namely, that there should be no intermediary tenure-holder between the State and the tillers of the soil and that there should be uniformity in the extent of the obligations of the ryots all over the State.

Now the grounds on which the validity of Act XXX of 1947 is assailed fall under two groups. Firstly, it is contended that the Act was void when it was passed as being repugnant to the provisions of the Government of India Act, 1935, which was the Constitution Act in force at the time of the enactment. Secondly, it is argued that even if Act XXX of 1947 was valid when it was passed it became void under Article 13 of the Constitution as being inconsistent with the fundamental rights guaranteed under Part III of the Constitution. The objections that have been put forward under the first ground are that under the Act the owners of the properties are deprived of substantial rights, and that as there is no provision for compensation it is opposed to section 299 (2) of the Government of India Act and is therefore void. Another condition put forward under this heading is that the subject-matter of the legislation is not covered by any of the entries in List 2 to Schedule 7 of the Government of India Act and therefore the Act is not within the legislative competence of the Madras Legislature. The objections falling under the second group are that the provisions of Act No. XXX of 1947 infringe the fundamental rights guaranteed under Article 31, Article 19 and Article 14 of the Constitution and therefore the Act has become void under Article 13. These are the contentions common to all the petitions. There are besides some special contentions raised in some of the cases. It will be convenient to deal in the first instance with the common contentions. For determining whether the impugned legislation is open to the objections advanced by the petitioners it is necessary to examine the provisions of the Act with a view to ascertain its true character and operation. The Act is described as

"one to provide for the reduction of rents in estates governed by the Madras Estates Land Act, 1908 approximately to the level of the ryotwari assessments levied on lands in ryotwari areas in the neighbourhood."

The preamble to the Act runs as follows:

"Whereas the rents now payable by ryots in estates governed by the Madras Estates Land Act, 1908 are in many cases substantially higher than the assessments levied on lands in ryotwari areas in the neighbourhood; and whereas it is expedient to provide for the reduction of such rents approximately to the level of the ryotwari assessments in the neighbourhood."

Under section 1 the Act is made applicable to all estates as defined in the Madras Estates Land Act, 1908. Section 2 (1) provides, that the Government may appoint a

"special officer for any estate or estates for the purpose of recommending fair and equitable rates of rent for the ryoti lands in such estate or estates."

Then follow provisions which prescribes how the rate is to be fixed. Explanation (1) enacts that the special officer shall have power only to determine that the rents payable for any class of ryoti land shall be reduced and not enhanced. Under

section 3, clauses 1 to 3 it is provided that the Provincial Government should, after considering the recommendations of the special officer and the remarks of the Board of Revenue, fix the rates of rent payable in respect of each class of ryoti lands in the estate. Then follows sub-clause 4 which has been one of the main targets of attack in these proceedings. It provides :

"That the rent shall be recovered by the Provincial Government as if such rents were arrears of land revenue due to them and the amount so recovered in respect of each fasli after deducting therefrom the cost of such recovery as determined in accordance with such rules as may be made by the Provincial Government in that behalf and also the peshkush, cesses and other moneys due from the landholder to the Provincial Government and constituting a charge on the estate shall be paid to the landholder."

The above are the provisions in Act XXX of 1947 that are material for the purpose of these applications. The amendments introduced by Act VII of 1951 may now be noticed. The preamble to the main Act has been enlarged by the addition of words " and for the collection of such rents exclusively by the State Government." The addition of Explanation to section 3 (4) has already been mentioned. One of the provisions newly incorporated by the Amendment Act is section 3, sub-clause 7 which is in these terms :

"The landholder shall not be entitled to collect and the provisions of Chapters V and VI of the Madras Estates Land Act, 1908 shall cease to apply to any rents or interest recoverable by the State Government under sub-section (4)."

There are other amendments but they are not material for the purpose of this case.

From the above analysis it will be seen that the provisions of Act XXX of 1947 fall into two distinct categories: (1) Sections 2, 3, sub-clause (1) to (3), sections 4 and 5, relate solely to reduction and fixation of rent payable by the ryots in an estate. (2) Section 3 (4) of the main Act and sub-sections (5) to (7) of the Amending Act VII of 1951, confer on the Provincial Government power to collect the rents due to the landholder as fixed under the Act and to pay him the net balance. The former category is tenancy legislation pure and simple while the latter is constititution of the Government as a statutory agency for collection of rents on behalf of the landholder. The question is whether either or both of them is void under the Government of India Act of 1935. Now the arguments on behalf of the petitioners is that under both these categories valuable rights of the petitioners have been taken away ; that it amounts to acquisition of property within the meaning of section 299 (2) and as there is no compensation provided it is expropriatory and bad under that section. As the considerations applicable to the two categories differ I shall deal with them separately.

Taking first, the sections relating to reductions of rent the contention as developed by Counsel on behalf of the several petitioners is this : The landholder has a right to recover rent from the tenant at a particular rate; the effect of reducing the rent is to transfer to the tenant the landholder's right to the rent to that extent and that this is acquisition of right over immoveable property as defined by section 299, clause (5). When rent payable by a tenant is reduced, the obligation is *co-extanti* extinguished ; it is thereafter not alive in any form and it is incapable of being transferred or acquired. The case is analogous to partial discharge of an obligation by a debtor in which case it will not be contended, I presume, that the debtor is an assignee of his own debt. It is unnecessary to discuss this matter at any great length because it is concluded by authority. In *Jagannath Baksh Singh* v. *United Provinces*.[1] the Federal Court had to consider the effect of tenancy legislation in the United Provinces. Under Act XVII of 1939 the quantum of rent recoverable by taluqdars, who held estates under sanads, corresponding to those of zamindars in the Madras Presidency was reduced. It was contended that the Act was opposed to section 299 (2) of the Government of India Act, 1935, as the effect of reduction of rent amounted to taking property without compensation.

This contention was rejected and the Court observed as follows :

"First it is said that the provisions of the Act which are complained about in this case fall within section 299 (2) of the Constitution Act. It provides that the Provincial Legislature has no power

1. (1943) 2 M.L.J. 114 : 6 F.L.J. 55 (F.C.).

to pass a law authorising compulsory acquisition for a public purpose of any land unless the law provides for payment of compensation for the property acquired. The answer to this is that the law which regulates the relations of the landlord and tenant and thereby diminishes the rights which the landlord has hitherto exercised in connection with his land does not authorise compulsory acquisition of the land for public or any other purpose: and therefore the question of compensation does not arise."

This decision was taken on appeal to the Privy Council and was confirmed by the Judicial Committee. Vide *Thakur Jagannath Baksh Singh* v. *The United Provinces*[1] Dealing with the contention that the reduction of rent was repugnant to section 299 of the Act, Lord Wright observes as follows :

"The appellant relies on certain express provisions of the Government of India Act. Thus he relies on section 299 of the Act, which provides that no person shall be deprived of his property in British India save by authority of law, and that neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition of land for public purposes save on the basis of providing for the payment of compensation. But in the present case there is no question of confiscatory legislation. To regulate the relations of landlord and tenant and thereby diminish rights, hitherto exercised by the landlord in connection with his land, is different from compulsory acquisition of the land."

In *Kunwarlal Singh* v. *Central Provinces and Berar*[2], the Federal Court had to deal, with a case in which there was enhancement of the land revenue payable by the zamindars. It was contended that the increase of assessment amounted to acquisition of property within the meaning of section 299 (2). In repelling this contention, Spens, C.J., delivering the judgment of the Court observes :

"In our judgment this view is misconceived. His rights over his land or his rights in or over his immovable property remain exactly the same, and only his liability for payment of *takoli* is increased. It is, we think impossible to hold that the mere increase of an assessment for land revenue involves any acquisition of the land or any rights in, or over immovable property. It further seems to us that the word ' acquisition ' implies that there must be an actual transference and it must be possible to indicate some person or body to whom is or are transferred the land or rights referred to. It is impossible in our view to suggest that when the land revenue is increased, there is any transference to the Provincial Government or any other person of any land or rights in or over immovable property, which remain in the same possession or ownership as immediately before the increase of assessment. In our judgment the attempt to bring the case within section 299 (2) must fail."

In view of these authorities, I am clearly of opinion that the mere reduction of rent is not acquisition of property within the meaning of section 299 (2) of the Government of India Act.

I shall now take up the second category of sections in Act XXX of 1947 and Act VII of 1951, and consider how far they are opposed to section 299 (2) of the Government of India Act. For this purpose it is necessary first to examine what rights the landlord possessed before the impugned legislation came into force and how far these rights have been affected or modified thereby. It is essential to bear in mind that the rights and obligations of the landholders and tenants in estates are regulated by the Madras Estates Land Act are in many respects different from those of the landlords and tenants under the general law. The ryots have occupancy rights in their holding. So long as they pay rent they cannot be ejected. In other words the estate holders have no right to physical possession of the lands but only to rent accruing thereon. They have a charge on the holding for the rent due and they have also a right of distraint. These are not rights possessed by the landlords under the general law. For recovery of rent, proceedings had to be taken not in the ordinary civil courts but in revenue Courts specially constituted under the Act. These are some of the special incidents attaching to the relationship of the landlord and the ryots in an estate under the Estates Land Act. Now under section 3 (4) the rent is to be collected not by the landlord but by the Government and it is to be recovered as arrears of land revenue. The provisions of the Estates Land Act which provide for proceedings being taken by the landlord in revenue Courts for recovery of rent are repealed. The most important provision however is that the Government is to pay over to the landlord all the rent realised deducting the amounts payable as mentioned in section 3 (4). The result of this legislation may thus be summed up :

1. (1946) 2 M.L.J. 29 : L.R. 73 I.A. 123 : (1946) F.L.J. 88 (P.C.). 2. (1944) 1 M.L.J. 510 : 1944 F.L.J. 178 (F.C.).

The landlord continues to be the owner of the estate as before his title being left untouched. As for possession it was the tenant who was entitled to it, the right of the landlord being only to recover rent and that right again is left unaffected by the legislation. The only change that has been effected is that the collection of rent is to be made not by the landlord but by the Government.

The question is does this amount to acquisition within the meaning of section 299 (2) of the Government of India Act?

Mr. K. Umamaheswaram, the learned Counsel for the some of the landholders argues that it does. He contends that that section is of sufficient reach to take in all cases in which properties suffer diminution in value as a result of legislation, that the right to recover rent is of the substance of the right of landlords and that when the Government takes it over there is acquisition within the meaning of section 299 (2) and he cited a number of authorities in support of this position.

With reference to the American authorities it must be remembered that they are decisions given under a different statute and under conditions vastly different from ours. The 5th amendment which was construed as a limitation on the powers of the Congress provided that no person shall be

> "deprived of life, liberty or property without due process of law nor shall private property be taken over for public use without just compensation."

The 14th amendment which operates as a limitation on the powers of the States provides

> "nor shall any State deprive any person of life, liberty or property without due process of law."

The power to take private property for a public purpose is stated to be an attribute of the sovereignty of the State, and it is termed "Eminent Domain" in American jurisprudence. The statute requires that when property is taken under "Eminent Domain" there should be just compensation to the owner. There is another power also inherent in the estates as an attribute of the sovereign character: that is the power to regulate the use of private property in such a manner as to advance the welfare of the public. That is called the police power and the law is that when the owner of property suffers loss or damage in relation to property by reason of the exercise of the police regulations it is *damnum absque injuria* and no compensation can be recovered therefor. In such cases the attempt of the owner is to establish that the police regulations are in excess of what is required in the interests of the public welfare, that it is unreasonable and arbitrary and that it should not be upheld as a valid exercise of the police power, in which case it will be invalid. Thus the American decisions are based on a construction of the 5th and 14th amendments and on a consideration of the requirements of the due process clause and the reasonableness of the police power regulations. Great caution must be exercised in applying these decisions for determining the rights of the parties under section 299 (2) of the Government of India Act and Article 31 (2) of the Constitution. Both these provisions speak of acquisition of property whereas the 5th amendment refers to taking of property. Are the two expressions of the same import? While it has been held that acquisition of property in section 299 (2) implies that there must be actual transference vide *Kunwarlal Singh* v. *Central Provinces and Berar*[1] the expression taking of property has been construed as of much wider significance. Willis in his treatise on Constitutional Law states that at one time a narrow view was taken of the meaning of the word "taking" limiting it to physical possession and then refers to cases which have taken a broader view. *Vide* pages 821 to 823 and the law as stated by him in these terms:

> "The true effect of the Constitutional amendments referred to was only to require the Courts to do what they should have done without such amendments to wit: to hold that there is a taking whenever there is any injury to property other than by the police power or taxation which would be actionable if done by a private individual that is a tort; in other words, that there is a taking whenever any incident of property, whether a right, power, privilege, or immunity of ownership, is taken from the owner."

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1. (1944) 1 M.L.J. 510: (1944) F.L.J. 178 (F.C.).

Another learned writer Nichols has the following on the meaning of the word "taking":

"It is well settled that a taking of property within the meaning of the Constitution may be accomplished without formally divesting the owner of his title to the property or of any interest therein. Any limitation on the free use and enjoyment of property constitutes a taking of the property within the meaning of the constitutional provision. It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation."

It is not necessary, in order to render a statute obnoxious to the restraint of the Constitution, that it must in terms or in effect authorise an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner. Property in land is "taken" whenever any one of the qualified privileges of which it is composed is taken. *Vide* Nichols on Law of Eminent Domain, 1950 Edition, Vol. 2, pages 233-237. *See also* Gorwin on "Constitution and what it means to-day" page 179.

Thus under the American law 'taking' includes not merely the transfer of title and taking physical possession but any act which interferes with the use and enjoyment of any right over property. The cases cited by Mr. Umamaheswaram, the learned Advocate for the petitioners are instances of the extended meaning put upon the word "taking". Thus in *Pennsylvania Coal Co.* v. *Mahon*[1] a State Law which prohibited the owners from carrying on mining operations under certain circumstances was held to amount to taking property without compensation and therefore bad. Mr. Justice Holmes put the matter thus:

"The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking."

This reasoning will clearly be inadmissible in construing section 299 (2) or Article 31 (2) because a mere prohibition cannot be acquisition under these provisions. In *United States* v. *Thomas Lee Causby*[2] there was a chicken farm adjacent to an airport and the complaint of the owner was that the flight of the planes at low altitudes at all hours of the day and night and the frequent noise and glare of lights seriously interfered with the enjoyment of the property as chicken farm and diminished its value and that the acts amounted to taking of property without compensation. This contention was upheld. Mr. Justice Douglas observed:

"It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe *cujus e t solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway as Congress had declared. . . . . But that general principle does not control the present case. For the United States conceded an oral argument that if the flights over respondents' property rendered it uninhabitable there would be a taking compensable under the fifth Amendment."

On the same principle it was held in *Portsmouth Harbour Land and Hotel* v. *United States*[3] that the continuous firing and discharging of guns across a land which was used as a summer resort and which had the effect of frightening off the visitors would constitute taking of that land, if it was of an abiding character. These and similar decisions proceed on a principle of law which is different from that embodied in section 299 (2) and Article 31 (2) and cannot be relied on as furnishing a safe guide for interpreting them. It is essential under the Indian law that there should be a transfer before these sections could be invoked. A case nearer home is the one reported in *The Minister of State for the Army* v. *Dalziel*[4]. That was a decision under placitum 31 to section 51 of the Constitution Act of Australia which is in these terms:

"The Parliament shall subject to this Constitution have power to make laws for the peace, order and good Government of the Commonwealth with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

The question arose with reference to a vacant site belonging to the Bank of New South Wales of which the claimant was in possession as lessee. In 1942,

1. 260 U.S. 393.
2. 328 U.S. 256: 90 Law. Ed. 1206.
3. 260 U.S. 327.
4. (1943-44) 68 C.L.R. 261.

the Government required it for the purpose of war and acting under certain regulations entered into possession of the same. Some compensation was awarded but the claimant contended that he was entitled to compensation on just terms treating the action of the Government as acquisition under section 51, placitum 31. The argument for the Government was that the acquisition under placitum 31 could only mean an acquisition of the entire bundle of rights as owner or as tenant, that the tenancy of the respondent, claimant, was not acquired and the mere taking of possession was not acquisition. Latham, C.J., was of the opinion that there was a distinction between acquisition of property and taking possession thereof and that on the facts there was no acquisition but only taking of possession as licensee. The following passages from his judgment may be quoted :

"But possession and ownership of land, though closely connected, are not identical."

"And accordingly in my opinion, the fact that the rights to possession is the most valuable attribute to ownership, that possession is *prima facie* evidence of ownership, and that possession may develop into ownership, do not justify any identification of possession with ownership, but on the contrary, emphasise the distinction between the two ideas. The fact that the Commonwealth is in possession of land as a result of action under the Regulation does not show that the Commonwealth has become the owner of the land or of any estate in the land."

But the majority of the Court held that when a substantial portion of a right is taken away it must be treated as an acquisition notwithstanding that certain unessential elements of the rights remain unaffected. Thus though the tenancy of Dalziel was not acquired as such, when possession of the property was taken away from him for an indefinite period there was nothing more left to him of his rights as a tenant excepting the "husk of tenancy" which the Court held amounted to an acquisition. The following oft-quoted passage from the judgment of Rich, J., brings out the reasoning behind this decision :

"Property in relation to land, is a bundle of rights exercisable with respect to the land.

The tenant of an unencumbered estate in fee simple in possession has the largest possible bundle. But there is nothing in the placitum to suggest that the Legislature was intended to be at liberty to free itself from the restrictive provisions of the placitum by taking care to seize something short of the whole bundle owned by the person whom it was expropriating.

Possession vault titre in more sense than one. Not only is a right to possession a right of property but where the object of proprietary right is a tangible thing it is the most characteristic and essential of those rights."

It will be noticed that this judgment does not dissent from the clear opinion of Latham, C.J., that acquisition is different from taking of possession ; it only decides that in determining whether there has been acquisition of property or not one must have regard to the substance of the matter and not its mere form. That is how this decision has been understood in *Charanjit Lal Chowdhury* v. *The Union of India*[1], by Mukherjee, J., at page 50 and by Das, J., at page 59.

A question may be raised as to whether taking of possession apart from the acquisition of ownership is within section 299 (2) of the Government of India Act. Article 31, clause (2) of the Constitution mentions both acquisition and taking of possession suggesting thereby that the two are distinct and that acquisition does not comprehend taking of possession. In *Charanjit Lal Chowdhury* v. *The Union of India*[1], already cited the following observations occur in the judgment of Mukherjee, J. :—

"Article 31 (2) of the Constitution itself makes a clear distinction between acquisition of property and taking possession of it for a public purpose, though it places both of them on the same footing in the sense that a legislation authorising either of these acts must make provision for payment of compensatilon to the displaced or expropriated holder of the property."

I have already referred to the observations of Latham, C.J., in *The Minister of State for the Army* v. *Dalziel*[2], where the ownership and possession are treated as different.

As section 299 (2) of the Government of India Act refers only to acquisition but not to taking of possession it may be a debatable question as to whether mere taking

1. (1951) S.C.J. 29 at 50 and 59. 2. (1943-44) 68 C.L.R. 261.

of possession would be within that section. In *Tan Bug Taim* v. *Collector of Bombay*[1]. Bhagavathi, J., held that a requisition of immovable property could not be held to be acquisition within the meaning of section 299 (2) even with the aid of the definition in section 299 (5). The effect of this decision was nullified by an Ordinance and now under the Constitution requisition has been expressly included along with acquisition in Entry No. 36 in List No. 2 and in Entry No. 42 in List No. 3. It is however unnecessary to discuss this question further because even if it is to be assumed that section 299 (2) would cover cases of possession there has been no such taking of possession in this case. The petitioners had only a right to receive rent and that is wholly left in tact and has not been taken away. The decision in *The Minister of State for the Army* v. *Dalziel*[2], therefore does not help the petitioners.

I shall now deal with the Indian authorities cited on behalf of the petitioners. In the case in *Charanjit Lal Chowdhury* v. *Union of India*[3], the facts were that under a special Ordinance the Government superseded the existing directorate of the Sholapur Spinning and Weaving Company and appointed a fresh set of directors with authority to take over the property, the effects and actionable claims of the company and to manage the same. Certain rights of the shareholders such as moving for winding up or appointment of receiver were suspended. An individual shareholder challenged the validity of this Ordinance by a writ under Article 32 of the Constitution. It was held that none of the fundamental rights of the shareholders were violated by the Ordinance and that therefore the application by him was not maintainable. One of the points raised was whether the provisions of the Ordinance were repugnant to Article 31 (2). In discussing this question a distinction was made between the rights of the company as a juristic person and the individual rights of a shareholder. Mukherjee, J., with whom Kania, C.J., and Fazl Ali, J., agreed observed that an acquisition under Article 31 (2) must be of the right in its entirety.

> "It cannot be disputed that acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former."

And again concludes :

> "In the context in which the word "acquisition" appears in Article 31 (2) it can only mean and refer to acquisition of the entire interest of the previous holder by transfer of title and I have no hesitation in holding that there is no such acquisition either as regards the property of the company or of the shareholders in the present case."

This is clear authority against the petitioners' contention that taking over of the right to collect rent under section 3 (4) could be regarded as an acquisition under section 299 (2). Then taking up the question of possession Mukherjee, J., held that there was no dispossession so far as individual shareholders were concerned because their rights to dividend and their rights to dispose of the property were not affected by the legislation ; that they were a substantial portion of their rights as shareholders and that even applying the test enunciated by Rich, J., in *The Minister of State for the Army* v. *Dalziel*[2] there was no such dispossession as would in substance amount to acquisition. The question was raised as to whether the provisions relating to management by the new directors could not amount to dispossession of the company as a juristic person. It was contended by the learned Attorney-General that the dispossession was not of the entire rights of the company and that, therefore, the case did not fall under Article 31 (2) of the Constitution. As to this the learned Judge observed :

> "It is difficult in my opinion to accept the contention formulated in such broad terms."

And he adds :

> "It is not, however, necessary for my purpose to pursue the matter any further, as in my opinion there has been no dispossession of the rights of a shareholder in the present case."

Das, J., also held that the restrictions imposed upon the rights of the shareholders did not take away their rights to receive dividends or to dispose of the shares

1. A.I.R. 1946 Bom. 216.
2. (1943-44) 68 C.L.R. 261.
3. (1951) S.C.J. 29.

and as these rights were substantial Article 31 (2) did not apply. He also held that the curtailment of a right to elect directors, pass resolutions and present winding up petitions are really in the nature of privileges incidental to the ownership of the shares and not property within the meaning of the Article. Then dealing with the question whether the company was dispossessed the learned Judge refers to the argument of the learned Attorney-General that the possession by the new directors may be construed as possession by the company and observed that that could not be the position as the directors were not under the control and direction of the company and accordingly there was great force in the contention that the company had been dispossessed. That, however, was held to give no right to the individual shareholder to apply under Article 32. These observations do not help the petitioners because the position of the landholders in these petitions is analogous to that of the shareholders, their right to receive rent and dispose of the property being unaffected by the legislation.

Another decision relied on before us is the case in *M. B. Sir Kameshwar Singh* v. *State of Bihar*[1]. I shall have to revert to this decision in dealing with another point. On the application of section 299 (2) this case does not support the petitioners. Shearer, J., in dealing with this question says :

> " There has been much controversy at the Bar as to whether or not, what is proposed to be done under the impugned Act amounts to the acquisition of the plaintiff's property. Mr. Das strongly relied on *The Minister of State for the Army* v. *Dalziel*[2] and adopting the words of Rich, J., contended that, once the management of his client's estate had been taken over, nothing would be left to him but ' the empty husk of ownership '. I find myself quite unable to accept this view. The plaintiff is to remain the owner of his estate and is alone to be competent to sell or make a gift of it, and he is to continue to derive a considerable, although perhaps a much reduced, income from it."

These words aptly describe the position of the present petitioners. Sinha, J., also takes the same view. He observes :

> " As already pointed out, the impugned Act is a mixture of restraints on the power of alienation of land by a proprietor or a tenure holder, a suspension of his rights of management without acquisition of any rights by the Government to be exercised for the benefit of the public or for the benefit of any particular section of the public."

and he held that the legislation did not amount to acquisition within section 299 (2). Das, J., however was of a different opinion. *Vide* the discussion at pages 888 to 892.

In discussing the applicability of section 299 (2) to this category of sections it has to be borne in mind that that section applies only to acquisition of land which as defined in section 299 (5) includes also rights over land. But what is the right to land which section 3 (4) of Act XXX of 1947 takes away ? The right to rent may be correctly described as a benefit to arise out of the ownership of the land but that as we have seen is not touched by section 3 (4). Is the right to collect rent apart from the right to the rent itself an interest in immoveable property ? Clearly not. It is a mere power which the owner possesses as an incident to his ownership. It is only this power that has been transferred to the Government and not the interest in the land in respect of which this power is to be exercised. The argument for the petitioners fails to take into account the fundamental distinction which in law exists between an estate and a power. A right to collect rent even putting it as high as a right to manage the properties is nothing more than a power. "The creation of a power does not in any way vest the property in the donee." (Halsbury's Laws of England, Volume 25, paragraph 934) and section 299 (2) is limited to acquisition of land or interests in land and not to grants of powers.

Again when section 299 (2) refers to acquisition of property and payment of compensation therefor, it obviously refers only to property for which there is a value. What is the value to be put on a right to recover rent apart from the rent itself ? Under section 3 (4) the Government undertakes a duty of collection and deducting the collection charges and dues it has to pay over the balance to the owner. Is this a right or an obligation ? It appears to me to be clear beyond doubt that the right of management can in no way or sense be regarded as property within the meaning of section 299 (2). To sum up :

1. (1950) I.L.R. 29 Pat. 790 at 807 (S.B.). 2. (1943-44) 68 C.L.R. 261.

(1) For section 299 (2) to apply there must be a transfer of land or interest in land;

(2) mere reduction of rent or enhancement of assessment is not acquisition even though the value of the property might suffer diminution;

(3) an acquisition contemplated by section 299 (2) is of the entire bundle of rights of the expropriated owner but if all the substantial elements of rights have been taken away it can be treated as an acquisition notwithstanding that some unessential ingredients of the rights are left unaffected, and

(4) a legislation which merely takes away the right of management without interfering with the title of the owner or his right to income from the property is not within section 299 (2).

I am accordingly of opinion that Act XXX of 1947 is not bad as infringing the requirements of section 299 (2) of the Government of India Act.

I shall now deal with the contention that Act XXX of 1947 was beyond the competence of the Provincial Legislature as the subject-matter could not be brought under any of the entries either in the Provincial or Concurrent list in Schedule 7 of the Government of India Act. The learned Advocate-General conceded that this legislation does not fall under Entry No. 9 of the Provincial List, which is "compulsory acquisition of land"; if it did, it will of course be hit by section 299 (2) but he contends that it falls under Entry No. 21 of List No. 2 which is as follows:

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonisation; Courts of wards, encumbered and attached estates, treasure trove."

His argument is that the legislation is one in respect of collection of rent and that it is within the competence of the Provincial Legislature. That this is legislation relating to collection of rents cannot be disputed. The rent has to be paid by the tenant to the Provincial Government. In default it could be recovered as arrears of land revenue and the chapters of the Estates Land Act relating to recovery of rent through revenue Courts are repealed by Act VII of 1951. Thus these sections enact special provisions for collection of rent and they constitute the Government as statutory agents for the landlords and provide appropriate provisions for realising of the rents. It should also be remembered that from 1865 there have been special laws relating to collection of rents in estates; that under these laws proceedings are to be taken before a Deputy Collector and there are special rules enacted for the conduct of these proceedings. Section 3 (4) is one more step in the same direction and that instead of the landlord applying to the Deputy Collector to take action the Provincial Government is itself to take action and in the place of the cumbersome machinery of suit and execution proceedings for the recovery of rent there is substituted a procedure for realising rent as if it were arrears of land revenue. I am unable to see, anything in section 3 (4) which is outside the scope of Entry No. 21, nor is there anything in the language of Entry No. 21, to exclude Act XXX of 1947 from its purview.

In *The United Provinces* v. *Atiqa Begum*[1], a question arose as to the validity of the United Provinces Regularisation of Remission Act XIV of 1938. Certain remissions of rent had been made by the Collector under the provisions of certain regulations and these were legalised by the Act XIV of 1938. In *Atiqa Begum* v. *Abdul Muzhim Khan*[2], a Full Bench of the Allahabad High Court had held that the impugned Act was *ultra vires* as being opposed to section 292 of the Government of India Act. Iqbal Ahmed, J., had further held that the legislation was not within the ambit of Entry No. 21 of List No. 2 and was therefore beyond the competence of the Legislature. He observed:

"By the authority given to it to make laws about the 'collection of rents' the Provincial Legislature is in my judgment authorised to provide about payment of rent in cash or in kind; to fix the instalments in which rent is to be collected to make provision about abatement or enhancement of rent, to prescribe the conditions under which the rent may be remitted, to regulate the method by which the rent is to be collected and to legislate about kindred matters.

1. (1941) 1 M.L.J. (Supp.) 65 : 3 F.L.J. 97. 2. I.L.R. (1940) All. 455 (F.B.).

The impugned Act however is not with respect to any such matter. It is therefore outside the scope of Entry No. 21 of the Provincial List."

In commenting upon the correctness of these observations Gwyer, C.J., stated :

"I do not know why the learned Judge should assume that the list of illustrations which he gives is necessarily exhaustive . . . . . . The general descriptive words in Item No. 21 include 'the collection of rents' and if a Provincial Legislature can legislate with respect to the collection of rents it must also have power to legislate with respect to any limitation on the power of the landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collections . . . .

I have no doubt that legislation with respect to the remission of rents is legislation with respect to a matter included in Item No. 21."

He also observes :

"I think, however, that none of the items in the lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

Varadachariar, J., expressed himself in similar terms, *vide* page 110. *Maharajadhiraj Uday Chand Mahtab of Burdwan* v. *Samarendranath Mitra*[1], is another decision of the Federal Court in which the validity of a legislation was considered with reference to Entry No. 21. Section 168 (A) of the Bengal Tenancy Act prohibited the landlord from realising the rents due from a tenant from any property excepting the holding in respect of which it was due. It was held that this was

"clearly a piece of legislation in respect of the right of landlord and tenant with regard to rent which had accrued due in respect of the property let to the tenant"

and that it was *intra vires* under Entry No. 21. These authorities show that the subject "collection of rents" is of wide import. This is in accordance with the view which is well-settled that the words "with respect to any matter enumerated in the list" occurring in section 100 of the Government of India Act should receive a liberal construction and that they should not be interpreted narrowly so as to invalidate legislation. Moreover there being a presumption in favour of the validity of an Act, it is a well-settled rule of construction that when Courts are called upon to pronounce upon the validity of an Act they would be justified in putting as wide a construction on the words of the statute as possible for the purpose of giving effect to it. The following observation of the Federal Court in *Re* : *In the matter of the powers of the Federal Legislature to provide for the levy of an estate duty*[2], in the judgment of Spens, C.J., and Varadachariar, J., is relevant.

"When a Court is called upon to pronounce an actual legislation *ultra vires* the view point (of ascertaining the probable intention of Parliament) becomes slightly different because though the intention of the Constitution Act is even then the test, the presumption in favour of validity—weak as it may sometimes be—inclines the Court to put as wide a construction as possible on the words used in the enactment."

I am accordingly of opinion that the language of Entry No. 21 should be construed as sufficiently wide to comprehend Act No. XXX of 1947.

It is urged for the petitioners that under the Act the Government has in effect taken over the management of the estates and that is not a subject within the competence of the Provincial Legislature. The decision in *M. D. Kameshwar Singh* v. *State of Bihar*[3] was strongly relied in support of this contention. There the question related to the validity of Bihar State Management of Estates and Tenures Act (Bihar Act XXI of 1949) and it was held that that legislation was not covered by any of the entries in the Provincial list and that, therefore, it was unconstitutional. An examination of the provisions of that Act shows that in its scope and operation it is altogether different from the Madras Act. It is unnecessary to set out in any detail the provisions of that Act because they have been exhaustively analysed in the judgments of the three learned Judges who pronounced that Act to be invalid. Some broad features wherein that Act differs from the Madras Act XXX of 1947, may be noted. That Act purports to "provide for the State management of estates" and not merely "for the collection of rents" as does the Madras Act.

1. (1947) 1 M.L.J. 258 : (1947) F.L.J. 1 : (F.C.). 1947 F.C.R. 1.
2. (1944) 2 M.L.J. 234 : 7 F.L.J. 215
3. (1950) I.L.R. 29 Pat. 790 (S.B.).

Under that Act the management is to be by an officer to be appointed by the Government whereas in the Madras Act the Provincial Government itself is constituted the collecting agency. The manager under the Bihar Act is empowered to take charge of the estates and such buildings and papers and other properties as are essential for the management and he has the power to cancel leases and mortgages, to ascertain amounts due to creditors and frame scheme for the liquidation of the debts of the proprietor and the period of management is to last for twenty-years. The substance of the Act was stated by Shearer, J., in the following terms :

"The conclusion is, to my mind, irresistible, and is that the impugned Act is to be used as a device for making the estate of the plaintiff and the estates of other substantial zamindars the *vile corpus* of a vast and hazardous experiment. If it is found that the estates can be successfully managed and made a source of revenue to the Provincial Government, other estates will gradually be taken charge of. If on the other hand, the experiment proves a dismal failure, the estates will be restored to their owners, and the latter will be left to do what they can to rehabilitate themselves. Was the Provincial Legislature competent to enact such a law?"

The learned Judge held that it was not. It will be seen that in the Madras Act the proprietors are not dispossessed of any properties of which they had possession prior to the Act. No building and no papers are taken possession of and no management of their estates is generally undertaken. The Act does what it purports to do and only provides for recovery of rent due from the ryots. The decision in *Sri Kameshwar Singh* v. *State of Bihar*[1] is inapplicable to Act XXX of 1947.

It is noteworthy that while the petitioners contend that this legislation does not fall under Entry No. 21 they do not suggest that it falls under any Entry in List No. 1 so as to bar the jurisdiction of the Provincial Legislature. If their argument is to be accepted then the position would be that the subject does not fall within the scope of any of the Entries enumerated in the three lists and that, therefore, it should form part of the residuary power in respect of which there could be legislation only in the manner provided in section 104 of the Government of India Act.

In *Manikasundara Bhattar* v. *R. S. Nayudu*[2], a similar contention was put forward with reference to Entry No. 34, List No. 2 which was in these terms :

"Charities and charitable institutions ; charitable and religious endowments."

The argument was that religious institutions were not within this entry and that there being no other entry relating to that subject it fell within section 104 and that the legislation by the Provincial Legislature was incompetent. Rejecting this argument the Federal Court observed as follows :

"We should moreover in any event prefer a construction which would enable the legislation on a subject of such vital importance in India to be enacted by some legislative body rather than leave it to be dealt with under sect. on 104 . . . . But when there is a choice between two possible constructions of an entry or entries one of which will result in legislative power being co ferred by some entry or entries in the lists and the other in a finding of no existing power, but if legislation is required that recourse must be had to section 104, the first construction should on principles analogous to those applied to the Canadian Constitution be preferred."

These observations furnish a strong ground for construing Entry No. 21 as wide enough to cover Act XXX of 1947.

Mr. Vedantachariar appearing for the zamindar landholders sought to argue that the true relationship between a zamindar and a ryot was not that of a landlord and a tenant and he referred to passages from the fifth report and the observations in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*[3], *Raju Vellanki Venkatarama Rao* v. *Raja Papanna Rao*[4] and *Venkatamahalakshmamma* v. *Ramajogi*[5]. It is true as already pointed out, that the rights of the zamindar differ in material particulars from those of the landlords under the general law but these differences do not affect the relationship of the zamindar and the ryots in law which is that of a landlord and a tenant ; nor do they alter the character of the payments made by the ryot

1. (1950) I.L.R. 29 Pat. 790 (S.B.).
2. (1946) 2 M.L.J. 17 : (1946) F.L.J. 57 (F.C.).
3. (1897) 7 M.L.J. 251 : I.L.R. 20 Mad. 299.
4. (1897) 8 M.L.J. 43 : I.L.R. 21 Mad. 299 at 301.
5. (1892) I.L.R. 16 Mad. 271 at 274.

to the zamindar whether in kind or money which is rent. The legislation on this subject has proceeded for nearly a century on the basis that they stand in the relation of a landlord and tenant and it is too late in the day to dispute that position. If the argument of Mr. Vedantachariar is to be accepted then the zamindar and the ryot will have to be regarded as being in the position of joint proprietors of the estate and the impugned legislation will then fall directly under the category of land under Entry No. 21. The following observations of the Privy Council in *Megh Raj* v. *Allah Rakhia*[1] may in that context be quoted :

> " The key to item 21 is to be found in the opening word ' land '. That word is sufficient in itself to include every form of land, whether agricultural or not. Land is indeed primarily a matter of provincial concern . . . . . The land in each province may have its special characteristics in view of which it is necessary to legislate and there are local customs and traditions in regard to landholding and particular problems of provincial or local concern which require provincial consideration . . . . It would be strange if the land in a province were to be broken into separate portions some within and some outside the legislative powers of the province. Such a conflict of jurisdiction is not to be expected. Item No. 21 is part of a Constitution and would on ordinary principles receive the widest construction, unless, for some reason it is cut down either by the terms of item No. 21 itself or by other parts of the Constitution which has to be read as a whole."

Nor am I impressed by the contention that this is a colourable legislation. When the Legislature intends to legislate on a subject which is outside its competence and it seeks to usurp that jurisdiction by disguising itself as a legislation on subjects which are ostensibly within its jurisdiction then it can be characterised as colourable legislation and that, of course, will be invalid ; but both the subjects covered by the Madras Act No. XXX of 1947 are within its competence and apart from those two subjects the Act does not in form or in substance legislate on any topic which is beyond its competence. There is no basis for the contention that the Government derives indirectly any benefit under this legislation. This contention must also be overruled. The result then is that the Act No. XXX of 1947 is within the ambit of Entry No. 21 of the Provincial List and that it is a valid piece of legislation.

In this view it becomes unnecessary to discuss whether the entire legislation should be regarded as bad in case section 3 (4) and the connected sections are held to be beyond the competence of the Legislature. It would be relevant for this purpose to note that the two categories of sections in the statute relating to reduction of rent and realisation of rent are distinct and severable, that the bill in its original form related only to reduction of rent and section 3 (4) came to be added only during the passage of the bill in the Legislature. The two classes of sections are not so interwoven as to be inextricable. Reliance was placed on behalf of the petitioners on the following observations of Viscount Simon occurring in *Attorney-General for Alberta* v. *Attorney-General for Canada*[2] :

> " This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is *intra vires* ' either in whole or in part ', but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the Legislature would be acting within its powers if it is passed what remains. The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is *ultra vires* at all."

Applying the above principles I should be prepared to hold that even if section 3 (4) is *ultra vires* of the Legislature the other portions of the statute relating to reduction of rent would be valid. I am accordingly of opinion that Act XXX of 1947 is not opposed to section 299 (2) of the Government of India Act, 1935 ; nor is it *ultra vires* of the powers of the Provincial Legislature and that it was therefore a valid piece of legislation when it was passed.

Now I shall consider the second group of objections whether Act XXX of 1947 became void under Article 13 of the Constitution as being inconsistent with the fundamental rights declared in Article 31 (2), Article 19 and Article 14. The

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1. (1947) 2 M.L.J. 1 at 4 : L.R. 74 I.A. 12 : (1947) F.L.J. 28 (P.C.).
2. (1947) A.C. 503 at 518.

objections put forward on the basis of Article 31 (2) are identical with those urged in connection with section 299 (2) of the Government of India Act, 1935 and for the reasons already given they must be overruled.

It has been strongly pressed upon us that the provisions of Act XXX of 1947 are opposed to Article 19 (1) (*f*) as imposing restrictions on the rights of an owner to "hold" property and that they could not be upheld as either reasonable or made in the interests of the public. Here again it is necessary to consider separately the provisions relating to reduction of rent and those relating to realisation of rent. It was argued by Mr. Kesava Iyengar who appeared for some of the petitioners that the Act avowedly reduced rents to a substantial extent and that it is therefore, an invasion of the right of the owner to hold property which means, of course, his right to enjoy the income from the property. Indeed he argued that the reduction of rent payable to a landlord to any extent will be hit by Article 19 (1) (*f*). But the relationship of the landholder and the ryot in an estate has peculiar incidents attaching to it, many of them having their roots in custom. The rights of a landlord in an estate are often variable and not seldom undefined. This is particularly so with reference to quantum of rent payable by ryots. Tenancy legislation has generally been directed to the ascertainment of these rights and it may be doubted whether Article 19 (1) (*f*) can in strictness be applied to such a legislation. The true scope of Article 19 (1) (*f*) is not to determine what rights a citizen possesses but only to confer on him a power to enjoy those rights to which he may be found to be entitled and the tenancy legislation which has for its object the determination of those rights cannot be said to be inconsistent with Article 19 (1) (*f*). It is true that there has been substantial reduction of rent and it is possible to contend that this is much more than ascertainment of rights and in reality an expropriation thereof but then the claim of the ryots is that they are liable to pay only what the tenants in the ryotwari areas pay and that the excess which they have been paying is illegal exaction by the landholder and if the Legislature takes the view that this is the correct position, then the reduction of rent in estates to ryotwari levels will not deprive the landlord of what is justly due to him but would only limit his rights to what he is lawfully entitled. It is difficult to say that section 19 (1) (*f*) stands in the way of such a legislation. In any event I am prepared to hold that the Act is saved by Article 19 (5) as a reasonable limitation on the rights of the proprietor made in the interests of the public. The occasion for the legislation was that a large population of tenantry in the estates was groaning under a heavy rate of rent and the Act was passed for granting a relief to them. Such a legislation will be within Article 19 (5). This objection must accordingly be overruled.

Mr. Vedantachariar appearing for some of the zamindars raised a contention which was special to them. In order to appreciate this contention it is necessary to bear in mind that in the definition of estates in the Madras Estates Land Act, section 3, clause (2), are comprised different varieties of them. The zamindars holding sanads under permanent settlement form one class. They are assessed to the payment of fixed peshkush to the Government. Then we have jagirdars who bear analogy to zamindars in the nature of their estates but differ from them in that there is no permanent settlement and no liability to pay peshkush. In this respect they resemble inamdars who hold estates either free of assessment or on payment of favourable rates of assessment. These three classes differ considerably among themselves though they have this in common that the tenants in all of them have occupancy rights. The reduction of rent must operate with varying effects on the several classes of landholders. The zamindars unlike others are under an obligation to pay peshkush which was fixed in relation to income from the estate. In their case reduction of rent must operate more harshly than on the jagirdars or inamdars who pay little or no assessment and in whose case the reduction of rent is only a reduction of income. Now the contention of Mr. Vedantachariar is that the effect of this legislation must be confiscatory so far as zamindars are concerned because if the peshkush and cess and collection charges and other liabilities are deducted out of the reduced rent income there may be little or nothing left for them out of the estate, if indeed there be not any deficiency to be made good

by them. He accordingly contended that if in the working of the Act the zamindar is unjustly deprived of his property he will be entitled to protection under Article 19 (1) (*f*) and he relied on the cases in *John H. Reagan* v. *The Farmers Loan and Trust Co.*[1] and *Covington and Livington Turnpike Road Co.* v. *Sandford*[2]. In these cases certain Commissioners acting under the powers granted to them by the statute which created them fixed rates of tariff for railroad traffic in the former case and tolls in the latter. The complaint was that the rates were unreasonably high and unjust and amounted to destruction of rights of property. This contention was upheld, It might be conceded that by reducing the rent without reducing peshkush much injustice might result in particular cases. At the same time it must be remembered that Act XXX of 1947 operates only in respect of ryoti lands ; that zamindars have other valuable incomes such as forestry, fishery and so forth and private lands of the zamindars are also left untouched. It is, therefore, difficult to hold without more that the Act must necessarily deprive the zamindars as a class of their entire estate. It is just likely that some of them might be hit to such an extent as to bring their case within Article 19 (1) (*f*) and that in turn will depend upon investigation of facts but we are now concerned only with validity of the legislation as a whole and there is no legal basis for holding that it is invalid.

I shall now consider whether the provisions relating to collection of rents are hit by Article 19 (1) (*f*). It appears to me that this question is concluded by the decision of the Supreme Court in *Charanjit Lal Chowdhury* v. *The Union of India*[3]. There one of the contentions put forward by the shareholder was that the restrictions placed on his right as a shareholder were void under Article 19 (1) (*f*). In dealing with this contention Mukherjee, J., observed :

"It is quite clear that there is no restriction whatsoever upon the petitioner's right to acquire and dispose of any property. The shares, which he holds, do remain his property and his right to dispose them of is not fettered in any way. If to 'hold' a property means to possess it, there is no infringement of this right either for, as I have stated already, the acts complained of by the petitioner do not amount to dispossession of him from any property in the eye of law. It is argued that holding includes enjoyment of all benefits that are ordinarily attached to the ownership of a property. The enjoyment of the fruits of a property is undoubtedly an incident of ownership. The pecuniary benefit, which a shareholder derives from the shares he holds, is the dividend and there is no limitation on the petitioner's right in this respect."

Then dealing with the restrictions on the right of the shareholder to elect directors, pass resolutions or to institute proceedings in a Court of law the learned Judge observed :

"In my opinion, these rights are privileges which are appurtenant to or flow from the ownership of property but by themselves and taken independently they cannot be reckoned as property capable of being acquired, held or disposed of as is contemplated by Article 19 (1) (*f*) of the Constitution."

Das, J., expressed himself to the same effect, *vide* page 59. On this reasoning it must be held that no rights of the petitioners have been infringed under Article 19 (1) (*f*) because their title to the estate is unaffected, their right to dispose of it is untouched and their right to receive rent has been expressly preserved. I am also prepared to hold that the provisions of section 3 (4) of Act XXX of 1947 can be upheld as a reasonable restriction made in the general interests of the public under Article 19 (5). I have already held that the provisions relating to reduction of rent are reasonable and in the interests of the public. Section 3, clause (4) which is intended to give practical effect to the provisions relating to reduction of rent must also be held to be valid as being reasonable and in the interests of the public. To fix a reasonable rate of rent is not to bring home relief to the tenants so long as the landlords are unwilling to reconcile themselves to substantial reduction of rent which they had hitherto been receiving and resort to Courts might become necessary to work out the rights of the tenants. The relief might become slow and tardy and it is this state of affairs that is sought to be remedied by section 3 (4). The landlord does not thereby lose any of his substantial rights ; on the other hand realisation of rent by the Government will be more speedy and less costly. Under

1. 154 U.S. 361 : 38 Law Ed. 1014.
2. 164 U.S. 578 : 41 Law Ed. 560.
3. (1951) S.C.J. 29.

the circumstances these provisions must also be held to be valid. I am, therefore, of opinion that none of the provisions of Act XXX of 1947 infringes the fundamental rights under Article 19.

It remains to deal with the contention of Mr. Kesava Aiyangar that the provisions of Act XXX of 1947 are opposed to Article 14 and that, therefore, it is invalid. This contention is based upon Explanation 1 to section 2 that the special officer has power only to reduce rent and not to enhance it. It is stated that in the same estate the rates of rent vary with different tenants, that while many of them pay more than the ryotwari rates, some of them pay less and that to authorise reduction of rent but not enhancement thereof is discrimination within Article 14. So argues the learned Advocate. But it has been held that Article 14 does not apply where there is classification and as the legislation has for its object the reduction of rent where it is higher than the ryotwari rates, it is a legislation in respect of a class and not to open challenge under Article 14. Moreover, if even after the enactment of Act XXX of 1947 there is difference in the rights of the several classes of tenants, that is not discrimination arising by reason of the Act. The disparity in rates existed prior to the legislation and it is no objection to the validity of the Act that it has not entirely obliterated the pre-existing inequalities. The case is analogous to that in *Ramjilal* v. *Income-tax Officer, Mohindar Garh*[1]. The facts of that case were that there was no income-tax law in the State of Nabha while the State of Kapurthala had one and after these States were integrated the residents of Nabha State were assessed to income-tax under the law of Pepsu Union. This rate was higher than the rates of income-tax in Kapurthala. Nabha contended that there was discrimination in that Kapurthala was paying less income-tax and that, therefore the Pepsu regulation was discriminatory under Article 14. The Supreme Court rejected this contention, Das, J., observing:

"The discrimination, if any, was not brought about by the two Ordinances, but by the circumstance that there was no Income-tax Act in Nabha."

The result then is that Act XXX of 1947 was valid when it was passed and has not become invalid under the Constitution and that Act VII of 1951 is also valid.

I agree with the conclusions of my Lord the Chief Justice and in the order to be passed on these petitions.

K.S. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

Sri Raju V. Chandra, Chudamani Dev. Bahadur Varu and others .. *Petitioners* *

v.

The Madras State represented by the Collector of Srikakulam and others .. *Respondents.*

Madras Estates Land (Reduction of Rent) Act (XXX of 1947)—Validity of the Act—Question whether particular property is or is not an "estate" within the Act—Suit in Civil Court—Maintainability—Civil Procedure Code (V of 1908), section 9—Writ of mandamus—*If to be issued—Constitution of India* (1950), *Article 226—Jurisdiction under—Scope.*

Madras Act XXX of 1947 is *intra vires*, and has not become void after the Constitution. In exceptional cases when on the face of the record or on admitted facts, it is clear that a particular property does not fall within the definition of "an estate" in section 3 (2) of the Madras Estates Land Act and Madras Act XXX of 1947 is applied to it, the High Court can quash the order of the Government passed under section 3 (2) of Madras Act XXX of 1947. But in the majority of cases it may not be possible for the High Court with its limited scope of jurisdiction under Article 226 of the Constitution to give relief to an applicant who alleges that his property does not fall within the definition of "estate." In such cases the proper and adequate remedy would be by way of a suit. There can be no question that a suit to challenge the validity of an order of the Government

1. (1951) S.C.J. 203.

* C. M. Ps. Nos. 11740 of 1950, etc. 28th September, 1951.

made under section 3 of Madras Act XXX of 1947 on the ground that the Act itself does not apply to the property concerned would be maintainable. Where a suit is the proper and adequate remedy an order under Article 226 of the Constitution would not ordinarily be made.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of *mandamus* directing the respondent to forbear from collecting the rents due to the petitioner from his tenants from fasli 1357 onwards, from interfering with the petitioner's collection of rents due to him from his tenants in respect of his Inam Sriharipuram-Mokhasa, Palakunda Taluk, Vizagapatam District now of Srikakulam District and from taking any proceedings under Act XXX of 1947 as notified in Part I of the *Fort St. George Gazette*, dated 8th August, 1950, as notification No. 5396 at page 2535, etc.

V. Vedantachariar, T. Rangaswami Aiyangar, T. Krishnaswami Aiyangar, K. Umamaheswaram, A. Kuppuswami, C. V. Dhikshitalu and *K. V. K. Sarma for Petitioners.*

The Advocate-General (*V. K. Thiruvenkatachari*) for the State.

The Order of the Court was made by

The Chief Justice.—These applications are directed against the orders issued by the Government under section 3 (2) of Madras Act XXX of 1947 reducing the rates of rent payable in respect of the estates of the several applicants. Two main grounds were taken in these applications, namely, (1) that Madras Act XXX of 1947 was *ultra vires* and in any event became void after the Constitution and (2) that the Act did not apply to the properties owned by the applicants because they did not fall within the definition of " estate " in section 3 (2) of the Madras Estates Land Act I of 1908.

The first ground has since been disposed of by our judgment in *Rajah of Bobbili* v. *State of Madras* (C.M.P. No. 894 of 1951, etc.)[1] adverse to the applicants. The second ground remains.

The Act applies to all estates as defined in section 3 (2) of the Madras Estates Land Act, 1908 [section 1 (2)]. The applicants deny that their properties fall within this definition. There is no provision in the Act itself under which any special Tribunal is appointed to decide a dispute as to whether a particular property is or is not an estate within the meaning of the Act. Under section 2 (1) of the Act the Provincial Government is given the power to appoint a special officer in any estate or estates for the purpose of recommending fair and equitable rates of rent for the ryoti lands in such estate or estates. The rents as finally approved by the Government are published in the *Fort St. George Gazette*, under section 3 (2). It is obvious that if a particular property is not an estate, such property would not be governed by the provisions of the Act and any order published by the Government under section 3 (2) of the Act would not be of any legal consequence or force. The question is : what is the remedy of the aggrieved owners of such properties when orders are published by the Government reducing the rates of rent in respect of them. In exceptional cases when on the face of the record or on admitted facts, it is clear that a particular property does not fall within the definition of an estate in section 3 (2) of the Madras Estates Land Act, 1908, this Court can quash the order of the Government passed under section 3 (2). But in the majority of cases it may not be possible for this Court with its limited scope of jurisdiction under Article 226 of the Constitution to give relief to an applicant who alleges that his property does not fall within the definition. In such cases the proper and adequate remedy would be by way of a suit. There can be no question that a suit to challenge the validity of an order of the Government made under section 3 of the Act on the ground that the Act itself does not apply to the property concerned would be maintainable. There is nothing in the Act itself ousting the jurisdiction in this behalf. No doubt section 8 of the Act says that the validity of an order made under section 3 (2) shall not be liable to be questioned in any Court of law. But such provision will never apply to a case where there is initial lack of power in the Provincial Government to take any proceeding under

1. (1952) 2 M.L.J. 174.

the Act. Before section 8 can apply, there must be an order which could be held to be a lawful order passed under the Act. If it is an order passed under the colour of the Act, the provision cannot obviously apply.

It has been held over and over again that when executive authorities in exercise or under colour of a statutory power interfere with the property of a subject improperly and in excess of the limits authorised by law, the subject has a right to resort to the civil Court unless its jurisdiction has been taken away by express words or by clear implication. As their Lordships of the Judicial Committee observed in *Secretary of State for India* v. *Mask & Co.*[1],

"It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

The Act expressly applies only to certain subject-matter. If anything falls outside that subject-matter, then it follows that the Act cannot apply to such a thing. Even in such cases it may be when a special statutory tribunal has been created by the Act invested with power and jurisdiction to decide any dispute as to whether any particular property falls within or outside the Act, then, the jurisdiction of the civil Court is to that extent ousted. But in this case, as already pointed out, there is no such special tribunal. A civil Court would therefore have the jurisdiction vested in it under section 9, Civil Procedure Code, to decide the question whether particular property is or is not an "estate" within the Act in a suit instituted by any aggrieved party.

A suit is the proper and adequate remedy under the circumstances, and as a rule an order under Article 226 would not be made when there is another proper and adequate remedy. These applications will therefore be dismissed. There will be no order as to costs. Under instructions from the Government, the Advocate-General states that in case any of the applicants intends to file a suit, the Government would waive their right to two months' notice under section 80 of the Civil Procedure Code.

K.S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

S. Ananthakrishnan .. *Petitioner**

v.

The State of Madras .. *Respondent.*

Constitution of India (1950), *Article* 19 (1) (g) *and Stamp Act* (*II of* 1899) *as amended by Madras Stamp Amendment Act* (*VI of* 1922), *Schedule* 1-*A*, *Article* 25—*Fundamental rights to practise advocate's profession—Power of State to tax—Reconciliation.*

The stamp duty levied under Article 30 of Schedule I of the Indian Stamp Act or Article 25 of Schedule 1-A of the Act as amended in Madras is not of the same nature as the licence tax or privilege tax, examples of which are to be found in some American cases. It is not a periodical or recurring levy depending on the practice of the profession or on which the practice of the profession depends. Besides acting and pleading in Courts there are many ways in which a lawyer can pursue his profession. If any one wants the additional privilege of being entitled as of right to act and plead in the High Court he has got to be enrolled on the rolls of that Court. Enrolment consists in making an entry on the roll and the Legislature says that the particular entry should bear a stamp duty. This entry is an instrument as defined in the Indian Stamp Act. There is no evidence that the purpose of the stamp duty is to destroy the practice of the profession of law or that it was prompted by improper motives. Even assuming a tax otherwise lawfully levied can be held to be an unreasonable restriction on the exercise of any of the freedoms guaranteed by Article 19, it cannot be said in this case that the imposition of the stamp duty is not a reasonable restriction and not in the interests of the general public. So long as the monetary exaction is, in the opinion of the Court, reasonable, it cannot be said that it is invalid as being unconstitutional.

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1. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. 1940 Mad. 599 at 614 (P.C.).

* C. M. P. No. 7894 of 1951. 19th October, 1951.

Though any system of permits which eventually depends upon the discretion of executive authority would be bad when the system curtails any fundamental right, it cannot be said that in this case, it is in anybody's discretion to enrol or not to enrol a person otherwise qualified for being enrolled. There being thus neither discrimination nor any possibility of the exercise of naked arbitrary power, the practice of the profession is not dependent on the will and pleasure of any individual.

The right to plead and act on behalf of suitors in Court is not a right flowing from citizenship. It is not only a Citizen who is entitled to be enrolled as an Advocate. Even a foreigner if he fulfills the prescribed qualifications and requirements can be enrolled as such. The exclusive right to represent suitors in a Court which an Advocate possesses is really in the nature of a privilege though the fact that it is a privilege does not imply that on the conferment of the privilege there can be discrimination. Article 14 is a sufficient safeguard against any unequal treatment. The charge of a fee by way of levy of stamp duty for such privilege cannot be invalid as unconstitutional.

Even if the right to act and plead is deemed to be a right comprised in the right to practise the profession guaranteed under Article 19 (1) (*g*) there is nothing in the Constitution to exempt such right wholly from the taxing power of the State. Article 265 which says 'no tax shall be levied except by authority of law' does not provide for any exemptions. A number of entries in the legislative lists clearly indicate the scope of the taxing power as extending even to rights covered by Article 19 (1). The right to levy stamp duty in respect of documents is specifically enumerated in both Lists I and II. The proper way to reconcile the fundamental rights guaranteed under Article 19 and the power to tax contained in the several provisions of the Constitution is that if the taxation is only for legitimate revenue purpose then it is not invalid merely because it may adversely affect any of the fundamental rights. This way of reconciling would tend to give room for judicial review in exceptional cases and a power in the Court to declare a particular instance of taxation as unconstitutional.

As the enrolment fee is not with the object of deliberately abridging or destroying the right to carry on the legal profession nor is it so excessive and oppressive as to virtually abridge or destroy such right, it must be held proper and constitutional.

Per *Venkatarama Aiyar, J.*—There is abundant authority for the proposition that fundamental rights are not immune from taxation. The Stamp Act is a measure of taxation. The power to tax is an attribute of sovereignty, it carries with it the power to determine when and how the tax shall be levied and it is no objection to its validity that it is levied before the commencement of the trade and not after. Hence the theory of previous restraint on the exercise of the fundamental right being void in the sense that the imposition of the tax as a condition precedent to the exercise of the profession is illegal and opposed to Article 19 (1) of the Constitution has no application. While the levy of income-tax cannot be questioned in Courts the levy of profession tax might be challenged on the ground that it is unreasonable and excessive as to be prohibitive of the right to carry on trade. Any question whether a tax in a particular case is so unreasonable as to amount to a destruction of the right will, of course be a matter for determination by Courts in the same manner as questions of reasonableness under Article 19, clauses (3) to (5).

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to declare that Article 25 of Schedule I-A of the Indian Stamp Act of 1899 as amended by the Madras Stamp Amendment Act of 1922 and further modified by Madras Act XVI of 1943 inoperative and ineffective in view of Article 13 (1), Article 19 (1) (*g*) and Article 246 (1) read with Items 78 and 96 of List I of the Seventh Schedule of the Constitution of India and that the petitioner is entitled to be enrolled as an Advocate without reference to Article 25 of Schedule I-A of the Madras Stamp Amendment Act, 1922.

K. V. Venkatasubramania Aiyar and *P. Anandan Nambiar* for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) for the State Counsel (*John and Row*) for the State.

The Judgment of the Court was delivered by

The Chief Justice.—This is an application made under Article 226 of the Constitution. The petitioner is a Law Graduate of the Madras University. According to the Statements made in his affidavit in support of the application, he has completed the prescribed term of apprenticeship and passed the Bar Council examinations in Practice and Procedure and has complied with all the requirements prescribed under the rules framed by the Madras Bar Council under the Indian Bar Councils Act. He is an applicant to be admitted to the rolls of this High Court as an advocate thereof. His complaint and the relief which he seeks from this Court are thus set out in the following paragraphs in his affidavit :

"3. I am a citizen of India. Article 19 (1) (*g*) of the Constitution of India secures to me the right to practise any profession. I am desirous of practising the profession of law, and with that view, I have applied to be enrolled as an Advocate of this Honourable Court.

4. Under section 8 of the Indian Bar Councils Act, I will not be deemed to be entitled to practise the profession of law before the High Court unless I have been enrolled as an Advocate

thereof. The Madras Stamp Amendment Act of 1922, by Article 25 of Schedule I-A prescribes a fee of Rs. 625 for enrolment as an Advocate.

5. I desire to bring to the consideration of this Honourable Court the question whether the right to practise any profession secured to me under Article 19 (1) (*g*) of the Constitution can be subjected to restrictions other than those prescribed in clause 6 of the same Article, and whether that provision of the Madras Stamp Amendment Act of 1922 prescribing a fee of Rs. 625 could be sustained at all in view of the provisions of the Constitution of India, particularly Article 19 (1) (*g*) read with Article 13 (1). I submit, however, that whatever might have been the legality or propriety of the impugned provisions prior to the coming into force of the Constitution, the same could not be maintained inasmuch as they seek to regulate enrolment not only by professional qualifications or merit but also by consideration as to payment of fees.

* * * * * * *

7. It is therefore just and necessary that this Honourable Court should be pleased to make an order declaring that Article 25 of Schedule I-A of the Madras Stamp Amendment Act, 1922, is void, ineffective and inoperative, and I be entitled to be enrolled as an Advocate of this Honourable Court, the said Article notwithstanding; and to pass such other order or orders as this Honourable Court may in the circumstances deem fit to pass."

The material provisions relating to the enrolment of legal practitioners as advocates of the High Court are as follows: So far as the Chartered High Courts are concerned, one of the clauses of the Letters Patent (clause 9 in the Letters Patent granted to this Court) authorised and empowered the said High Court

"to approve, admit and enrol such and so many Advocates, Vakeels and Attorneys, as to the said High Court shall seem meet."

Such Advocates and Attorneys were authorised to appear for the suitors of the said High Court, and

"to plead or to act, or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine and subject to such rules and directions."

By another clause (clause 10 of the Madras Letters Patent) it was provided that:

"No person whatsoever but such Advocates, Vakeels or Attorneys shall be allowed to act or to plead for or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor."

As regards a High Court established by Royal Charter, section 41 of the Legal Practitioners Act of 1879 provided that such a High Court may from time to time with the previous sanction of the Provincial Government make rules as to the qualifications and admission of proper persons to be Advocates of the Court, and subject to such rules may enrol such and so many advocates as it thinks fit.

The Indian Bar Councils Act of 1926 contains provisions regarding the admission and enrolment of Advocates. Section 8 (1) says that:

"No person shall be entitled as of right to practise in any High Court unless his name is entered in the roll of the Advocates of the High Court maintained under this Act."

Sub-section (2) of the same section enjoins the High Court to prepare and maintain a roll of Advocates. The proviso is important for the purpose of this application. It runs thus:

"Provided that such persons shall have paid in respect of enrolment the stamp duty, if any, under the Indian Stamp Act, 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in clause (*a*) and in other cases such amount as may be prescribed."

Section 3 of the Indian Stamp Act II of 1899 enacts that the instruments mentioned in Schedule I shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor subject to exceptions with which we are not concerned. Item 30 of Schedule I is as follows:

"Entry as an Advocate, Vakeel or Attorney on the roll of any High Court (under the Indian Bar Councils Act, 1926) or in exercise of the powers conferred on such Court by Letters Patent or by the Legal Practitioners Act, 1884:

(*a*) in the case of an advocate or vakil—five hundred rupees;

(*b*) in the case of an attorney—two hundred and fifty rupees.

Exemption: Entry of an Advocate, Vakeel or Attorney on the roll of any High Court when he has previously been enrolled in a High Court".

By the Madras Stamp (Amendment) Act VI of 1922, the duty was increased from Rs. 500 to Rs. 625 in the case of Advocates and in the case of Attorneys to Rs. 312-8-0.

The entire argument of Mr. K. V. Venkatasubramania Aiyar, learned counsel for the petitioner was built upon Article 19 (1) (*g*) which declares the right of every citizen " to practise any profession or to carry on any occupation, trade or business." Clause (6) of the same Article no doubt indicates that the exercise of this right may be curtailed by the imposition of reasonable restrictions in the interests of the general public. It also saves laws prescribing professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. But petitioner's counsel contended that the payment of the stamp duty cannot be said to be a qualification necessary for practising the profession. He further contended that the levy of this duty cannot amount to a reasonable restriction on the exercise of the right.

Learned counsel did not deny the power of the State to impose taxes. He even conceded that a citizen could not claim exemption from the taxing power of the State simply because he was exercising one of the fundamental rights guaranteed to him by the Constitution for instance, a citizen could not claim exemption from income-tax simply because the tax is levied on the income derived by practising a profession or carrying on a trade. But he contended that the taxing power of a State could not be used to impose a monetary exaction by way of a condition precedent to the exercise of a fundamental right, though there may be cases in which a system of licensing can be justified and a nominal fee for the grant of a licence may be collected, provided the monetary exaction was a legitimate licence fee and not a tax intended for the augmentation of revenue in the guise of a licence fee. The basic proposition developed in his argument was this that the freedom guaranteed by our Constitution cannot be subjected to advance restraint by the plenary taxing power of the State. For this proposition he sought support mainly in decisions of the Supreme Court of the United States.

The first decision on which he relied is that in *Grosjean* v. *American Press Co*[1]. The impugned provision in that case was contained in an Act of the Legislature of Louisiana which ran as follows :

> " That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licences levied and assessed in this State, pay a licence tax for the privilege of engaging in such business in this State of two per cent. of the gross receipts of such business."

The Act required everyone subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business and the resulting tax must be paid when the report was filed. Failure to file the report or pay the tax constituted a misdemeanour punishable with fine or imprisonment or both. The validity of the Act was assailed as violating the Constitution in that it abridged the freedom of the Press in contravention of the due process clause contained in clause (1) of the fourteenth amendment. The first amendment provided that Congress shall make no law abridging the freedom of speech or of the Press. Though this provision did not relate to the States, it was well established that the States were precluded likewise from abridging the freedom of speech or of the Press by force of the due process clause of the fourteenth amendment. Mr. Justice Sutherland delivered the opinion of the Court. He reviewed the history and circumstances which led to the adoption of the abridgment clause of the first amendment which expressed one of those

> ' fundamental principles of liberty and justice which lie at the base of all our civil and political institutions ".

The object of the constitutional provisions contained in the first and the fourteenth amendment was to prevent previous restraints on publication. Liberty of the Press meant principally although not exclusively immunity from previous restraints or censorship. The reasons given for the conclusion of the Court that the tax in question was unconstitutional under the due process clause, because it abridged the freedom of the Press are best given in the words of the learned Judge himself :

1. 297 U.S. 233 : 80 Law. Ed. 660.

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the Government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the Press . . . . . The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because in the light of its present setting it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled to in virtue of the constitutional guarantees. A free Press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves . . . . . The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalising the publishers and curtailing the circulation of a selected group of newspapers."

I do not understand this case as an authority for the proposition advanced by learned counsel for the petitioner. It will be noticed that the tax was not imposed in advance. The payment of the tax was not a condition precedent to the publication of the journal. Periodical reports had to be filed and along with them the tax was payable according to the receipts. As I understand it, the decision in that case really rested on the circumstance that there was an ulterior bad motive behind the enactment. It was a deliberate and calculated device to penalise a certain group of newspapers. As pointed out in *Mebes* v. *White Plains Publishing Co.*[1], in the *Grosjean case*[2]:

"The payment was singled out for special taxation and the tax was graduated in accordance with volume of circulation."

In my opinion the *Grosjean case*[2] is not in point here. I doubt if the Court which decided *Grosjean's case*[2], would have held a non-discriminatory tax on advertisements as such unconstitutional. Even if such a decision was possible on an interpretation of the American Constitution, I do not think it would have application to a case arising under our Constitution, because Article 269 of our Constitution mentions among the duties and taxes which shall be levied and collected by the Government of India and assigned to the States " taxes on the sale or purchase of newspapers and on advertisements published therein ".

The next set of cases relied on by learned counsel for the petitioner deals with the freedom of religion guaranteed by the American Constitution. In *Jones* v. *Opelika*[3], the majority of the Judges of the Supreme Court held that a State may without violation of the constitutional guarantees of freedom of religion and freedom of speech and Press, exact a reasonable and non-discriminatory licence fee from religious adherents engaged in the sale of religious books and pamphlets through the ordinary methods used in commercial canvassing. The *ratio decidendi* of the decision of the Court is contained in the opinion delivered by Mr. Justice Reed and is thus expressed :

"When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is natural and proper exercise of the power of the State to charge reasonable fees for the privilege of canvassing."

Chief Justice Stone and Mr. Justice Murphy delivered dissenting opinions in which Mr. Justice Black and Mr. Justice Douglas concurred. The Chief Justice understood the purpose of the ordinances to be suppression of the distribution of religious literature. He said :

"The taxes are insupportable either as a tax on the dissemination of ideas or as a tax on the collection of funds for religious purposes. For on its face a flat licence tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise. The first Amendment prohibits all laws abridging freedom of Press and religion, not merely some laws or all except tax laws . . . . Freedom of Press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to inter-state commerce . . . . In its potency as a prior restraint on publication the flat licence tax falls short only of outright censorship or suppression."

Mr. Justice Murphy is his dissenting opinion observed :

"But whatever the amount, the taxes are in reality taxes upon the dissemination of religious ideas, a dissemination carried on by the distribution of religious literature for religious reasons alone

1. 327 U.S. 128 : 50 Law. Ed. 607.
2. 297 U.S. 233 : 80 Law. Ed. 660.
3. 316 U.S. 584 : 86 Law. Ed. 1691.

and not for personal profit. As such they place a burden on freedom of speech, freedom of the Press, and the exercise of religion even if the question of amount is laid aside . . . . The exercise without commercial motives of freedom of speech, freedom of the Press, or freedom of worship are not proper sources of taxation for general revenue prupoces."

Mr. Justice Black who also dissented tersely put his point of view thus :

"The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practised by a minority group . . . . Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be."

The majority view which prevailed in *Jones* v. *Opelika*[1], was overruled shortly after that decision in *Murdock* v. *Pennsylvania*[2]. In that case the impugned Ordinance provided that all persons canvassing for or soliciting orders for goods, paintings, pictures, or merchandise of any kind shall be required to procure from the Burgess a licence to transact the said business and shall pay certain sums according to the time for which the said licence shall be granted. The rates were : for one day 1½ dollars, for one week 7 dollars, for 2 weeks 12 dollars and for 3 weeks 20 dollars. The persons who impugned the Ordinance were members of a sect known as Jehovah's witnesses. They went about from door to door distributing literature and soliciting people to purchase certain religious books and pamphlets. Mr. Justice Douglas delivered the opinion of the Court. His approach to the discussion of the question is significant. After referring to the first amendment which the fourteenth amendment makes applicable to the States and which declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the Press, observed,

"It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the licence tax imposed by this Ordinance is in substance just that."

After dealing with the religious practice of Jehovah's witnesses and their type of evangelism, the learned Judge rejected the contention that when a religious sect uses ordinary commercial methods of sales of articles to raise propaganda funds, it is proper for the State to charge reasonable fees for the privileges of canvassing and said :

"But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."

Considerable reliance was placed by petitioner's learned counsel on the following passage in the opinion of the Court :

"We do not mean to say that religious groups and the Press are free from all financial burdens of Government. See *Grosjean* v. *American Press Co.*[3]. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeanette is a flat licence tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . . In all of these cases the issuance of the permit or licence is dependent on the payment of a licence tax. And the licence tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realised revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat licence tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the first amendment."

Reed and Frankfurter, JJ., delivered dissenting opinions. Mr. Justice Frankfurter very forcibly put forth the opposite view. He said :

"Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constiutional right . . . . It is certainly true that the protection afforded the freedom of the Press by the first amendment does not include exemption from all taxation. A tax upon newspaper publishing is not invalid simply because it falls upon the exercise of a constitutional right. Such a tax might be invalid if it invidiously singled out newspapers publishing for bearing the burdens of taxation or imposed upon them in such ways as to encroach on the essential scope of a free press."

According to the learned Judge, the question really turned on the nature of the condition imposed and the extent to which it hinders or restricts the exercise of the privilege. He very lucidly draws the distinction between the use and the abuse

1. 316 U.S. 584 : 86 Law. Ed. 1691.
2. 319 U.S. 105 : 87 Law. Ed. 1292.
3. 297 U.S. 233 : 80 Law. Ed. 660.

of the power to tax. The fact that the power can be perverted does not mean that every exercise of the power is a perversion of the power. If a tax indirectly suppresses or controls the enjoyment of a constitutional privilege which a Legislature cannot directly suppress or control, of course, it is bad. But if it does not, it is irrelevant that some other tax would have that effect. The learned Judge posed the ultimate question thus :

"The ultimate question in determining the constitutionality of a tax measure is—has the State given something for which it can ask a return"

and answers the question :

"There can be no doubt that these petitioners, like all who use the streets, have received the benefits of Government."

He found that the taxes in question did not actually cramp the activities pursued by the petitioners to promote their religious beliefs. He was therefore of opinion that the ordinance was valid. In *Follett* v. *McCormic*[1], the principle laid down in *Murdock's case*[2] was applied and an Ordinance levying a licence tax on the occupation of a book agent from a distributor of religious literature was declared to be unconstitutional as the guarantee of religious freedom precluded any exaction from a person who was engaged in spreading his religious beliefs by the distribution of religious literature, although such person's activities were confined to his residential town and he depended for his livelihood on contributions expected in return for the literature distributed. Mr. Justice Douglas who delivered the leading judgment observed *inter alia* after referring to *Jones* v. *Opelika*[3] and *Murdock* v. *Pennsylvania*[2], thus :

"In those cases members of Jehovah's witnesses had also been found guilty of 'peddling' or 'selling' literature within the meaning of the local Ordinances. But since they were engaged in a 'religious' rather than a 'commercial' venture, we held that the constitutionality of the Ordinances might not be measured by the standards governing the sales of wares and merchandise by hucksters and other merchants. "Freedom of Press, freedom of speech, freedom of religion are in a preferred position" (*Murdock* v. *Pennsylvania*)[2]. We emphasised that the 'inherent vice and evil' of the flat licence tax is that it restrains in advance those 'constitutional liberties' and inevitably tends to suppress their exercise."

So far as I am able to follow the reasoning of the dissenting judgments in *Jones* v. *Opelika*[3] which was practically adopted as the opinion of the Conrt in the subsequent *Murdock's case*[2], it is thus : that the freedom of religion guaranteed by the first and the fourteenth amendments cannot in any manner be curtailedor abridged by any law which imposes a monetary levy on the exercise of that freedom. The exemption is not only from the plenary taxing power which when abused may even destroy the very exercise of the right ; the exemption is also from the operation of the licensing power of the State and liability even to a nominal fee. The political history of the United States from its origins in the founding by the Pilgrim Fathers had not a little to do with the views of the Supreme Court on the subject of religious freedom. Though there is no necessary inconsistency between the taxing power and the exercise of the fundamental rights, nevertheless in the case of religious freedom, it looks as if an exception is made and the exercise of this freedom is deemed to be outside the purview of the power of taxation.

All the cases referred to us demonstrate amply the distinction drawn over and over again by the Supreme Court between the exercise of religious freedom and the exercise of secular rights. Sometimes the lines drawn between God and the pocket book are too fine, but that such lines are accepted is clear from the following passage in the judgment of Mr. Justice Murphy in *Follet* v. *McCormick*[1] :

"There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and laying a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication."

In *Lovell* v. *Griffin*[4], a Municipal Ordinance prohibiting the distribution without a permit of circulars and books advertising, or literature of any kind, whether

1. 321 U.S. 573 : 88 Law. Ed. 938.
2. 319 U.S. 105 : 87 Law. Ed. 1292.
3. 316 U.S. 584 : 86 Law. Ed. 1691.
4. 303 U.S. 573 : 82 Law. Ed. 949.

delivered free or sold was held to be invalid on its face as infringing the constitutional freedom of the press. This case also related to Jehovah's witnesses who followed the practice of distributing pamphlets of a religious nature. Chief Justice Hughes who delivered the opinion of the Court said :

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to licence and censorship."

In *Valentine* v. *Chresternsen*[1], the Supreme Court upheld the constitutionality of a Municipal regulation prohibiting the distribution in city streets of handbills bearing on one side a protest against action taken by public officials and on the other advertising matter, where the affixing of the protest to the advertising circular was with the intent and for the purpose of evading the prohibition of a city Ordinance forbidding distribution in the City's streets of commercial and business advertising matter. The learned Judges were clear that the Constitution imposes no restraint on Government as respects purely commercial advertising.

Mr. Venkatasubramania Aiyar argued with considerable force that the exercise of a fundamental right guaranteed by the Constitution cannot be made subject to an advance tax, because the general taxing power is plenary in nature and cannot be controlled by Courts. He referred to the well-known dictum of Marshall, C.J., that "The power to tax is the power to destroy," and argued that if advance taxation is permitted, it may result in the total destruction of the right itself. He cited to us *McCray* v. *United States*[2], for the proposition that the motives or purposes of the Legislature in enacting a tax are not open to judicial enquiry and the Court has no jurisdiction to enquire into the reasonableness of the rate of tax. In that case artificially coloured oleo-margarine was subject to a higher rate of taxation than oleo-margarine not so coloured. It was held that though the effect of the tax may be to suppress the manufacture of the article, that circumstance did not render it invalid and any implied constitutional prohibition which might prevent the destruction of fundamental rights which it is the duty of every free government to safeguard could not be invoked to invalidate the said taxation. Though the point was not decided, Mr. Justice White who delivered the opinion of the Court was willing to concede that if by the perverted exercise of the power of taxation, so great an abuse was manifest as to destroy fundamental rights which no free government could constitutionally violate, then it would be the duty of the judiciary to hold such acts to be void.

Mr. Venkatasubramania Aiyar referred us to three decisions of the American Supreme Court which held certain acts of States to be invalid on the ground that they encroached on the field of the Congress and *vice versa*. But I do not find them very relevant to a discussion of the questions arising in this case except possibly as instances of the general rule that what cannot be done directly cannot be done indirectly. I shall refer briefly to these three cases. In *Child Labour Tax case*[3], the Congress made a law imposing a tax of ten per cent. of the net profits of the year upon an employer who knowingly employed during any portion of the taxable year a child within a particular prescribed age limit which was held to be invalid as being an attempt by the Congress to use the so-called tax as a penalty for the employment of child labour in the States which under the Constitution was exclusively a matter for the State Legislature. As Chief Justice Taft remarked the tax in question was

"a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State Government under the Federal Constitution."

In *Panhandle Oil Co.* v. *Mississipi Ex. Rel. Knox*[4], the State of Mississipi imposed a tax on a gasoline sold to the Federal Government for the use of its Coast Guard Fleet and its Veteran's hospital. The tax was held to be unconstitutional, because it interfered with the rights of the United States which had been empowered to operate the fleet and the hospital.

1. 316 U.S. 52 : 86 Law Ed. 1262.
2. 195 U.S. 27 : 49 Law Ed. 78.
3. 66 Law Ed 817.
4. 277 U.S. 218 : 72 Law Ed. 857.

"The States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of Federal functions." (Per Butler, J.)

In *Ingles* v. *Morf*[1], a State exaction which burdened and interfered with inter-state commerce was declared to be unconstitutional. The State of California passed a statute imposing a permit fee for the movement from without the State over its highways of motor vehicles for the purpose of selling or offering them for sale. It was sought to be justified as intending to reimburse the State for the added expense which it may incur for the administration and enforcement of the Act, and the expense of policing the highways. But the amount of the fee was shown to greatly exceed these expenses. It was therefore held that the permit fee unduly interfered with the right of inter-state commerce. It was held that to justify the exaction by a State of a money payment burdening inter-state commerce, it must affirmatively appear, either from the statute itself or from the use of the money collected that it is demanded as reimbursement for the expense of providing facilities or of enforcing regulations of the commerce which are within the State's constitutional powers.

As I said before, none of these cases is directly in point. The stamp duty levied on the entry in the rolls is not *in pari materia* with the permit fee or the other taxes with which these cases were concerned.

Learned counsel for the petitioner cited to us *Bradwell* v. *Illinois*[2]. In that case the Supreme Court of Illinois refused to grant the plaintiff (Myra Bradwell) a licence to practise law in the Courts of that State on the ground that females were not eligible under the laws of that State. It was held that the refusal did not violate a provision of the Constitution. The ground of the decision was that the right to practise law in the State Courts was neither a privilege nor any immunity of a citizen of the United States within the meaning of the first section of the fourteenth Article of the Amendment of the Constitution. Mr. Justice Miller who delivered the opinion of the Court pointed out that the right to admission to practise in the Courts of a State in no sense depends on the citizenship of the United States and has never been made to depend on such citizenship at all. Mention was made of the fact that many prominent and distinguished lawyers had been admitted to practise in the State and in the Federal Courts who were not citizens either of the United States or of any State. No doubt, reference was made to the opinion of the Court in the Slaughter House cases recently delivered in support of the proposition that the right to control and regulate the granting of licences to practise law in the Courts of a State was one of the powers which are not transferred for its protection to the Federal Government. But we are not really concerned with this aspect of the case. Mr. Venkatasubramania Aiyar contended that this decision should no longer be deemed to be good law having regard to the change in the attitude of the Supreme Court in construing the fourteenth amendment. There is great force in the contention, because there can be no doubt that it was the construction put forward in Mr. Justice Field's dissenting opinion that subsequently prevailed. Mr. Justice Sutherland speaking for the Court in a later case, *Colgate* v. *Harvey*[3], said that the right of a citizen of the United States to engage in business or to transact any lawful business is a privilege attributable to his national citizenship. But so far as I have been able to see there has been no disapproval of this decision either in subsequent decisions of the Supreme Court or even in recognised text-books on American Constitutional law. How the principle underlying this decision applies to the case before us will be considered later on.

Re *Summers*[4] also deals with lawyers, but it is not of much assistance to us. A state Court (Illinois) refused an application for admission to the Bar on the ground that the applicant, because of a conscientious belief in non-violence, could not take in good faith the required oath to support the State Constitution, where such support is construed to include willingness to serve in the State militia when required. It was held that the refusal was proper and did not violate the

1. 300 U.S. 290 : 81 Law Ed. 653.
2. 83 U.S. 644 : 21 Law Ed. 442.
3. 296 U.S. 404 : 80 Law Ed. 299.
4. 375 U.S. 561 : 89 Law Ed. 1795.

freedom of religion which the Fourteenth Amendment secured against the State action. The decision in this case was based to a large extent on two earlier cases, namely, *States* v. *Schwimmer*[1] and *United States* v. *Macintosh*[2] in which it had been held that an alien who refused to pledge military service was not entitled to be admitted to citizenship of the United States as of right. The authority of this decision (Re *Summers*[3]) must be deemed to have disappeared with the subsequent decision of the Court in *Girouard* v. *United States*[4] which overruled the two decisions on which it was based.

Mr. Venkatasubramania Aiyar's argument in brief was that any exaction by way of a tax or otherwise as a condition to the exercise of any of the freedoms guaranteed by the constitution would be unconstitutional. A citizen cannot be compelled to purchase for a price what has been granted to him by the constitution. Whether it be called a privilege tax or a license tax or a franchise tax or occupational tax, if the right to practise a profession is to depend on the payment of a tax, then, it would amount to an abridgment, if not, a total denial of that right. In proper cases the State may introduce a system of licensing in the interests of the general public and incidentally charge a fee for the licence which may be granted; but if the licence fee is too excessive to be really considered as a licence fee and partakes of the nature of plenary taxation, there would be an infringement of the freedom guaranteed by constitution.

The learned Advocate-General sought to meet the petitioner's case by taking his stand on the position that here was a tax which the State was empowered to levy and once it is found that the State was competent and within its powers in imposing the tax, there could be no question of any infringement of fundamental rights, though incidentally the enjoyment of such fundamental rights may be more or less affected. He refused to accept the distinction drawn by petitioner's counsel between taxation prior to and as condition of the exercise of the right and subsequent taxation on the exercise of the right. He analysed the cases relied on by the petitioner's learned counsel to show that this distinction was not considered material in any of the decisions relied on. *Grosjean case*[5] really dealt with a tax on advertisements and would not have been held to have been invalid as such but for the fact that the Court knew that the dominant purpose of the Ordinance was not the realisation of revenue but the suppression of certain newspapers. The Court found in that case that it was not an ordinary case of tax but had a long history of hostile misuse of State power behind it. The cases dealing with Jehovah's witnesses which revealed the swing of the pendulum in the view of the Supreme Court on the scope and extent of religious freedom turned on the peculiar history of that country and an anxiety to safeguard against religious persecution of any sort whatever.

The learned Advocate-General contended that the American Supreme Court did not recognise an unrestricted privilege to engage in a business as guaranteed by the Constitution and on this point it appeared to me that even Mr. Venkatasubramania Aiyar was willing to confess that occupational freedom was not so well established in the United States as the freedom of speech and freedom of religion. In *Nebbea* v. *New York*[6], it was held that a State Statute establishing a milk control board with power to fix the minimum and maximum retail prices of milk and making it unlawful for any milk dealer to sell or buy milk at a price less or more than that fixed by the Board was valid and did not violate the due process clause of the Fourteenth Amendment. The Court observed (there was no dissent):

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited, and the right to conduct a business, or to pursue a calling may be conditioned."

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*[7], the Court had to deal with the scheme for the regulation of Radio Broadcasting contained in the

1. 279 U.S. 644: 73 Law Ed. 889.
2. 283 U.S. 605: 75 Law Ed. 1302.
3. 375 U.S. 561: 89 Law Ed. 1795.
4. 328 U.S. 61: 90 Law Ed. 1084.
5. 297 U.S. 233: 80 Law Ed. 660.
6. 291 U.S. 502: 78 Law Ed. 940.
7. 309 U.S. 134: 84 Law Ed. 656.

Federal Communications Act, 1934, as amended in 1937. Apprehending that in the absence of Government Control, the public interest might be subordinated to monopolistic domination in the broadcasting field, the Congress provided for a system of permits and licences. The Communications Commission was entrusted with the power of granting or refusing licences, which could not however be granted for longer than three years. In granting or withholding permits for the construction of stations, and in granting, denying, or revoking licences for the operation of stations, public convenience, interest or necessity was to be the guiding factor in the exercise of the Commission's discretion. The learned Advocate-General also cited to us reports of the decisions of the State Supreme Court in which it has been assumed that the State has got a right to say who should enter a particular trade and under what conditions. Even under our constitution, the State can impose conditions and prescribe professional or technical qualifications necessary for practising in any profession or carrying on any occupation, trade or business [*see* Article 19 (6)].

It was therefore contended by the learned Advocate-General that the State could make a law making it incumbent on a person who desired to practise in particular Courts of the land to be enrolled as advocates of that Court. If so much is conceded, then the next step is to recognise that it is the entry of enrolment that is the subject of the stamp levy.

Much was not said at the Bar as to what exactly is comprised in the right to practise a profession guaranteed under Article 19 (1) (*g*). Taking the profession of law, what does this right consist in? Is the effect of Article 19 (1) to confer on every person who may be otherwise qualified the right to practise in any Court in the land? I see nothing in Article 19 (1) (*g*) to justify the conclusion that this Court or any other High Court or Supreme Court cannot lay down rules for the admission of advocates who alone will be permitted to represent the suitors before them. On the other hand the clauses in the Letters Patent granted to the Chartered High Courts to which reference was made earlier on in this judgment clearly confer on the High Courts the power to virtually prevent even qualified persons other than the advocates on their rolls to plead and act before them on behalf of suitors. This power of the High Court has been continued under Article 225 of the Constitution. The Bar Councils Act recognises this right and lays down that only the persons enrolled as advocates of a particular High Court have certain rights of audience. It was not contended before us that all these provisions were invalid. Though Mr. Venkatasubramania Aiyar would not concede in so many terms, he was not willing to challenge the power of the State to make it compulsory that every lawyer should obtain a licence before he could be allowed to practise before the Courts of the land. But he contended that there could not be an advance plenary tax on which the right to practise would depend.

I do not consider that the stamp duty levied under Article 30 of Schedule I of the Indian Stamp Act or Article 25 of Schedule 1-A of the Act as amended in Madras is of the same nature as the licence tax or privilege tax examples of which are to be found in some of the American cases, *e.g.*, *Grosjean's case*[1] and *Murdock's case*[2]. It is not a periodical and recurring levy depending on the practice of the profession or on which the practice of the profession depends. Besides acting and pleading in Courts there are many ways in which a lawyer can pursue his profession and he is free to so practise his profession. If any one wants the additional privilege of being entitled as of right to act and plead in the High Court he has got to be enrolled in the rolls of that Court. Enrolment consists in making an entry in the roll. So far it was not suggested there was anything unconstitutional. It is at this point the Legislature says that the particular entry should bear a stamp duty. It was not denied that this entry would be an instrument as defined in the Indian Stamp Act. It was not contended that this Court could go into the question as to what is the proper stamp duty leviable. It was not alleged—and there is no

1. 297 U.S. 233 : 80 Law Ed. 660. 2. 319 U.S. 105 : 87 Law Ed. 1292.

I agree with the learned Advocate-General that the
not proceed on a distinction between what I may call adv
tion subsequent to the exercise of any fundamental rig
the licence tax was levied periodically after the publication o
on its circulation. Nevertheless, the Court held that the (
licence tax was unconstitutional.

I agree with the learned counsel for the petitioner th
which eventually depends on the discretion of executive a
when the system curtails any fundamental right. But i
was not suggested that it is any body's discretion to enrol
otherwise qualified for being enrolled. There is neither
possibility of the exercise of naked arbitrary power. The
sion is not dependent on the will and pleasure of any official

After consideration of the arguments of counsel ar
to us, and an examination of the provisions of our Cons
should govern the decision of this case, I have come to th
The right to plead and act on behalf of suitors in a Cou
from citizenship. The reasoning in *Bradwell* v. *Illionois*
bad law even to this day. It is not only a citizen who is
as an advocate of this Court. Even a foreigner, if he fulf
fications and requirements, can be enrolled as such.
represent suitors in Court which an advocate possesses is
a privilege, though the fact that it is a privilege does
conferment of the privilege there can be discrimination

word "State" in its larger definition under Article 12). ;
s " no tax shall be levied or collected except by authority o
e for any exemptions. Articles 268, 269 and 276 and a numb
e Lists in the Seventh Schedule clearly indicate the scope o
xtending even to rights covered by Article 19 (1). (*Vide* Ent
axes on the sale or purchase of newspapers and on advertis
ein ", Entry 49 of List II " taxes on lands and buildings ",]
e List " taxes on the sale or purchase of goods other than n
60 of the same List " taxes on professions, trades, callings ;
The right to levy stamp duty in respect of documents i
d both in List I and List II.

question then is : how to reconcile the fundamental rights
icle 19 and the power to tax contained in several provisions o
One way is to hold that a tax otherwise valid does not bec
cause it abridged any of the fundamental rights. This way
econciliation, it practically makes the fundamental rights ent

The learned Advocate-General on the other hand contends that the Constiution does not exempt fundamental rights from the operation of taxation laws, hat the provisions of Part III should be so construed as to effectuate the other arts of the Constitution as well, that the theory of a previous restraint has no pplication to a measure of taxation and that the Stamp Act is valid.

The substantial point, therefore, which arises for determination in this case is i what relation do the fundamental rights of a citizen under Part III stand towards ie powers of taxation possessed by the State? The question is one of considerable nportance as there are other provisions in the Stamp Act which impose duties n the other fundamental rights recognised in Part III and if the contention of the etitioner is well founded they will also have to be declared invalid. There are, r example, provisions in the Stamp Act prescribing stamp duty on sales, gifts, ttlements, mortgages, trusts, leases and other conveyance of immovable property. tamp duties are also prescribed on transfers of other properties. All these taxes ust be held to be invalid as being opposed to Article 19 (1) (*f*) of the Constiition which recognises a fundamental right to acquire, hold and dispose of roperty. There are provisions prescribing stamp duties on deeds of partnership id articles of association of a company and these also must be held to be invalid, opposed to the right to form associations or unions conferred by Article 19 (1) (*c*). he question thus raised is one involving far-reaching consequences and being *s integra* it has to be determined on a consideration of the relevant provisions of the onstitution and the conclusions to be drawn therefrom. It must be mentioned at Mr. K. V. Venkatasubramania Iyer, the learned advocate for the petitioner, hile he contended that a profession tax is illegal conceded that it would be lawful levy licence fee and income-tax on professions. It may be useful to note the stinction between profession tax on the one hand and licence fee and income-tax the other. When a person embarks on business the law may require him to ke out a licence and charge a fee therefor. The idea behind the licence system that the State has a right to control trade in the interests of the public and for that irpose impose suitable restrictions on the conduct of the business. The licence a symbol of State regulation and the licence fee is intended to cover expenses iich the State has to incur in maintaining an establishment for the purpose of gulating the trade. It is conceded by the learned advocate for the petitioner at licensing of trades including the profession of law is valid and a reasonable can be charged for the issue of a licence. But as no contention has been urged at the stamp duty in question is in the nature of licence fee this aspect of the itter requires no further consideration. Then there is the income-tax and that evied in accordance with the provisions of the Income-tax Act on incomes actually ned. The learned advocate for the petitioner concedes that such a tax would lawful and does not infringe the fundamental rights because what is guaranteed der Part III is freedom of trade and not freedom from taxation of profits made that trade. The profession tax differs from the licence fee in that it is a fiscal asure intended to bring revenue and not merely to regulate trade. It differs m income-tax in that it is not a levy on incomes earned but is a tax on the carrying of a profession itself even before any income could be earned. That being the true ition of profession tax, the petitioner contends that it is an invasion of his fundantal right to carry on a profession under Article 19 (1) (*g*). It is indisputable t the rights conferred by Part III are and were intended to be in a favoured ition. Discarding the theory of parliamentary supremacy of British Jurispruice, the framers of our Constitution deliberately adopted the American view t the subjects should be protected against the tyranny of legislative majorities l for achieving that purpose they guaranteed certain rights set out in Part III l forbade legislation in derogation of those rights. Article 13 (1) is particularly ortant. Article 13 (1) enacts that all laws in force in the territory of India immetely before the commencement of this Constitution in so far as they are inconnt with the provisions of fundamental rights shall be void, and Article 13 (2) hibits making of any laws which will take away or abridge the fundamental ts. Thus legislation past and future must give way before fundamental

rights. In this connection Article 33 is also important. Under that Article Parliament can pass legislation restricting or abrogating rights conferred in Part III so far as armed forces are concerned. The intention as expressed in these provisions is obviously that apart from Article 33 the Legislatures should not have the power to abridge or abrogate fundamental rights. Article 32 also provides a special right of direct recourse to the Supreme Court in case of violation of fundamental rights. These provisions clearly put the fundamental rights in a preferred position.

But what follows from this? Does the favoured position granted to the fundamental rights carry with it any immunity from taxation? The right to levy tax is an incident of sovereignty and the Legislatures as sovereign bodies have plenary powers of taxation subject only to such limitations as may be prescribed by the Constitution and nowhere in the Constitution do we find any prohibition against taxation of fundamental rights. Part III does not contain any such inhibition. On the other hand there are provisions in Part XII of the Constitution which clearly recognise the existence of such powers. Article 269 (1) provides that certain duties and taxes shall be levied and collected by the Government of India and assigned to the States in the manner provided and one of such taxes is " taxes other than stamp duties on transactions in stock exchanges and future markets " [Section 269 (1) (*e*)]. Article 276 is very important for this purpose. Article 276 (1) enacts that no law of the Legislature of a State in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income. Article 276 (3) provides that the power of the State Legislature to impose profession tax shall not be construed as in any way limiting the power of the Parliament to impose taxes on incomes. Here is a plain distinction made between profession tax and tax on income earned in the profession and provision is made for imposition of both classes of taxes. Then turning to the 7th Schedule we find in the Union List No. 1, Items No. 90. "Taxes other than stamp duties on transactions in stock exchanges and future markets "; and in the State List No. 2, Entry No. 60 " Taxes on professions, trades, callings and employments ". These provisions establish beyond all doubt that it was the intention of the Legislature to confer on the appropriate legislative bodies power to impose profession tax.

As against this the learned advocate for the petitioner urges that the fundamental rights are under the Constitution in a paramount position, that under Article 13 the Legislatures of the country have no power to abrogate or abridge them, that the power to tax is the power to destroy and that, therefore, part 12 is inoperative in respect of the rights conferred under Part III. I am unable to agree. Article 13 on which this argument is mainly founded does not support such a wide contention. It applies in terms only to laws in force before the commencement of the Constitution and to laws to be enacted by the States, that is, in future. It is only those two classes of laws that are declared void as against the provisions of Part III. It does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions in Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole. Article 13, therefore, cannot be read so as to render any portion of the Constitution invalid. This conclusion is also in accordance with the principle adopted in interpretation of statutes that they should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of them inoperative should be avoided. For these reasons I must hold that the operation of Part XII is not cut down by Part III and that the fundamental rights are within the powers of the taxation by the State.

It is contended that to recognise a power to tax fundamental rights would be to concede a power to destroy them because there could be no limit to the power of the State to impose taxes and the power could be exercised in such a manner as to destroy them altogether. Reliance is placed on the well-known observations of Marshall, C.J., in *Maculloch* v. *Maryland*[1]. There, the State of Maryland passed

1. 4 U.S.P. 316 : 4 Law Ed. 579.

power to control the constit
easures is declared to be supr
ed."

if these observations ma
dent sovereign bodies v
rred by the Constitution
ecisions of the America
cases where there is no
Thus in *Knowlton* v. *M*
tax is the power to dest
ciple is pertinent only when
a case where such right exist

reasoning has no application
hat is to say, if a lawful tax
n may when further exercise
unlawful and therefore no ta
ations were quoted wi
bserved

recently pointed out by thi
Justice Marshall in *Mcculloch*
no support whatever to the p
tion may be treated as with
authority."

finding that the power
that the principle of th
case. For the same rea
commerce must also be

sion in *Macray* v. *The U*
ntal rights are proper
tution. The Congress
argarine and one of the
iolated the freedom of
ndment. In rejecting th

ame considerations dispose of
. That provision, as we hav
er to tax conferred upon Co
ction the following obse
In criticising the view
s an exercise of religio

om' all taxation . . . . .
a constitutional privilege

n tax as from a licensing
tly reject any distinction
tional difference between

observation occurs

pts or a net income-tax

went on a different
ention to the follow-
l v. *Income-tax Officer*,

axes save by authority of
le 31 . . . . ."

nposition or collection of
1 (1) the questions urged

fundamental rights

ner that a previous
it, therefore, the im-

But these freedoms differ by their very nature consi
lating to property or trade. While a censorship in the
mount to a prohibition it is otherwise when it relates
apply the theory of previous restraint to the freedom o
ignore the reason behind the rule. *Cessant ratione legis,*
where as already mentioned freedom of trade is one
in the 5th and 14th amendments, licensing of trades a
have been accepted as valid and constitutional. Wheth
first time or it is renewed, it is a case of imposing a cond
be carried on and if the principle of previous restraint
the imposition of the tax must be held illegal. In this co
dock v. *Pennsylvania*[1], which is relied on by the petitio
the city of Jeannette had enacted a law that persons who
within the city must obtain licence before so doing, and
for breach of the law. Certain persons belonging to a m
Jehovah's witnesses distributed religious books for pric
under the Act for not taking out a licence. They plead
engaged in commercial activities but were carrying on
they were protected by the 14th amendment. The facts
precisely the same. In both these decisions there was a s
among the Judges and all of them acted on the view that i
witnesses were commercial in character the levy of the ta
would be valid. It was not suggested that as an occupa

Though I have discussed the scope of th
reference to the authorities cited before us, in
really arise for determination if it should be he
of taxation. The power to tax is an attribut
the power to determine when and how the tax
to its validity that it is levied before the comme
The theory of previous restraint has no applic

The result then is that the Stamp Act being
to be constitutional and valid.

There is one other aspect of the matter
hereafter. Has the Legislature power to imp
without any limit whatsoever? The law undo
of taxation is absolute, that it could be exercis
mination of that limit is for the Legislature and
what are prescribed by the Constitution. The la
in the Courts on the ground that the tax is hea
has been applied to Stamp Act as well.

In *Patton* v. *Brady*[1], the contention that the
it was remarked

> "that it is no part of the function of a Court to enq
> either as respects the amount or property on which it is

Treat v. *White*[2] is another stamp duty case in
within the province of the Court to examine the
passage from Cooley on Constitutional law ma

> "The power to tax is an incident of sovereignty an
> the sovereignty extends. It is unlimited in its range ac
> that security against its abuse is to be found only in t
> imposes the tax to the constituency who are to pay it."

But it is open to argument that when the C
of taxation also confers certain fundamental righ
as not to destroy the latter. The contention th
destroy has been rejected in so far as it seeks to
mental rights but it does not follow that it shou
impose a limitation upon that power, that it shou
them. As already pointed out there is a diff
income-tax. The power of levying a tax on inco
chooses to levy a tax of fifteen annas in the rupe
no jurisdiction to declare it unconstitutional on
But a right to carry on business is a fundamental
and it stands to reason that a tax on such a rig
it—as for example—a professional tax equal or
in the previous year. It might well be contend
tation on the powers of taxation, implicit in th
not be exercised in such a manner as to take a
given by the other. If this is the correct positi
of income-tax cannot be questioned in Courts
challenged on the ground that it is so unreasonab
of the right to carry on trade. Any question w
so unreasonable as to amount to a destruction of
for determination by Courts, in the same man
of restrictions under Article 19, sub-clauses (3)

There is support for this view in the Ame
before us. Thus in *Jones* v. *Opelika*[3] in uphol
witnesses Reed, J., who delivered the opinion of t

1. 184 U.S. 608 : 46 Law Ed. 713. 3.
2. 181 U.S. 264 : 45 Law Ed. 853.

Lease—Agricultural lease—Notice terminating—Essentials for validity—Postal endorsement that notice been refused—If sufficient proof of tender of notice without examination of person making endorsement—Transfer roperty Act (*IV of* 1882), *sections* 106 *and* 116—*Scope—Applicability to agricultural leases.*

The original grant by a zamindar (who was not a mere farmer of rent) of the year 1754 which styled as *Bhoodana Dharma Sasana Patram* giving to the grantee as *manyam* certain lands and stating the grantee " may, getting the said land cultivated every year, enjoy the whole produce thereof n your son to grandson in succession " must be held to be a grant of the land and not merely he *melwaram* especially so where the entry in the inam rejister mentioned that " since fasli 1210 whole extent was left uncultivated for the last about 60 years." Further the fact that leases had n executed for fixed periods by different tenants agreeing that they should surrender possession he expiry of the stipulated period shows that the grantee was entitled to both the warams and tenants had no occupancy rights.

Case-law examined.

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319 U.S. 105 : 87 Law Ed. 1292.

8. 195 U.S. 27 : 49 Law Ed. 78.

The postal endorsement that a notice sent by registered post to the tenant has been refused is admissible in evidence even if the postman who made the endorsement was not examined to prove it and unless rebutted it would constitute sufficient notice under section 106 of the Transfer of Property Act. (In the instant case the addresses of the tenants were admitted to be correct and two of the addressees were actually served and some of the tenants did not in their evidence deny the tender of notice to them. Accordingly it was held that there was proper notice to the tenants and the suit for ejectment was maintainable.)

Case-law discussed.

Terms as to notice contained in an expired lease should not be held to be terms of the lease arising by holding over under section 116 of the Transfer of Property Act. Section 106, Transfer of Property Act, does not in terms apply to agricultural leases and the requirements of law as to notice terminating the tenancy are satisfied if in fact there is reasonable notice. Though the fasli would end on 30th June harvesting would have been completed by 31st March and as the land would lie fallow till the end of June, it will make no difference whether the tenants were called upon to surrender possession on 31st March or 30th June. Accordingly notices calling on the tenants to surrender possession by 31st March must be held to be reasonable notice in the circumstances.

Case-law referred.

Appeal against the decree of the Court of the Subordinate Judge of Vijayawada in A.S. No. 208 of 1945 preferred against the decree of the Court of the District Munsif of Vijayawada in O.S. No. 86 of 1944, etc.

P. Somasundaram and *U. Sethumadhava Rao* for Appellants.

M. S. Ramachandra Rao and *A. L. Narayana Rao* for Respondents.

The Judgment of the Court was delivered by

Venkatarama Ayyar, J.—This batch of second appeals arises out of suits instituted by the respondent for ejecting certain tenants. The properties are situated in a village called Yanikepadu. In 1754 one Venkatarayanim Garu who is stated to have been the then zamindar of Bezwada granted them as inam to one Chandrasekhara Sastri, Exhibit P-1 and the inam was confirmed in 1865 during the enfranchisement proceedings. The plaintiff is the successor in interest of the inamdar. The defendants are the tenants in possession of various parcels of land comprised in this inam.

The plaintiff sued to eject them and to recover mesne profits. The defendants resisted the suits on the ground that they had occupancy rights in the land and that, therefore, they could not be evicted. They also pleaded that there was no notice to quit as required by law and that, therefore, the suits were not maintainable. The learned District Munsif held that the defendants had not established occupancy rights and that, therefore, they were liable to be ejected. He also held that the plaintiff had sent registered notices to the defendants calling upon them to surrender possession and that the defendants had refused to receive them and that was sufficient notice. In the result the suits were decreed. On appeal the learned Subordinate Judge held that under the grant Exhibit P-1 both *kudiwaram* and *melwaram* passed to the inamdar; that the defendant had not established any occupancy right and that, therefore, they were liable to be ejected. On the question of notice, he held that there was no notice because the postal endorsement was not sufficient to establish refusal thereof by the defendants. But he held that as the lease deeds executed by the defendants contained a provision that they would surrender possession without notice they must be deemed to hold on the same terms when they continued in possession after the expiry of the lease period and that, therefore, no notice was necessary. In the result he confirmed the decrees of the first Court. Against that decision the defendants have preferred these second appeals. On the first question as to the right of the plaintiff to eject the defendants, it was contended by Mr. P. Somasundaram the learned advocate for the appellants that the findings of the Court below were substantially based on the decision in *Venkateswarlu* v. *Lakshmanna*[1] and as that had been reversed in *Lakshmanna* v. *Venkateswarlu*[2], the lower Court should be directed to re-hear the appeals and send revised findings in the light of the decision of the Privy Council. We do not consider it necessary to do so because we have the original grant before us and all the relevant materials

1. (1944) 1 M.L.J. 160. I.L.R. (1950) Mad. 567 (P.C.).
2. (1949) 2 M.L.J. 500 : L.R. 76 I.A. 202.

necessary to come to a correct conclusion have
P-1 is the original grant of the year 1754 by K.
Chandrasekhara Sastri. It runs as follows :—

"Fasli 1164 :—For the purpose of your maintenance, I
in the name of Sitharama Jonnapalam (land) of the extent of o
in Venikipadu of Bezwada. So you may, getting the said lan
produce thereof from your son to grandson in succession and li

This document is styled as Bhoodana Dharma
"Bhoodana" is more consistent with the grant of
words "that the grantee is to get the land cultivate
clearly show that what is granted is both the war
matory grant made by the succeeding zamindar,
out the prior grant and adds :—

"So, you shall cultivate the said land and raise crops there
madas per year and happily enjoy the remaining produce fro
succession."

Exhibit 5 is the extract from the inam register.
of 1754 and the confirmatory grant of 1795 and the
21 it is mentioned "since fasli 1210 the whole ext
last about 60 years". This is a very important ci
could not have been occupancy tenants on the lan
series which are lease deeds executed by various ten
ings. They cover the period of 1874 to 1936. The
and are renewed from time to time.

From 1890 they contain a provision that the t
sion at the expiry of the stipulated period. The le
1919 and thereafter also contain recitals that the te
that they possessed no other right and that they wou
further notice. Exhibit P-3 series are dambalas
kapu of the village to allow the grantee to harvest an
the material documents bearing on the question an
our opinion, to come to any other conclusion than
warams and not merely *melwaram*. That is the co
below have come and we are in agreement with it.

Mr. P. Somasundaram the learned advocate fo
on the facts above stated the plaintiff could not be
warams and he relied on the decisions in *Lakshmanna*
v. *Subramania Somayajulu*[2]. In *Lakshmanna* v. *Venkat*
not available. The question then arose at to whethe
tiff landlord to prove that he was the grantee of both
to show that they had occupancy rights. Then holdi
landlord, the Privy Council observed that the facts e
shift the burden. On the other hand three facts
the case of the defendant, namely, (i) that the gran
min ; (ii) none but the members of the two famil
body of the cultivating tenants had been in possession
partitions and consequent divisions of the property t
recognised by the inamdar.

As already observed if we had not the original
as to whether the facts in this case are sufficient to sh
casts on the plaintiff. But as it is Exhibits P-1 and P
was of both the warams and the terms of the dambal
no cultivation of the lands for a period of 60 years le
clusion. In *Seethayya* v. *Subramania Somayajulu*[2] a co

1. (1949) 2 M.L.J. 500 : L.R. 76 I.A. 202 : I.L.R. (1950) Mad. 567 (P.C.). 2. (1929) I.L.R. 52 M

available. It was a grant of shrotria
revenue officers under the paramount a
of another village and the grant itself w
village in which there were peasant p
Council came to the conclusion that the
this case it does not appear that the gra
also found by the Courts below that the
the members of Kamma families and oth
sometimes they are in favour of stranger
was made not by a farmer of revenue l
the grant clearly and unmistakably sh
Some argument was sought to be addre
to be "*ma*" occurring in Exhibit P-1
It was stated in *Seethayya* v. *Subramania S*
was evidence of the existence of peasan
Lakshmamma[2] in answer to a similar cont
of the letter "*ma*." as meaning existen
agreement in the Privy Council case;
no inference could be drawn from the u
reached by Lakshmana Rao and Horw
Suryanarayana Raju[3].

Mr. Somasundaram contended tha
the grantee is to get the lands cultivate
on the land. He also referred to the fa
karnam and kapus and he says that kap
this context, kapu naturally would refer
grantee should get the land cultivated is
his own arrangements for cultivation wh
of tenants having occupancy rights on
Exhibit P-1 have been construed in thi
rights over the land. In *Nagi Reddi*
grantee was exhorted to make the land
it was held by Lakshmana Rao and Ho
with only *melwaram* having been grante

> "The fact that the grantee was to make t
> suggest that he was to cultivate the lands himself

In *Kondapa Naidu* v. *Mahalakshmamma*[2] t

> "You shall get the lands cultivated extensi
> aforesaid, the circar beriz year after year and en
> the Sun and the Moon last from son to grandson

It was held by Madhavan Nair, J., as
warams. He also observed:

> "The expression, 'you shall get the lands c
> were already in the possession of the tenants an
> contended for by Mr. Somayya. It is quite cons
> that was granted under the deed. The grantee
> lands, the grantor may well say he should get

A case which is near the present on
v. *Sitaramudu*[4]. There, the grantee was
cultivate the lands and enjoy the proc
grantee was to reap and enjoy the pro
grantee was entitled to both the waran
below that the grant comprised both
established any occupancy rights and tha

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1. (1929) 56 M.L.J. 730: L.R. 56 I.A. 146:
I.L.R. 52 Mad. 453 (P.C.).
2. A.I.R. 1933 Mad. 194.

nem. He accordingly held that there was proper notice
ıed Subordinate Judge held that the postal endorsements
fusal in the absence of evidence by postman and as the defe
pt of notice the plaintiff had not discharged the burden
ɜr section 106 of the Transfer of Property Act.

Mr. M. S. Ramachandra Rao, the learned advocate fo
ended that the postal endorsement was admissible as evic
tenants and as there was no reliable evidence on the side
the endorsement was untrue it must be held that there was
ited a number of authorities in support of this position.

In *Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar*[1] a noti
egistered letter and was returned with the postal endorsem
ing that this was sufficient the learned Judges observed :

'Upon the case cited before us—[illegible]

The decision in *Durga Nath Paramanick* v
appear to have been brought to the notice of t
v. *Kishore Mohan Das*[2], the decision in *Gobinda C*
was treated as one on the facts of that case anc
the postal endorsement would be sufficient pr

The learned Judges observed :

"It is trifling with the facts of this case to come to the
through the post office has not been made. Each case m

In *Hari Pada Dutta* v. *Joy Gopal Mukherjee*
letter was returned as refused that in itself, until e
that the addressee had an opportunity of accep
reviewed in a case reported in *Nirmala Bala* v.
in *Gobinda Chandra Saha* v. *Dwarka Nath Patita*
weight of authority and it was held that the pos
of tender and refusal though it was open to the
v. *Mohan Lal*[6] is another authority for the posit
admissible evidence.

In *Bacha Lal* v. *Lachman*[7], it was pointed ou
of Transfer of Property Act by Act XX of 1929 i
notice by post to the party, that under section 2
should be deemed to have been effected if it w
addressed and that accordingly even if there w
the word "refused" there was sufficient proof

Mr. P. Somasundaram, the learned advoc
following observations occurring in *Vaman* v. *Kh*

"In the case of defendants 4 and 5 a registered letter
addressed and service is alleged to have been refused. In
man who took the letter and brought it back was not calle

Then the learned Judge goes on to observe th
letter was tendered and refused that would not b
With great respect we are unable to agree w
that the postal endorsement is admissible evi
examined and that unless rebutted it would be
of the Transfer of Property Act. Turning to
of the tenants were admitted to be correct ; t
served and some of the defendants did not in t
of notice to them.

The learned District Munsiff did not belie
defendants about the non-tender of notice and
does not proceed on the footing that this evide
matter of law that without the evidence of the
not be treated as evidence. We are accordin
proper notice to the defendants and that, theref
not maintainable for want of notice should be

These findings are sufficient to dispose o
arising out of the judgment of the Court below
and we shall express our opinion thereon. T
that there was no notice to the defendants te
under section 106 of the Transfer of Property A
on the ground that no notice to quit was neces
was that in the lease deeds executed by the ten
term that they should surrender possession at th

1. (1913) 17 C.W.N. 1073. 5.
2. A.I.R. 1920 Cal. 287. 6.
3. (1914) 19 C.W.N. 489. 7.
4. (1931) 39 C.W.N. 934. 8.

notice was necessary. This agreement, however, is not properly s
and so does not dispense with the necessity of giving notice if the tena

There is thus ample authority in support of the positio
appellants. As against this Mr. M. S. Ramachandra Ra
for the respondents relied on the decisions in *Moosa Kutty* v.
Kutty[3] and *Badal* v. *Ram Barsa*[6]. In *Moosa Kutty* v. *Tha*
there was an oral lease for a term and one of the condi
demised should be surrendered whenever required. It
tenancy was for a period and it expired by efflux of
to give notice and that section 106 of the Transfer o
only to tenants from year to year or tenants at will. This
that in the case of a tenant holding over stipulations as t
lease become applicable under section 116 of the Transfer
decision in *Kelu* v. *Mamad Kutty*[5] is again not one under sec
of Property Act. The judgment is very brief and is contai

"Seeing that in Exhibit A there is an express provision to surrend
a contract to the contrary within the meaning of section 106 of the

We do not consider that this can be taken to be an author
contended for by the respondents. Reliance was also placed
in *Badal* v. *Ram Bharosa*[6]. In that case there was a notice t
was as to when the tenancy must be deemed to have comm
It was held that as the original tenancy commenced on
purposes of section 116 the tenancy by holding over mu
commenced on 24th October. Some of the observations i
terms but in our opinion having regard to the authoriti
must be held that terms as to notice contained in an expi
held to be terms of the lease arising by holding over unde

Mr. Ramachandra Rao argued that even if notice wa
tenant holding over and even if it is to be held that se

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1. (1933) 37 C.W.N. 971.
2. (1904) I.L.R. 32 Cal. 123.
3. (1934) 67 M.L.J. 455 : I.L.R. 58 Mad. 75.
4. A.I.R. 1928
5. (1910) M.W.
6. A.I.R. 1938

'e tenants of agricultural lands section 106 does not in
: requirements of law are satisfied if in fact there is reas

t P-10 series the defendants were called upon to sur
March, 1941. Though the fasli would end on the 30th o
ave been completed by 31st March, 1941, and the land
end of June.

'eafter that agricultural operations would commence. A
purposes it will make no difference whether the tenant
ender possession on 31st March, 1941 or 30th June, 1941.
that the notices Exhibit P-10 series were reasonable notic
the plaintiff would be entitled to eject the defendants.
Transfer of Property Act the provisions as to notice cor
not *proprio vigore* applicable to agricultural leases. It ha
tti v. *Gilbert Pinto*[1], that though sections 105 to 116 are not
ricultural leases they would be binding as rules of justice,
ce. It was held in *Jaru Poojari* v. *Somakke*[2], that where
:nce to agricultural leases was reasonable and in acco
' the country it was valid though the notice did not requ
r possession exactly at the end of the year. In *Narayan*
tr[3], a Bench of this Court to which one of us was a part
: in *Krishna Shetti* v. *Gilbert Pinto*[1] observed :

iples which the Full Bench decision of this Court cited above laid dow
spect of an agricultural lease, is that the lease must be determined
any rate, by reasonable notice ; that is to say, a notice giving a re
racate his holding."

'eo v. *Harihar Singh*[4] Jenkins, C.J. and Mookerjee, J., he
ses it was sufficient that the notice was a reasonable on
iine the tenancy at the end of the year and that wheth
must be determined with reference to all the circums
law was adopted and followed in *Ratneswar Das* v. *Sree*
ni[5]. In *Nabi Chandra Chakrabarti* v. *Ramesh Chandra Chakr*
n a review of the authorities that in case of agricultural te
there was reasonable notice. We are of opinion that
onable notice and that on this ground also the plaintiff is e
'esult then is that the decisions of the lower Courts are
ppeals must be dismissed with costs.

197 *of* 1947.—In this appeal the learned Subordinate
case for fresh evidence being taken on the question as to w
f notice to the tenant. The defendant has preferred this
rrectness of the finding of the learned Subordinate Judg
rantee of both the warams under Exhibit P-1. On our
xhibit P-1 the plaintiff was entitled to both the waran
nd must be dismissed with costs.

Appeals di

. 367 : I.L.R. 42 Mad. 654.
941.
. 559.

4. (1909) I.L.R. 36 Cal. 927.
5. (1921) 33 Cal.L.J. 299.
6. (1933) I.L.R. 60 Cal. 771.

evised decree by
ppeal, the point
n of the omission
This objection
ial after remand
time on appeal
heard the appeal
neral-in-Council
tral Government
merits. Hence

sel on both sides

the action by the

was the omission to
written statement a
n which vitiated the

ode. essential, when
r Order 22, rule 10,

tion 80, Civil Proce-
stances of this case?

on the Central
Procedure Code,
, is necessary to
ne suit, there is a
Railway v. *Maha-*
of this Court in
decisions in *Appa-*
dambaram Chettiar
quired by section
ainability of the
to be impleaded
as no devolution
e recent decision
rovince of Madras[1]
. Civil Procedure

Bench as the decision in the case was likely to affect a number of suits and appeals of the same type.

The suit out of which this second appeal arises was instituted by the appellant originally against the South Indian Railway represented by the General Manager having his office at Trichinopoly for damages for short delivery of goods consigned to him through the railway company on 18th September, 1943. The suit was instituted on 23rd March, 1944, after the issue of the notice required under section 77 of the Indian Railways Act. On 1st April, 1944, the South Indian Railway was taken over by the Government of India and by a notification dated 14th October, 1944, the General Manager was authorised to act for and on behalf of the Central Government as from 1st April, 1944 in all judicial proceedings in which the South Indian Railway administration might be concerned. On 19th June, 1944, on an application by the plaintiff-appellant, the plaint was amended by removing the name of the South Indian Railway, Co., Ltd., through its Agent and General Manager and by substituting instead, the Governor-General-in-Council represented by the General Manager, South Indian Railway. On the same day, the General Manager of the South Indian Railway filed a written statement. It is not clear whether this written statement was filed as the General Manager representing the South Indian Railway before it was taken over or it was filed by the General Manager as representing the Governor-General-in-Council, because the first paragraph of the written statement is as follows :

> "The suit is unsustainable in law, the South Indian Railway Co., Ltd., having ceased to exist on and from 1st April, 1944, the Governor-General-in-Council should be brought on record."

Evidently this written statement was filed, at any rate prepared to be filed, before the plaint was actually ordered to be amended. On 24th November, 1944, the District Munsif, Tenkasi, who tried the suit dismissed it. There was an appeal by the plaintiff (A.S. No. 66 of 1945) in the Court of the Subordinate Judge of Tinnevelly. The appeal was allowed and the suit was remanded for fresh disposal on 27th September, 1945, and eventually a decree was passed in favour of the plaintiff on 15th April, 1946. Against this decree the Governor-General-in-Council represented by its General Manager, South Indian Railway, filed an appeal A.S. No. 93 of 1946.

In the Memorandum of appeal for the first time the point was taken that the suit was liable to be dismissed because of the failure on the part of the plaintiff to give the notice under section 80, Civil Procedure Code, to the Government. The learned Subordinate Judge took up this point as a preliminary point and held that a notice under section 80, Civil Procedure Code, was necessary in the case and as no such notice had been given, the suit should be dismissed *in limine*. In the result, the appeal was allowed and the suit dismissed. The plaintiff has filed the present second appeal against the decree and judgment of the Subordinate Judge.

Several points appear to have been argued by learned counsel before Viswanatha Sastri, J., but, in our opinion, the appeal can be disposed of on our decision on one of these points. This point may be stated in the language of Viswanatha Sastri, J., thus :

> "Is a notice to the Government under section 80, Civil Procedure Code, essential, when it is made a party to a pending suit by reason of a devolution of interest under Order 22, rule 10, Civil Procedure Code."

There appears to be very little of case law on this question, but we have felt no difficulty whatever in coming to a conclusion on this point. Apart from the decided cases to which we shall presently refer, the language of section 80, Civil Procedure Code, does not appear to us to give much room for doubt. It says that no suit shall be instituted against the Government until the expiration of the two months next after notice in writing has been delivered to or left at the office of the official specified. The section can obviously have no application to the continuation of a suit properly instituted when at the time of the institution the Government was not a necessary party. If the Government was a necessary party against whom

the Government is made a party, and obviously section 80 would apply to such a case and the Government would be entitled to the two months' notice. But in a case where on the date of the institution of the suit, the plaintiff could not have claimed, and did not claim, any relief against the Government and therefore no notice under section 80, Civil Procedure Code was necessary, but if it transpires during the pendency of the suit that the interest of the defendant has devolved on the Government, either by voluntary act of the Government or by operation of law, there is no fresh institution of the suit as against the Government. The Government only steps into the shoes of the party whose interest has devolved on it. Because in such a case there is no institution of a suit as against the Government at the time when it is brought on record in the pending suit and section 80 cannot have any application. In *G.I.P. Railway* v. *Mahadeo*[1] an identical question arose for decision. The suit was instituted against the G.I.P. Railway while it was a private company. During the pendency of the suit the line was taken up by the Government and the Secretary of State for India in Council was substituted as defendant. An objection was taken that notice should have been given to the Secretary of State under section 80 and the objection was overruled by Daniels, J. The learned Judged observed :

"Here there was no question of instituting the suit. The suit was already instituted."

The learned Judge pointed out that in the case of a devolution governed by Order 22, rule 10 of the Code, the suit is by the leave of the Court continued by or against the person to or upon whom such interest has come or devolved. Clarke, J., followed this decision in C.S. No. 39 of 1944 the judgment in which is unreported. With great respect we are in entire agreement with the reasoning in *G.I.P. Railway* v. *Mahadeo*[1]. In fact we think no other view can reasonably be taken.

The learned counsel for the respondent sought to rely on certain decisions of this Court in which the Government happened to be impleaded as a party during the course of the suit and it was held that section 80 of the Code applied to such cases. As we pointed out already, that would be so in cases where the Government was a necessary party even at the time of the institution of the suit, but for some reason or other the plaintiff had not joined the Government as a party at the time of the Institution. In such cases, there is no devolution of interest and the suit as against the Government must be deemed to have been instituted only at the time when they happened to be impleaded as party. We do not doubt the correctness of these decisions—*Appala Narasimha* v. *Municipal Council, Vizagapatam*[2], *Chidambaram Chettiar* v. *Municipal Council, Karaikudi*[3]—but the principle underlying these decisions have no application whatever to the case before us.

In the view we have taken, the appeal must be allowed and the appeal (A.S. No. 93 of 1946) must be remanded to the Court of the Subordinate Judge of Tinnevelly, to be decided on the merits. The appellant will be entitled to the costs of this appeal. The appellant will also be entitled to a refund of the stamp duty paid on the Memorandum of Second Appeal.

V.S. *Appeal allowed. Case remanded.*

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1. A.I.R. 1926 All. 585.
2. (1945) 1 M.L.J. 22.
3. A.S. No. 126 of 1941.

to issue a writ of *certiorari* calling for the records relating to Exhibit A filed there-with *viz.*, Office Memorandum, No. 289 of 1951-1, Public (Elections) Department, dated 20th August, 1951, issued by the Additional Secretary to Government, Public (Elections) Department, Fort St. George, Madras and quash the order in the said Office Memorandum and declare section 3 of the Constitution (Schedule Castes) Order, 1950, unconstitutional and inoperative and to award the Petitioner costs of this petition.

K. V. Venkatasubramania Aiyar for Petitioner.

The Advocate-General (*V. K. Tiruvenkatachari*) for the State Counsel (*Messrs. John and Row*) on behalf of the Respondents.

The Court made the following

ORDER : *The Chief Justice.*—Article 330 (1) of the Constitution provides that seats shall be reserved in the House of the People for the Scheduled Castes. Article 332 (1) similarly provides for the reservation of seats for the Scheduled Castes in the Legislative Assembly of every State. The expression " Scheduled Castes " is defined in Article 366, clause 24, as meaning .

" Such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 to be scheduled castes for the purpose of this Constitution."

Article 341 (1) now runs as follows :—

" The President may, with respect to any State, or where it is a State specified in Part A or Part B of the First Schedule, after consultation with the Governor or Rajapramukh thereof, by public

so far as regards members thereof resident in the localities specified in relation to them in those parts of that Schedule.

3. Notwithstanding, anything contained in paragraph 3, no person who professes a religion different from Hinduism shall be deemed to be a member of a Scheduled Caste." . . . . . ."

The petitioner alleges that he is a member of the Paraiyan caste which is item 64 in Part V of the Schedule to the Scheduled Castes Order. Admittedly, he is a convert to Christianity. He therefore would be a person professing a religion different from Hinduism and therefore under paragraph 3 of the Scheduled Castes Order would be deemed not to be a member of a Scheduled Caste. He desires to stand as a candidate for a seat reserved for the Scheduled Castes and he can do so only if he is deemed to be a member of a Scheduled Caste. As the aforesaid provision prevents him from so standing he has filed the above application for adequate relief from this Court.

Learned Counsel for the petitioner contended that paragraph 3 of the Order in question is not valid as it is beyond the power conferred on the President by Article 341 (1). The President can no doubt specify the Castes or parts of or groups within Castes which shall, for the purposes of the Constitution, be deemed to be Scheduled Castes. But he cannot artificially or arbitrarily create a part of or group within a Caste. The part or group must have a separate objective existence independent of the President's fiat. The President can only specify a part or group which has such an independent existence, even before he specifies it. He cannot create a part or group by specifying it. He cannot, for instance, say that only the illiterate members of a particular Caste shall be deemed to be a Scheduled Caste or members of the Caste who do not own any property. No doubt, persons could be selected on such a basis and formed into a part or group ; but Article 341 does not contemplate such a part or group. So ran one part of the argument of the petitioner's learned counsel.

The other part of the argument was based on the form of the rule embodied in paragraph 3. It is negative in character it was submitted. It assumes that a particular person would otherwise be a member of a Scheduled Caste but because the person happens to profess a religion other than Hinduism, he is taken out of the category of a Scheduled Caste. This is beyond the powers of the President under Article 341.

The second part of the argument does not call for much discussion. It is true that the rule is in a negative form ; but reading paragraphs 2 and 3, the result is as if the Hindu parts of or the Hindu groups within the castes specified in the schedule shall be deemed to be Scheduled Castes. We do not agree with the petitioner's learned counsel that the words " notwithstanding anything contained in paragraph 2 " necessarily imply that a person who professes a religion different from Hinduism is a member otherwise of a Scheduled Caste. Such expressions are almost invariably used in provisions inserted by the Legislature by way of abundant caution to remove any possible doubt which might arise in the application of a substantive provision. We must take it that what the President has specified is that part of or group within the castes enumerated by him which consists of persons professing Hinduism.

Mr. Venkatasubramania Aiyar learned counsel for the petitioner incidentally addressed an interesting argument in which stress was laid on the expression " professes a religion different from Hinduism ". Learned counsel asked, what about a free thinker, an agnostic or an atheist ? He would not be professing any religion at all. He also dwelt on the extremely liberal tenets of Hinduism which can assimilate every one of the religions of the world.

As this case must be decided without the help of any decided authority and more or less as a matter of first impression, it will not be out of place to set out what appears to me to be the background and the basis of the provisions relating to the Scheduled Castes in our Constitution. The preamble to the Constitution contains the solemn resolution of the people of India " to secure to all its citizen

er of a Scheduled Caste; (b) in Bengal no person who professes Buddhism or
e deemed to be a member of any Scheduled Caste;

n should arise as to whether any particular person does or does not profes
religion, that question shall be determined according to the answers which h
cribed manner, to such questions as may be prescribed."

ristian was defined in Schedule I as meaning a person who pro-
he Christian religion and is not a European or an Anglo-Indian
fore, from the several provisions of the present Constitution to
red and of the previous Government of India Act that certai
le are deemed to be depressed and backward socially and econo-
fore politically. Article 46 of the present Constitution ever
uggests that they have been the victims of social injustice and

"Hinduism is not a religion in the sense in which we now understand the word. The word is not Indian in origin; nor was it ever used by the Hindus as the same name of their religion" (The Cultural Heritage of India, Vol. I, page 150.)

But the word has come to stay and convenience requires that the word should be retained to describe a typical mode of life inclusive of religion and philosophy in the strict sense of those terms. It has been rightly said that

"Hinduism is thus less a religion in the Western sense of the word than a fellowship of those who accept the immutable laws of right conduct and fashion their lives after the pattern whose lines philosophy, religion and ethics have combined to trace."

It must, however, be acknowledged that in spite of the fact that the doctrines of Hinduism as a religion cannot be reduced to a formal creed, it is not difficult to differentiate those who profess Hinduism from those who profess other religions like Christianity and Islam. Mr. Venkatasubramania Aiyar said that Hinduism is so all comprehensive that it can embrace every religion in the world. This is true only if by Hindu religion one understands Hindu religious philosophy. I do not think it is true if one takes into account Hindu religious practice. For certain purposes, Buddhism, Jainism and Sikhism have been considered to be part of Hinduism. In our present Constitution itself Explanation (2) to clause 2 of Article 25 says that the reference to Hindus in sub-clause (*b*) of clause 2 shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion. Mr. Venkatasubramania Aiyar said that it would not be accurate to speak of Buddhism as something different from Hinduism and relied on the fact that Buddha is treated as one of the Avatars of Vishnu. But this is overlooking the fact that though some Hindus might consider so, the Buddhists would never accept that Buddha is an Avatar of a Hindu deity. So there is a clear difference, doctrinal and practical, between Hinduism and Buddhism.

Christianity and Islam are religions prevalent not only in India but also in other countries in the world. We know that in other countries these religions do not recognise a system of castes as an integral part of their creed or tenets. Is it different in India? Mr. Venkatasubramania Aiyar frankly confessed that so far as Islam is concerned there is no question that it does not tolerate any difference based on caste distinction. A member of one of the castes or sub-castes when he is converted to Islam ceases to be a member of any caste. He becomes just a Mussalman and his place in Muslim society is not determined by the caste to which he belonged before his conversion. Learned Counsel also conceded that generally this is so even when there has been a conversion to Christianity. But he said that there were several cases in which a member of one of the lower castes who has been converted to Christianity has continued not only to consider himself as still being a member of the caste, but has also been considered so by other members of the caste who had not been converted. I am prepared to accept that instances can be found in which in spite of conversion, the caste distinctions might continue. This is somewhat analogous to cases in which even after conversion certain families and groups continue to be governed by the law by which they were governed before they became converts. But these are all cases of exception and the general rule is conversion operates as an expulsion from the caste; in other words, a convert ceases to have any caste.

In my opinion, paragraph 3 of the Constitution (Scheduled Castes) Order proceeds on this general assumption and does not take notice of individual exceptional instances. When in any locality, in spite of conversion, caste distinctions continue as a general rule, then the President evidently takes notice of it. The proviso to paragraph 3 of the Order illustrates this. Apparently in the Punjab and the Patiala and the East Punjab States Union members of some of the castes in spite of professing the Sikh religion, continue to have caste distinctions. That is why the members of those castes are deemed to be members of the Scheduled Castes whether they profess the Hindu or the Sikh religion. Presumably on the information which must have been placed before the President, he was not convinced that as a general rule the persistence of caste differences obtained in other parts of the Union in spite of conversions to other religions. It may be that the President was mistaken or

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e President. The pe
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Ayyar, J.—I agree.

Ve certify that this ca
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E HIGH COURT O

:—MR. JUSTICE MAC

All of them have been found guilty under section 148, Indian Penal Code, for ıich they were sentenced to two years rigorous imprisonment each. The first cused was found guilty under section 302, Indian Penal Code, and sentenced to ınsportation for life. The other accused were acquitted of the offence under :tion 302 read with section 149, Indian Penal Code, but convicted under section 4 read with section 149, Indian Penal Code and they were each sentenced to o years rigorous imprisonment. The sentences were made to run concurrently.

This occurrence is said to have taken place on the 16th day of June, 1950, me time between 5 and 6 P.M. On that day there was a panchayat in the village settle a dispute between one Rosigadu of Yadaralla and his wife who belonged the village of Allugundu, where the occurrence took place. The panchayat nsisted of P.W. 1, P.W. 2, the six appellants and three other persons from the ighbouring hamlet of Mallepalle. After the panchayat was over, they were ting in the pial when P.W. 3, the father of the deceased, returned from the fields king the cattle to the shed. It appears one of the bulls trod on Ellammal, the fe of the fourth accused in the case and so she abused P.W. 3. P.W. 3 retorted. ıe fourth accused who was sitting on the pial took up the cause of his wife and it is d that he kicked P.W. 3 and P.W. 3 fell down. Then P.W. 1 who was there :nt to his rescue and thereupon the other accused who were there took the cart les and started beating the prosecution party. It may be mentioned here that : first accused has married a sister of the fourth accused ; accused 1 to 3 are others ; the fifth accused is the paternal aunt's son of accused 1 to 3 ; and the th accused is said to be a friend of accused 1 to 5. According to the evidence w given in Court, the fifth accused is said to have beaten P.W. 1 on his neck th a cart pole. The first accused raised the cart pole to beat him on his head t when he put forth his hands the blow fell on the hands. Accused 2 and 3 : said to have beaten him on his back with cart poles and the fourth accused beat n on the head with a cart pole. The first accused is said to have further beaten W. 3 also on his hand. When P.W. 2, the younger brother of P.W. 1, came to : P.W. 3 the eldest brother, the sixth accused is said to have beaten him with a rt pole. While this beating was in progress the deceased who is the son of P.W. 3 me running and asked the accused why they are beating the old people. There-

to his evidence, he searched for the accused anc houses. He came back and held the inquest b June. He then sent the body to the hospital at I

Before he left the station at 10-30 P.M. Ellar came accompanied by D.W. 1 Gajji Venkatann and he gave a report at the police station at abc as Exhibit D-10. She had three injuries ; one c ing to her, as a result of the injury ; of the tw of the right side of the head and the other on th was unable to speak and, therefore, D.W. 1 wh ment, Exhibit D-10. In this, he states that on was a quarrel between D.W. 2, the injured p that in the course of that quarrel Pedda Venk head with a bamboo stick ; and P.W. 2 and a a stick on the right cheek and the che account of her injuries in the lower jaw and t having considerable pain and therefore she co narrating what happened. It is also very sign were seven persons present when this woman occurrence. Next day she was also sent to the cates.

The next day, on 17th June, P. W. 4, the c on the body of Pedda Venkatanna and found thi pinkish black contusion 8" by 4" on the left sh black contusion on the left side of the back, with No. 1 injury ; (3) this is the important i contusion 4½" in diameter over the right side of th downwards to right cheek prominence. The fracture of right and left parietal bones and along the course of fracture between the bon matter was congested and according to the opini died of coma due to compression of the brain due to external injury No. 3.

On P.W. 1, the doctor found about sever and minor injuries. On P.W. 2 he found one found only one injury. The injuries on P.Ws might have been caused by stone throw. As he says that injury No. 3 which is really the s by a big smooth stone being thrown at that pa Madamma and has given her a certificate for not been filed in this case. But we find an e the police diary of the police officer who had injuries she received were, a diffused pinkish tr the lower portion of the right lower jaw. The jaw-bone was fractured but later on, after senc was no fracture. The second injury was a woun on the top of right side of the head ; the third w 4" × 4" on the right side of chest below righ the complaint given by D.Ws. 1 and 2 (Exhibit case only against the appellants.

The defence of the accused is one of denia scene at the time of the occurrence.

It is clear from the evidence of P.Ws. 1 ar amount of stone throwing by the accused. P.V

"Accused threw stones on my son, the deceased Pedda Venkatigadu. There was a ruined wall close by . . . The accused pulled out stones from that wall and hurled them."

Similarly P.W. 5 says in cross-examination that the accused threw stones at Pedda Venkatanna; and P.W. 11 stated in Exhibit D-14 an extract from this deposition in the committing magistrate's Court that

"In the disturbance there was a throw of stones and poles. There was promiscuous pelting of stones and poles"

P.W. 2 told the police that accused 1 threw a stick on the head of the deceased and the blow struck the deceased on his right temple and he fell down unconscious. But he denies having said so in his present evidence.

It is clear therefore from the evidence that the injuries on the deceased were caused either as a result of throwing the pole by the first accused or as a result of his throwing a stone at him. It is very significant that the third injury on the deceased and the first injury on D. W. 2 should more or less have been of the same nature, both of them being of pinkish colour. The injury on the deceased was 4½" in diameter whereas the injury on D. W. 2 was in the jaw 3" × 2". As already stated the injury No. 3 on the deceased might have been caused by a big smooth stone being thrown at that part of the body. Similarly all the injuries on D.W. 2 suggest that they are more likely to have been caused by stones hurled at her. Neither side would admit the injuries on the other side. In fact there is no explanation on the side of the prosecution for the injuries caused to D. W. 2. The defence in Exhibit D-10 has not stated anything about the injuries on the prosecution witnesses. It seems to us that in the course of the quarrel, there was throwing of stones by both sides and one of the stones hit the right temple of the deceased resulting unfortunately in his death. Similarly the injuries on the person of D.W. 2 were caused by stones thrown by the prosecution party. There was undoubtedly a confused fight in which both sides indulged in stone throwing against each other. In the circumstances it is difficult to fasten the liability on the first accused for the injury on the deceased. But there can be no doubt that the appellants are guilty of rioting punishable under section 147, Indian Penal Code. We therefore convict the appellants of the offence under section 147, Indian Penal Code and acquit them of other charges. For the offence under section 147, the sentence is reduced to the period undergone.

A question of procedure has been raised in this case and that is that the prosecution itself should have placed all the materials relating to the injuries on the person of D. W. 2 and filed Exhibit D-10 as an exhibit on the prosecution side. The case of the prosecution with regard to the injuries on D. W. 2 and Exhibit D-10 seems to be from the arguments of the Public Prosecutor in the lower Court, that these injuries were self-inflicted and Exhibit D-10 was given to provide a defence for the accused. We do not find from the evidence any suggestion to support the above arguments of the Public Prosecutor in the lower Court. The Investigation Officer if he had taken a little more trouble and investigated the case properly, would have found from the similarity of the injuries on the deceased and D. W. 2 and from a consultation of the doctor, that these injuries were more likely to have been caused by the stones than by sticks, in which case he would have realised that the injuries on D. W. 2 were caused at the same time and in the same occurrence in which the deceased was injured by stone. There would then be no charge-sheet for murder but only for rioting and perhaps for culpable homicide not amounting to murder, even if the view was taken that the injury on the deceased was caused by A. 1 exceeding his right of defence to D. W. 2. We have remarked on more than one occasion that the police do not really investigate the case but merely content themselves with the evidence of witnesses readily provided by the complainant party.

In a complaint and counter-complaint such as this obviously arising out of the same transaction when the prosecution proceeds on the basis of the complaint, we think it is the duty of the prosecution to exhibit the counter-complaint through the police officer who recorded it and also to prove medical certificates of persons wounded on the opposite side also and place before the Court a definite case which

they ask it to accept. We must deprecate the pr *in toto* one complaint and examining only witnesses nation at all for injuries caused to the other side variably not in strict conformity with either cor that all the facts are placed before the Court to e a just decision. If in the present case Exhibit D-1 tigating police a false complaint laid for defen D. W. 2 self-inflicted, the prosecution should no and D. W. 2's medical certificate asking the Cou a complaint Exhibit D-10 was filed, that it was and that D. W. 2 did have injuries on his person secution itself should have placed before the Cou waiting for the defence to disclose them.

V.S.

IN THE HIGH COURT OF JUDIC

PRESENT :—MR. JUSTICE S

V. Thanappa Chetty

v.

Arcot Govindaswami Naicker and another

Madras Buildings (Lease and Rent Control) Act (XXV of 194 residential building—Right to evict his tenant when he is himself in p a tenant.

According to the provisions of section 7 (3) (*a*) (*ii*) of Control) Act a landlord of a non-residential building can e sion of a non-residential building of his own or if he is n building. Hence where a landlord of a non-residential bu residential purposes, he cannot obtain an order for possessi the Act if he is himself in possession of another non-reside person because he has a right to continue in possession of himself duly evicted under the provisions of the Act. The possession unless and until he is evicted under the provisions

Petition praying that in the circumstances st with the High Court will be pleased to issue a record of C. M. A. No. 41 of 1949 on the file of th Chittoor, and quash the order passed thereon on

D. Ramaswami Aiyangar and *P. R. Varadachar*

K. E. Rajagopalachari for Respondents.

The Court made the following

ORDER.—This is an application for issuing order of the Subordinate Judge, Chittoor, in C. M

The petitioner is the owner of shop No. 7/9 respondent is his tenant and has been carrying shop. In the same street, the petitioner has l ness in another shop. That shop is owned by on tioner is his tenant. Kandappa Chetti filed an Buildings (Lease and Rent Control) Act, 194 Act) for evicting the petitioner. That applicat to the dismissal of that application, the petitione tion 7 of Act XXV of 1949 before the Rent C the respondent. The Rent Controller dismissed that the petitioner failed to establish that the re waste or that he has been in arrears of rent. He fi Judge of Chittoor. In appeal, the petitioner's ri contention that he has no other non-residential bu sion of which he is entitled. The learned Judge

* Writ Petition No. 399 of 1951.

firmed the order of the Rent Controller. The present application is filed for issuing a Writ of Certiorari to quash that order.

The learned counsel for the petitioner argued that the petitioner is in possession of the house of Kandappa Chetty by reason of the privilege conferred on him under the Act and not by reason of any title in him and therefore he would be entitled under the provisions of the Act for evicting the respondent from the premises. The question raised in this case turns upon the construction of section 7 (3) of the Act. Section 7 (3) reads :

"(*a*) A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession :

(i) in the case of a residential building, if he requires it for his own occupation and if he is not occupying a residential building of his own in the city, town or village concerned ;

(ii) in the case of a non-residential building, if he is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village concerned, which is his own or to the possession of which he is entitled."

It will be seen from the aforesaid provisions that in the case of a residential building, a landlord can evict a tenant if he is not occupying a residential building of his own whereas in the case of a non-residential building he can do so only if he is not in possession of a non-residential building of his own or if he is not entitled to the possession of any such building. The antithesis is between the ownership of a building and a building to the possession of which he is entitled. To narrow the point further, is he entitled to the possession of a non-residential building. The dictionary meaning of the word "entitle" is to give a claim, right or title to. Can it be said that a person, who is in possession of a premises under the provisions of the Act, is a person, who is entitled to its possession. Tenant is defined under section 2 (4) as follows :

"Tenant means any person by whom or on whose account rent is payable for a building and includes a person continuing in possession after the termination of the tenancy in his favour, but does not include a person placed in occupation of a building by its tenant or a person to whom the collection of rents or fees in a public market, cart-stand or slaughter-house or of rents for shops has been farmed out or leased by a Municipal Council or local board or the Corporation of Madras."

The definition of the word "tenant" takes in persons, who are not strictly tenants under general law. The statute creates a statutory tenancy even in respect of persons continuing in possession after the termination of the tenancy in his favour. Landlord is defined under section 2 (3). The definition of landlord under the Act is comprehensive enough to take in persons, who are not strictly landlords in general law. The rights and liabilities *inter se* between the landlord and tenant so defined are regulated and governed by the provisions of the Act.

Act was dismissed. Whether his tenancy terminated under general law or not, he is entitled to be in possession under the Act.

I shall now proceed to consider the cases cited by the learned counsel for the petitioner in support of his argument. In *Sutton Coldfield Grammar School*, In re[1], the facts are :

> "The Charity Commissioners framed two schemes by which it was proposed to withdraw from that part of the funds of the Corporation which were applicable to educational purposes a sum equal to £15,000 to be applied as part of the foundation of the Sutton Coldfield Grammar School."

It was said that having regard to the provisions of 11th section of the Act of 1869, as amended by the 6th section of the Act of 1873, the scheme was open to objection for not preserving, or rather for abolishing or modifying, the privileges or educational advantages to which persons of a particluar class of life were entitled. The Judicial Committee held that section 11 protects only vested interests. They observed :

> "It is—'Any privileges or educational advantages to which a particular class of persons' or (as extended by the later Act) persons in a particular class of life—'are entitled', *i.e.*, have a legal title. A person is not entitled simply because he has enjoyed, by the permission or the bounty of another, some benefit either for a longer or shorter period ; and therefore the question is, whether the persons in this particular class of life are entitled to these educational advantages. Now, when we investigate the title, we shall find that the original charter gave no title at all to these particular persons, or persons in this particular class of life.".

Neither the facts of the case nor the observations quoted above are apposite to the present case. But the learned counsel for the petitioner relied upon the observations and contended that the petitioner in the present case has no legal title but is permitted to continue in possession under what he called "the statutory bounty." As I pointed out, under the statute, the petitioner has a right to continue in possession till he is evicted under the provisions of the Act. The following observations of the Federal Court in *Kai Khushroo* v. *Bai Jerbai*[2], are relied upon :

> "With regard to the first part of the argument of the learned counsel for the appellant, it may be pointed out that in cases of tenancies relating to dwelling houses to which the Rent Restriction Acts apply, the tenant may enjoy a statutory immunity from eviction even after the lease has expired."

It was argued that a statutory immunity is different from a right to possession. But in my view a statutory immunity is not inconsistent with a right to possession. The statutory immunity itself creates a right in him to continue in possession till he is evicted under the provisions of the Act. Their Lordships neither considered nor expressed the opinion that a tenant has no right to possession under the statute. *Morrison* v. *Jacobs*[3] relied upon by the learned counsel has really no bearing on the question to be decided. There, the learned Judges held that mere receipt of rent from a tenant, who continued to be in possession after the tenancy expired would not create a new contractual tenancy. Scott, L.J., pointed out that

> "where, in such circumstances, the landlord desires to claim possession of the dwelling house on the ground that he reasonably requires the dwelling house for his own occupation as a residence, pursuant to section 3, sub-section 1 of, and para. (*h*) of Schedule I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, he need not, before suing, serve any notice to quit on the tenant."

The fact that a contractual tenancy expired and is not created afresh by the receipt of rent does not affect the question whether the tenant has a right to be in possession under a statutory tenancy till he is legally evicted.

The decision of Horwill, J., in *Venkatasami Naicker* v. *Navaneethakrishna Chettiar*[4] does not also afford any assistance in deciding the question raised in this case. There the plaintiff's predecessors-in-title brought the property to sale and purchased it in 1925. The auction-purchaser applied for delivery in the same year. But the tenant in actual possession obstructed delivery of possession to the purchaser

1. (1881) 7 A.C. 91.
2. (1949) F.L.J. 168 : 1949 F.C.R. 262 : A.I.R. 1949 F.C. 124 at 128.
3. (1945) 1 K.B. 577.
4. (1943) 1 M.L.J. 207.

on the ground that the lease in his favour would continue for two more years. Symbolical delivery being declined, the application was dismissed and the plaintiff's predecessor-in-title took no further steps. In 1932 the plaintiff bought the property and filed the suit within 12 years from the date when the term of the tenancy expired. The learned Judge held that Article 137 of the Limitation Act applied and that time would begin to run only from the date on which the plaintiff's predecessor-in-title was entitled to physical possession of the land, *i.e.*, from the date when the term of the tenancy expired.

The learned Judge held having regard to the provisions of Articles 136, 137 and 138 of the Limitation Act that possession referred to in Article 137 is actual possession and not constructive or symbolical possession. I do not see any relevancy in the citation of this case. Further the petitioner in this case has certainly a right to physical possession and indeed is in possession. The judgment of Rajamannar, C.J. and Rajagopalan, J., in *Kota Anandakrishna Chetty* v. *Messrs. M. K. & Co.* alias *Mahomed Kasim & Co.*[1], is not of any help as the learned Judges expressly left open that question. Nor does the decision of Rajamannar, C.J. and Raghava Rao, J., in *Muhammadunny* v. *Maleperakkal Unniri*[2], bear on the point raised, for in that case the learned Judges only held that notwithstanding the provisions of the Act, a suit for eviction would lie. The aforesaid decisions do not support the learned counsel's contention before me.

I therefore hold that the petitioner has a right to continue in possession of the non-residential building owned by Kandappa Chetty till he is duly evicted under the provisions of the Act and therefore he is not entitled to evict the respondent.

The petition therefore fails and is dismissed with costs. Advocate's fee Rs. 100.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

Aravamudha Iyengar formerly a minor since declared major and his guardian discharged .. *Appellant**

v.

Ramaswami Bhattar and another .. *Respondents.*

Hindu Law—Adoption—Authority to adopt given by a dwija *below 14 years of age—Validity.*

There is no particular rule laid down under Hindu law relating to adoption with reference to the mental capacity required or to the age of majority of the person making the adoption. The act of adoption contains the most essential element of the selection of a boy and the acceptance of the gift of the boy which are undoubtedly acts of a secular nature. The adoption no doubt also is a religious act; but the *vyavahara* or the secular element in it cannot be ignored. In order to perform a legal transaction, Hindu law requires that the person should have attained the age of majority without which there is no validity for the transaction. Whether the adoption is made by a male or whether he gives an authority to adopt to his widow or even if the widow makes the adoption either with the authority of her husband or after obtaining the assent of the sapindas, the act can be done and the authority can be given only if the person attained majority according to Hindu law. Otherwise the act is invalid.

No doubt there is no text of Hindu law specifically dealing with the act of adoption and laying down the limit for the age of majority. But minority under Hindu law comes to an end on the completion of the 16th year. This rule applies to males and females, to the act of adoption as well as to an authority empowering the widow to make an adoption. If the person is below the age of majority recognised and established by Hindu law, the adoption will be invalid.

Ceremonial competency or the qualification to perform a religious rite can never be the test in such a matter. It does not carry with it the necessary mental equipment for a person to form an independent judgment in the matter of affiliating a son to himself. The age limit, therefore, cannot be drawn at the point where a *dwija* becomes competent to have the upanayanam performed. Such a contention does not suggest any limit of age in the case of Sudras who are not qualified to perform any religious ceremony involving the recitation of the sacred Vedas.

Texts and case-law discussed.

1. (1949) 2 M.L.J. 138. 2. (1949) 1 M.L.J. 452.

* Appeal No. 731 of 1947. 24th September, 1951.

against the decree of the Court of the Subordinate Judge, Tiruchi
24th March, 1947, in O. S. No. 51 of 1946.

Krishnaswami Aiyar and *R. Rangachari* for Appellant.

Muthukrishna Aiyar, *T. A. Anantha Aiyar*, *D. Ramaswami Aiyangar* a
sa Desikan for 1st and 2nd Respondents.

ourt delivered the following

NT.—The first defendant whose adoption has been declared inva
-Court, Tiruchirapalli, is the appellant before us. The following pe
as the relationship between the parties :

Ramaswami Bhattar — Kuppa Bhattar = Srirangammal

d Rangaraju Bhattar
on 5th March, 1942)
wami Bhattar (plaintiff).

Krishna Bhattar
(Born on 3rd December, 1887, died on 6th June, 1901) married Rukmini Ammal (died on 17th April, 1940) alleged to have adopted.

Ponnammal (2nd def

Minor Aravamudam—1st defendant.

i Bhattar and Kuppa Bhattar were two brothers. The plaintiff
on of Ramaswami Bhattar. The plaintiff's father Rangaraja Bhat
5th March, 1942. Kuppa Bhattar had a son Krishna Bhattar and

In this appeal by the first defendant, the main question argued by Mr. T. M. Krishnaswami Aiyar, his learned advocate, was that the authority conferred by Krishna Bhattar was valid. He made a faint attempt to support the adoption also on the ground that irrespective of the authority of Krishna Bhattar, the adoption was valid. The respondents did not challenge before us the findings of fact which were against them. The argument, therefore, proceeded on the ground that the findings of fact of the lower Court regarding the genuineness of Ex. P-3 and the factum of adoption are correct.

We may dispose of the contention that Rangaraja consented to the adoption first as it does not present any difficulty. The unregistered family settlement deed, Ex. D-5 dated 18th March, 1940, was relied on in support of the contention. That document sets out the previous disputes regarding the will and that Rangaraja agreed not to dispute the will in consideration of Rukmini Ammal giving him property worth Rs. 4,000 out of the properties of Krishna Bhattar. In consideration of that Rangaraja promised not to put forth

> "any claim to the other moveable and immoveable properties belonging to the said Krishna Bhattar"

and consented

> "that the 2nd individual shall take all the steps necessary for the propagation of her family in accordance with the terms of the will left by Krishna Bhattar and that he would also be present and assist in the accomplishment of that object."

It is common ground that the terms of this family settlement were not carried out; but it was contended that the passage above extracted amounts to an independent consent on the part of Rangaraja to the adoption. It is impossible to accept this contention. All that Rangaraja agreed to do under that clause was that he would help the lady in carrying out the terms of the will of Krishna Bhattar by taking all necessary steps for the propagation of the family and to accomplish that object. There is no language suggesting that Rangaraja intended to assent to the adoption independently of the existence of the authority contained in the will of Krishna Bhattar. It has now been authoritatively established that the assent of a sapinda to an adoption should be one given by him in the exercise of an independent judgment irrespective of the question whether or not the widow had also authority to adopt from her husband. The reason for this is obvious. As has been pointed out repeatedly by the Judicial Committee, the sapinda has to decide for the widow the propriety and the expediency of introducing an heir to the deceased husband. Where a sapinda gave his assent believing that the husband also gave an authority to adopt, it was held that such an assent was not valid to support an adoption: see *Sri Raghunada* v. *Brozo Kishoro*[1], *Ganesa Ratnam Iyer* v. *Gopalaratnam Iyer*[2], *Venkamma* v. *Subramanyam*[3], affirming *Subramanyam* v. *Venkamma*[4]. It is impossible to infer from the language of Ex. D-5 that there was an independent assent of Rangaraja to the adoption of the first defendant by Rukmini Ammal. We have no hesitation therefore in rejecting this contention.

The only important question therefore that arises for serious consideration in this appeal is whether the authority of Krishna Bhattar, a boy below 14 years of age at the time, was valid. Krishna Bhattar was undoubtedly a minor as he was under the age of 18 on the date he gave the authority to adopt, if minority is to be determined with reference to the Indian Majority Act, IX of 1875. Section 2 of that Act however contains exceptions. The section enacts that:

> "Nothing herein contained shall affect—
>
> (a) the capacity of any person to act in the following matters, (namely)—marriage, dower, divorce and adoption."

In respect of marriage, dower, divorce and adoption therefore, the capacity of a person to act has not to be determined with reference to the age of majority fixed

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1. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).
2. (1880) I.L.R. 2 Mad. 270.
3. (1906) 17 M.L.J. 114: L.R. 34 I.A. 22: I.L.R. 30 Mad. 50 (P.C.).
4. (1903) 13 M.L.J. 239: I.L.R. 26 Mad. 627.

dian Majority Act. The personal law of the parties must th age at which a person is entitled to act in the matter of ad vas admitted by the appellant.

ırgument, however, strenuously pressed before us was that ac v being essentially a religious institution, if a person is qua igious act or partake in a religious ceremony, or in other wor l competency ", he is entitled to adopt or even give an auth re of his mental capacity ; that is, irrespective of the ques to comprehend or not, the import and the consequences of g. In the case of *dwijas* (twice born person), the right to p or partake in a religious ceremony or competency is acq ıce of upanayanam. Krishna Bhattar before his death l yanam performed but also his marriage, and therefore he : to do a religious act such as the adoption by himself, no d was equally competent to confer an authority to adopt on nal. So ran the argument. When pressed with the ques draw the limit at any particular age, learned counsel for t this competency would synchronise with the age at which erformed among *dwijas*. As stated by various Smriti write am is eight years computed from the date of conception i 11 years in the case of Kshatriyas and 12 years in the ca are not entitled to have upanayanam performed and pa ceremony, this limit would not apply. As a last resort, co stated that without drawing any arbitrary line and fixing the age of discretion, it must be decided as a question of fac r not the boy or the minor widow was capable of under ng the act he or she was performing. If he had attained su lerstanding to comprehend the nature of the act he was perf the age, he was entitled either to take a boy in adoption to adopt on his wife, and on the evidence it was contend fficulty in the case of Krishna Bhattar as he was undoubtec ding.

ıay now examine the authorities cited by learned counsel f whether they lend any support to the position taken up b n which strong reliance was placed by him as supporting l ıe Judicial Committee in *Amarendra Mansingh* v. *Sanatan* t was claimed, revolutionised the law of adoption and has l clearly established that the adoption under Hindu law in which no secular element enters. It is true that accord ı of religion, there is life after death which makes it inc g in this world and related to the deceased to perform such dai s as are conducive to the spiritual welfare of the deceased. It perform, but it is also obligatory to provide if possible for t ce of such ceremonies without break by leaving a perso vho would carry on the religious duties. A text of Sruti says

यमानो ह वै ब्राह्मणस्त्रिभिः ऋणैः ऋणवान् जायते, ब्रह्मचर्येण ऋषिभ्यो
भ्यः, एष वा अनृणी यः पुत्री यज्वा ब्रह्मचारी च ॥

ıana on being born becomes a debtor in three obligations : propounders of the sacred books) for Studentship (to perus ls for Sacrifices ; to the Paternal ancestors, for progeny ; h who has son, who has performed sacrifices and who ha

person has not the fortune of having a son of his own loi law permits the adoption of a son. A text of Atri says :

1. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C

त्रप्रतिनिधिः सदा ।
यस्मात् तस्मात् प्रयत्नतः ॥
पश्येत् चेत् जीवतो मुखम् ।
अमृतत्वं च गच्छति ॥

mittee on behalf of the reversioner. The first was that with the vesting estate by devolution in Banamali the reversioner, the power of the widow ated and became extinguished. In any event, as Bibhudendra attained capacity to continue the line, the power of the widow Indumathi terminat

As regards the first contention, the decisions beginning with *Boobhun Moy* were considered by their Lordships of the Judicial Committee. The conc arrived at was that the vesting of the property on the death of the last hol ne one other than the adopting widow, be it either another coparcener of family or an outsider claiming by reverter, or, their Lordships added, by inhe cannot be in itself the test of the continuance or extinction of the pov option. It was observed that the Hindu law itself did not set any limit xercise of the power and that there was no warrant in any of the texts of Hin o justify the imposition of a restriction based on considerations of proper necessity, however, of drawing the line was imperative and the question e the line should be drawn. Here again, religious importance of the s al or adopted, enters into consideration. None of the decisions examir e Judicial Committee, it was stated by Sir George Lowndes, warrant the assun nade in some of the decisions that the limit is reached when the property pas other.

The true reason must be ", to quote their Lordships, " that where the duty of providing ntinuance of the line for spiritual purposes which was upon the father, and was laid by icnally upon the mother, has been assumed by the son and by him passed on to a granc he son's widow, the mother's power is gone. But if the son dies himself sonless and unma ty will still be upon the mother, and the power in her which was necessarily suspended du

line is considered by the Hindus as something very ignominous. The necessity to continue the line is the necessity of the future not of this world but of the other world. This decision, therefore, in our opinion emphasises the importance of adoption from a religious point of view but does not altogether exclude the secular element in it.

The object of adoption is one and the act of adoption itself is another. If the object of adoption is religious it does not necessarily follow that the act of adoption is also entirely religious without secular element in it. We are not now concerned with the object of adoption but with the act of adoption itself and the question whether any and if so to what the extent mental capacity is required to perform the act of adoption. Ceremonial competence does not, in our opinion, warrant the assumption that the Judicial Committee intended to do away with any requirement as to mental capacity in the matter of adoption. Bibhudendra in that case was more than 20 years old but the power of adoption of Indumathi did not terminate as Bibhudendra did not leave a son or widow. The view that the adoption is more a temporal than a spiritual institution was again reiterated by the Judicial Committee in *Ramasubbayya* v. *Chenchuramayya*[1], following the opinion of Sir George Lowndes in *Amarendra Mansing* v. *Sanatan Singh*[2]. These two decisions, however, were not concerned with the question which we have now to decide. There is no particular rule laid down under Hindu law relating to adoption either with reference to mental capacity required or to the age of majority. The whole of the law of adoption, it may be observed, was evolved from a few texts and a metaphor. The texts are those of Manu, Vasishta, Bahudayana, and the metaphor is that of Saunaka who laid down that the adopted boy must bear the reflection of a son (*putra chhaya*). Most of it has been evolved by judicial decisions. It cannot, however, be gainsaid that the act of adoption consists of two elements, *the giving and taking* (*i.e.*), the giving of the boy by the parents and the taking of the boy by the adopter and the performance of *datta homam*. Giving and taking imply that the filial relationship in one family is snapped and is created in another. The act of adoption is the act of creating the relationship of son by satisfying the requirements of Hindu law. Of these, it cannot be disputed that the giving and taking of the boy is the most essential part of adoption. The religious ceremony of *datta homam* is not obligatory in all cases, as for example in the case of Sudras, who are not competent to perform any religious ceremony, and even in the case of Brahmins if they belong to the same gotra, it is not essential as laid down in *Govindayya* v. *Doraiswami*[3]. In that case, the decision of the Judicial Committee in *Shoshinath Ghose* v. *Krishnasundari Dasi*[4], was taken as authority for the proposition that any overt act is not sufficient to constitute adoption. There must be a corporeal delivery of the child by the person

"competent to give to a person competent to take accompanied by the declaration on the one side, 'I give the child in adoption' and on the other 'I take the child in adoption'."

At page 7 it is further observed that that

"decision shows further that in laying down the rules the Judicial Committee had before them what actually takes place when a formal adoption is made with ceremonies and that they rejected as superfluous the merely ceremonial observance as contra distinguished from the specific *secular act* and declaration which constitute the form in which the intention to give and take is manifested during the ceremonial."

That the acceptance of the child is a secular act is further emphasised by the fact that even during pollution though a person cannot perform a religious ceremony, he is entitled to accept a gift of a child and where *datta homam* is necessary, it may be supplemented after the period of pollution. Muthuswami Iyer and Best, JJ., observed in *Santappayya* v. *Rangappayya*[5], that pollution is only

"a bar to a religious act and renders religious ceremonies inefficacious but a gift and acceptance are secular acts and may therefore be supplemented by *datta homam* after the expiration of the period of pollution."

1. (1947) 2 M.L.J. 39.
2. (1933) 65 M.L.J. 263 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
3. (1887) I.L.R. 11 Mad. 5 (F.B.).
4. (1880) I.L.R. 6 Cal. 381.
5. (1894) 5 M.L.J. 66 : I.L.R. 18 Mad. 397.

religious ceremony is necessary and an adoption even In their case all that is necessary is the gift and accept out the filial relationship of an adopted son ; see *Thangai* *Annapurnamma* v. *Manikyamma*[2].

in the above decisions is in accordance with the rules lai y the texts. *Baudhayana* lays down पुत्रपरि dhim), *i.e.*, the rules for the adoption of a son. The the child and addresses a request to them " give me th " I give " and the adopter accepts the gift प g धर्मायत्व परिगृह्णामि (for the fulfilment of religious परिगृह्णामि (to continue the line, I take), *see* valkya Smriti, Book I Achara Adhyaya, transla irnava ; *see also*, the ritual of *datta homam* in 2, Strange's from Datta Mimamsa of Savara-Swami communicated e secular act, therefore, of acceptance of a gift of th ilial relationship is an essential element of the act of ac is a spiritual object and it should not be however conf The essentials of the act are distinct from the object re to draw the distinction between the two that has the appellant to contend that as the Privy Council ha spiritual institution, no requirement of any mental c njoined.

cisions cited, at the bar a brief notice of them is all the *Narain Lahoree* v. *Saroda Soondurее Debee*[3], Dwarkanath Mi option by a person who had attained the age of discretion is valid. He does not however lay down the age at law, a person attains years of discretion. He also emp a religious act and the necessity for the adoption is as y childless Hindu is deemed sure to go to hell called ' on to adopt a son which is almost imperative as a ma g Hindus. In *Jumoona Dassya* v. *Bamasoondari Dassy* held that adoption by a lady of the age of 15 or 16 and th ording to the law prevalent in Bengal is to be regarded as valid. They did not however decide whether the ken as the completion of the age of 15 or 16 as in eithe o the attainment of the age of discretion, was satisfied d, however, that this decision is no authority for holdi adoption even though a minor should have attained a o establish that he had attained the age of discretion by this argument as merely deciding the case on th case and as not enabling us to evolve any rule of law. accept this contention in view of the categorical sta nittee at page 295 of the report.

si v. *Adinath Dey*[5], the person who gave the authority to but the person who exercised that authority, that is the v the meaning of the Indian Majority Act. In fact, s old. If the authority to adopt by the husband specified t is nothing further to be done by the widow which re lgment ; but she had only to carry out her husband's wi Reference was made in that case to the decisions in *R* *da Soondurее Debee*[3], *Jumoona Dassya* v. *Bamasoondari D*

Iad. 358. 4. (1876) L.R. 3 I.A. 72 : I.L.R. 1
98 : I.L.R. (1946) Mad. (P.C.).
5. (1891) I.L.R. 18 Cal. 69.
[8.

ı was definitely named in the authority given by the husba
opted and that therefore the minority of the widow who exe
ould not affect the legality of the adoption. This decisi
orted on the ground that though the widow making the ado
ı years old, no exercise of discretion on her part was requir
of the case

f the Bombay High Court on this point were also referr
or the appellant. The first was the decision in *Patel Vandrav*
l Chunilal[1]. The husband to whom the adoption was ma
ow the age of 16 years at the time of his death. The wido
on was a major. Under the law obtaining in Bombay a Hind
ıake an adoption to her husband without his permission an
ent of sapindas unless the adoption was expressly prohibit
e adoption was contested on the ground that the authori
in the case of a husband who died while yet a minor in th
decision of Mitter, J., in *Rajendro Narain Lahoree* v. *Saro*
oved by the Privy Council in *Jumoona Dassya* v. *Bamasoonda*
as laying down that if the person adopting, though a mino
jority Act, if he had attained the age of discretion whic
m religious ceremonies prescribed for his salvation, he woul
an adoption and in the case before the learned Judges, the
tion on the part of the husband as he died two months befo
16 when he would have ceased, even in the eye of the law, t
erence in this observation to majority in the eye of the la
jority under Hindu Law and not under the Indian Majorit
ıappa[4], was a case which raised the question of the competenc
age to make an adoption to her deceased husband. Her
ith reference to the age of the husband making the adoptio
to adopt but a case of a widow making an adoption for he
nce to the determination of the question, it was considere
was the husband that made the adoption or the widow
ıt the decisions in *Rajendra Narain Lahoree* v. *Saroda Soonduri*
v. *Bamasoondari Dassya*[3] and *Mondakini Dasi* v. *Adinath Dey*
ıeaning of the expression "age of discretion" used in thos
was however upheld on the ground that there was nothin
ate of the adoption, the widow had not attained sufficien
ding to comprehend the nature of the act and that in fac
s of age. Under these circumstances, there was no reaso
of that age who had been married for two years or more an
d did not realise what was meant by taking a son in adop
ain proceeds on the peculiar facts of the case and enunciate
to say that if the person making the adoption was of suffi

on making the adoption to exercise an independent j
adoption and if so exercised, there should be a ma

tly, there is the recent decision of the same Court
Murlidhar[3], decided by Broomfield and Sen, JJ. T
who was 14 years and 7½ months of age at the time
of that adoption was in issue. Broomfield, J., who
it in the case after a consideration of the earlier autho
expressed himself thus at page 795 on the effect of t

hink it is clear from these cases that according to the view taken
and fast rule that an adoption by a youth or girl who has not co
rily invalid. On the contrary this Court has regarded the quest
understanding and discretion as a question of fact to be deter
ular case. Since we have found in the present case that Bhanu
anding to comprehend the nature of the act of adoption and
rule of law which requires us to hold that the adoption was in

mbay High Court has not considered whether ur
an age of majority fixed as no reference was made i
xts bearing on the question. They considered it suffic
ion in each case must rest upon the evidence relating
f understanding of the person making the adoption
The Bombay decisions, however, do not support th
n behalf of the appellant that a consideration of t
on making the adoption was wholly irrelevant and th
etency to perform a religious ceremony. If that is
ppellant, the adoption would be valid irrespective o
; of the person making the adoption.

doubt the decisions of the Bombay High Court s
ppellant to this extent that the question of the cap
n the facts of each case, of course taking into conside
ctors bearing on the question. The Bombay High
sion in *Jumoona Dassya* v. *Bamasoondari Dassya*[4], as
ority at 15 or 16 and according to the decisions, t
ed under Hindu-Law

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21) I.L.R. 46 Bom. 307.
19) I.L.R. 44 Bom. 327.
.R. (1942) Bom. 782.

4. (1876) L.R.
28) (P.C)

iyar, J., considered the question in ... v. ...
ase were: One Subbarayudu died in 1907 having
rtly before his death under which he gave authority
11 years old to make an adoption. A few months
lu, the widow, while yet a minor, made an adoption
in the matter of adoption, Viyamma did not exercise
was only 11 years old and her father acted on her
ner no opportunity to exercise her own discretion and
t the desirability of adopting a boy. Both the learned
ra Aiyar, JJ., agreed in finding that Viyamma was
of the adoption. Both the learned Judges were also
he decisions in *Ranganayakamma* v. *Alwar Setti*[2], and
[3], that there should be a sufficient maturity of under-
to comprehend the nature of her act; but Oldfield, J.
n of the age of majority under the Hindu Law. The
y Sadasiva Aiyar, J., though *obiter*, elaborately. Accord-
e of majority under the Hindu Law, for both males and
: of 16, प्राप्त तु षोडशे वर्षे, *i.e.*, on the completion of the
laced for this position on the decision in *Mothoo-Deb*[4] and *Madhusudan Manji* v. *Debigobinda Newgi*[5].
o on the decision of the Privy Council in *Jumoona*
, and the opinion of Jogeshchandra Ghosh in Hindu
learned author points out the difference of opinion
nares writers regarding the age of majority under
e Bengal writers, the age of majority is the beginning
etion of the 15th year while according to the Benares
h year. The opinion of Mr. Ghose at page 584 was
the act of taking in adoption is not only a religious
n, vyavahara and one who has not attained the age
entering into such a transaction. He then quotes
stri's Tagore Law Lectures on Hindu Law of Adoption
expressed the view in consonance with the opinion
e observation of the learned Judge, though *obiter*,
though on one point there is room for difference of
Law, latest edition at page 193 the law is thus

n who is a minor under the Indian Majority Act can adopt or
he has attained the age of discretion according to Hindu Law.
Dasya[6], the Privy Council held that the age of 15 or 16 was,
engal, to be regarded as the age of discretion. It corresponds to
by the Dayabhaga School at the completion of the 15th year.
l, it is the completion of the 16th year. It may be the same for
is quite possible to interpret the relevant rule as meaning the

paragraph which it is very difficult to reconcile with
paragraph. If the Hindu Law had fixed the majority
be, there is no room for fixing the age of discretion
to other considerations. The learned author says

certainly be fixed earlier than the completion of the 14th year
girl below 14 as a child for purposes of marriage. The age of
Where it is not so fixed, it can only be treated as a question of

based on the view taken by the Bombay High Court
it *Murlidhar*[7].

R. 40 Mad.
5. (1868) 1 Beng.L.R. 49.
6. (1876) L.R. 3 I.A. 72: I.L.R. 1 Cal. 289 (P.C.).
7. I.L.R. (1942) Bom. 782.
14.

ion, the age of majority under Hindu Law is fixed eitl
: 15th year or at the completion of the 16th year as the ca
:pts the Bengal view or the view of other text writers v
resently. In the present case the boy was below 14 and
:erial whether the age of majority is taken as the complet
16th. The act of adoption contains the most essentia
of a boy and the acceptance of the gift of the boy w
of a secular nature. The adoption no doubt also is a
vahara or the secular element in it cannot be ignored.
al transaction, Hindu Law requires that the person sh
of majority without which there is no validity for the tr
ption is made by a male or whether he gives an authority
even if the widow makes the adoption either under the
or after obtaining the assent of the sapindas, the act car
:y can be given only if the person attained majority
Otherwise, the act is invalid.

iere is no text of Hindu Law specifically dealing with
ing down the limit for the age of minority. But there
oranches of vyavahara law fixing the age of majority. Th
has been quoted with approval by most of the comme
In dealing with the question of the liability to pay debt:

स्थैः सदृशो ज्ञेयः आष्टमाद्वत्सराच्छिशुः ।

आषोडशाद्वर्षात् पौगण्डश्चेति शब्द्यते ॥

तो व्यवहारज्ञः स्वतन्त्रः पितरावृते ।

arable to an embryo up to his 8th year. A youth, wh
of 16, is called Poganda. Afterwards he is no longer
in case his parents are dead).

ry meaning of the word Poganda is " not full grown, a b
age " आपोगण्ड means " infant, not under 16 years
Narada cited above आषोडशाद्वर्षात् is used. The e
o used by Gautama in defining the limit of the
ccording to Smriti writers, upanayanam for a Brahman s
e 8th year from conception. Gautama says (upa
me.) उपनयनं ब्राह्मणस्य अष्टमे and 11 years for Kshatri

there is no father. It is therefore clear from these texts that a person attains competence for Vyavahara according to Hindu Law after the completion of the 16th year. Mr. Ganapathi Aiyar in his book on Hindu Law at page 415 and the following pages has collected the texts bearing on the question. The attention of the learned Judge Sadasiva Aiyar, J., was not apparently drawn to some of these texts and he was willing to accept the view of the Bengal writers. Colebrooke in his Digest of Hindu Law, refers to the text of Narada and agreeable to the Bengal view, he thinks that the minority must end with the 15th year as declared by Katyayana. Priyanath Sen a very eminent authority on Hindu Law in his jurisprudence deals with this question at pages 299 and 300 and states as his opinion :

> "Having regard to the context, the best interpretation seems to me to lead to the conclusion, that minority extends till the end of the 16th year, although Sri Krishna Tarkalankara in his commentary on the Dayabhaga appears in one place to take the opposite view."

A person who is a minor under Hindu Law is considered incapable of entering into any legal transaction as stated by the learned author. The opinions of Ghosh and Sarkar Sastri on Adoption have been cited *in extenso* by Sadasiva Aiyar, J.

Ceremonial competency or the qualification to perform a religious rite can never be the test. In the case of *dwijas*, after upanayanam is performed a person becomes competent to perform religious rites though he may not be qualified to perform religious sacrifice until marriage. The lower limit of the age for upanayanam, *i.e.*, 8, 11 and 12 according as the person is a Brahmin, Kshatriya or a Vysia. It is rather difficult to assume that a boy of that age would be capable of understanding the legal implications of affiliating a son to himself. After upanayanam, studentship commences and continues until the period when he becomes a *snathaka* fit to enter into a married life. His studies are then finished. Though it is now settled by decisions that a bachelor is entitled to adopt, according to strict conception of Hindu Law, it would be illogical to think of a bachelor producing a son of his own or entering into a grahasthasrama as it were, by adopting a son to himself. During the period of studentship he is incompetent to perform even *datta homam*, *puthreshti*, as it is a sacrifice which requires the presence of a wife. The ceremonial competency does not carry with it the necessary mental equipment for a person to form an independent judgment in the matter of affiliating a son to himself. It is therefore difficult to accept the extreme contention urged on behalf of the appellant without any binding authority for, this view if accepted would lead, as pointed out by Sarkar Sastri in his Law of Adoption,

> "pushed to its logical consequences this theory would justify the adoption even by a boy of 8 years and the Hindu legislators were not devoid of commonsense as to contemplate such an absurdity."

No doubt the learned author added an addenda at page 215. A citing instances of adoptions by minors which came to his knowledge during his professional career but that contains only a passionate plea for reform in that direction and does not in any way alter or affect the opinion already expressed by him in his lectures. The age limit, therefore, cannot be drawn at the point where a *dwija* becomes competent to have the upanayanam performed and this contention does not suggest any limit of age in the case of sudras who are not qualified to perform any religious ceremony inolving the recitation of sacred texts. To accept the test so strenuously pressed by learned advocate would lead to the serious consequences of young people being brought under the influence of elders who, to further their own interests, would force adoptions upon them. Such a danger must necessarily be avoided. In view of the above texts and of the opinions of text writers and also the *obiter dicta* of Sadasiva Aiyar, J., in *Sattiraju* v. *Venkataswami*[1], and the decision of the Judicial Committee in *Jumoona Dassya* v. *Bamasoondari Dassya*[2], it is impossible, in our opinion, to accept as did the learned Judges of the Bombay High Court the test of deciding the question on the facts of each case in order to come to a conclusion whether or not the person making the adoption was capable of understanding

1. (1916) 32 M.L.J. 119 : I.L.R. 40 Mad. 925.
2. (1876) L.R. 3 I.A. 72 : I.L.R. 1 Cal. 289 (P.C.).

lge in the Court below that the authority given by Krishna Bhattar when below 14 years of age was invalid and that the adoption of the first defenda Rukmani Ammal is also invalid was correct. The decree, therefore, of t er Court must be confirmed and the appeal is dismissed with costs of the fi pondent.

V.S. *Appeal dismiss*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO, MR. JUSTICE RAJAGOPAL MR. JUSTICE CHANDRA REDDI.

ntapalli Venkataratnam .. *Appellant**

and consequently attract clause (*iii*). *Vide* C. M. A. Nos. 316 and 391 of 1947. We are unable to accept this interpretation. There may be orders or decrees which are declaratory in nature and not executable and if they had become final before the commencement of the Act, a provision excluding the application of the amendments made by the Act as by clause (*ii*) will certainly be necessary. Apart from this, we do not see any reason why the third clause should not be construed as having an independent and exclusive operation which is *prima facie* what the language of the section suggests. We therefore think that the decision of the learned Judges requires reconsideration and for this purpose we direct that these papers be placed before the Honourable the Chief Justice to refer this case to a Full Bench.

(In pursuance of the aforesaid Order of Reference, this appeal coming on for hearing, the Judgment of the Court was delivered by

Satyanarayana Rao, J.—This Civil Miscellaneous Appeal has been placed before us under the directions of the Honourable the Chief Justice for a reconsideration of the decision in C. M. A. Nos. 316 and 391 of 1947 by our learned brethren Subba Rao and Somasundaram, JJ. As the case itself has been referred to us and not merely a question, it is necessary to state the facts out of which this appeal arises in order to appreciate the questions that arise for decision.

The legal representative of the third defendant in O. S. No. 16 of 1939 and who is also her adopted son is the appellant in this appeal and also the petitioner in C. M. P. Nos. 8384 and 8627 of 1950. O. S. No. 16 of 1939 was instituted to enforce a mortgage dated 6th November, 1926, for a sum of Rs. 12,000, executed by defendants 1 to 3 and also by the first defendant as guardian of his minor son the fourth defendant. The first defendant is the husband of the second defendant and the third defendant is the first defendant's paternal uncle's widow. She adopted one of the sons of the first defendant. The mortgage (Ex. A) was executed to discharge certain earlier debts. The property covered by the mortgage belonged originally to certain Chintapalli people who mortgaged the property to the plaintiff on 24th May, 1920, for a sum of Rs. 5,000 (Ex. D). They were also indebted to the same plaintiff under a promissory note dated 1st December, 1921, (Ex. E), the principal of which was Rs. 1,000. Under two documents dated 14th June, 1925 (Ex. G) and 12th October, 1925 (Ex. H) the property was purchased by the second defendant subject to the earlier mortgage and also with an obligation attached that from and out of the consideration for the sale the debt due under the promissory note should be discharged by her. It is common ground that the purchase by the second defendant, the wife of the first defendant was for the benefit of the family. The suit was instituted on 15th October, 1939 and in that suit the third defendant claimed, taking advantage of the provisions of Madras Act IV of 1938, that she was entitled to have the debt scaled down along with the other defendants who also claimed similar reliefs. She pleaded further that she was only a surety for the debt and her liability was co-extensive with that of the principal debtors. The learned Subordinate Judge who tried the suit allowed the benefits of the Act to the third defendant also to the same extent as he had allowed to the other defendants who were the other mortgagors, that is, the debt was scaled down as so to reduce the debt due under the suit mortgage to the principal amount due under Exs. D and E.

There were two appeals against that decision to this Court one by the plaintiff which was A. S. No. 6 of 1942 and the other by the defendants 3 and 7, A. S. No. 516 of 1941. We may leave out of consideration A. S. No. 516 of 1941 as it has no bearing to the present controversy. In A. S. No. 6 of 1942 the plaintiff creditor claimed that she was entitled to a decree against the third defendant for the principal sum mentioned in the suit mortgage with interest scaled down according to the provisions of the Act, and that the decree granted by the lower Court giving her also the benefits of the provisions of the Act so as to reduce the debt further as in the case of other mortgagors was not justified. This Court held that the third defendant was not entitled to the benefits of the Act in the same manner and to the same

a Full Bench for reconsideration.

It cannot be seriously disputed that the appellant is entitled to the be
the new Act if the provisions of Act XXIII of 1948 are held to be retrospe
the appellant is entitled to the benefits of the new provisions the debt shou
aled down in accordance with those provisions. The point therefore for
leration is whether the Act is retrospective. In order to give retrosp
ect to the provisions of the Act, section 16 was enacted in the Act (XX
48). It is as follows:

" The amendments made by this Act shall apply to the following suits and proceedings, nan

The provisions of this section are clearly mandatory as the section itself says that the amendment made by this Act "shall apply" to the following suits and proceedings. The clause that is relied on in support of the contention advanced on behalf of the appellant by this learned advocate Mr. Rama Rao is clause (*iii*). He also at one stage of the arguments attempted to rely on clause (*i*) but, when it was pointed out to him that there was no proceeding instituted after the commencement of this Act in the present case except the proceeding for scaling down which has been started after the new Act came into force he abandoned that contention and did not further press his contention based on clause (*i*). Clause (*i*) therefore may be left out of consideration altogether. It cannot be doubted that the two clauses (*ii*) and (*iii*) are entirely independent and are intended to provide for different situations. As has been rightly pointed out on behalf of the respondent by Mr. Kuppuswami in construing a provision like this which gives retrospective operati on to a statute it is incumbent upon the Court to give effect to the plain language of the section and that retrospective operation should not be unduly extended; nor should it be negatived or cut down if the language makes it imperative that such operation should be given. It is not open to a Court of construction in interpreting a statute either to add or to subtract from the language of the statute. As far as possible an attempt should be made to reconcile and interpret the provisions of a statute in a manner so as to make none of the provisions ineffective or nugatory. If possible the provisions of the Act must be so construed as to give effect to all the provisions. A provisi.on can be rejected as unnecessary only if a Court is driven to such a situation and not otherwise. Bearing these principles in mind it is clear that clause (*ii*) applies to pending proceedings, that is, proceedings which were instituted before the commencement of the Act but which did not become final before such commencement. This is made clear by the clause "in which the decree or order passed has not become final." It implies therefore that if the decree or order passed in a suit or proceeding becomes final before the commencement of the Act the provisions of the Act cannot be applied to such a suit or proceeding. But in clause (*iii*) the word "in which the decree or order passed has not become final" do not occur. It is quite general and applied to all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act so that it seems to apply to decrees or orders even if they had become final before the commencement of this Act provided the decree or order has not been executed or fully satisfied. The view taken by the learned Judges in the civil miscellaneous appeals already referred to was that while the two clauses are independent, clause (*iii*) has no application to proceedings in which the decrees or orders have become final before the commencement of the Act. It is this view which is also pressed now before us by the learned advocate for the respondent. While we agree with the learned Judges in holding that the two clauses are independent, we are unable with great respect to accept the view that clause (*iii*) applied only to cases in which the decrees or orders have not become final. If the decree or order has not become final, before the commencement of this Act, clause (*iii*) in our opinion seems to be unnecessary and as such the case would be covered by clause (*ii*). Further, it would be difficult to imagine that a decree or order which has not become final can be finally executed or can be finally satisfied. No doubt it is true that even when an appeal is pending a decree may be executed and satisfaction may be entered. But all that is only subject to the result of the appeal. If the appeal succeeds or the amount due by the defendant to the plaintiff is increased by the appellate Court fresh execution has to be started, the satisfaction must be re-opened and the execution must proceed. The Legislature, in our opinion, when it enacted these two provisions must have intended that even in the case of decrees or orders which have become final having regard to the provisions of the new Act, relief should be had by the judgment-debtor so long as the decree or order was not executed or was not satisfied in full before the commencement of the Act. If however a decree was executed in part and before it was fully satisfied the debt was scaled down under the provisions of the Act as a result of which the creditor was found to have received more than what he was entitled to, the proviso enacts that in such

a situation the creditor should not be required to refund any sum which has be paid to or realised by him before the commencement of this Act. The questi is asked, and legitimately, as to which are the kinds of decrees or orders whi have become final and which are sought to be excluded by implication in clause (of section 16. It is of course not easy to give an exhaustive list of such decrees orders. It may be that the Legislature contemplated that decrees and orders of declaratory nature and which are not executable and which have become fin before the commencement of the Act, need not be opened. A reading of the tv clauses together would suggest that clause (*iii*) would apply exclusively to exec able decrees or orders which though they have become final before the commenc ment of the Act are still in the stage of unfinished execution and at the stage

a sum of Rs. 850 for the expenses incurred in connection with the second plaintiff's marriage, and Rs. 116-3-0 interest that accrued thereon upto the date of the plaint.

The first plaintiff is the mother of the second plaintiff and the wife of the defendant. The marriage between the first plaintiff and the defendant did not prove to be a happy one, and in or about 1925, the plaintiff separated herself from her husband on the latter agreeing to pay maintenance, as provided in Ex. P-1. At that time, the second plaintiff was only two years old. Subsequently, the defendant married a second wife, and by her had some daughters. In 1940, the defendant issued a notice under Ex. P-2 calling upon his wife not to get the second plaintiff married to the former's brother, and leave the question of the second plaintiff's marriage to him. In spite of this, the second plaintiff was married to the first plaintiff's brother, and the defendant was called upon to meet the expenses of this marriage. As he refused to do so, the plaintiffs instituted the present suit for the recovery of the amount mentioned above.

The suit was opposed on various grounds relating to the customs of the community according to which the marriage expenses are not incurred by the bride's party. It is to be noted that there is no plea raised in the written statement that there is no legal obligation on the part of the father to bear the expenses of the daughter's marriage.

The Courts below dismissed the suit holding that there was no legal obligation on the part of the father to perform the marriage of his daughter and in support of this view they relied upon a decision of a Bench of this Court in *Sundari Ammal* v. *Subramania Aiyar*[1], where it was held that a wife, who spent money on her daughter's marriage was not entitled to recover it from the husband.

In *Subbayya* v. *Ananda Ramayya*[2], a Full Bench of this Court expressed the opinion that there was a legal obligation on the part of the father to meet the marriage expenses of the daughter, if the family was possessed of joint family property. Referring to *Sundari Ammal* v. *Subramania Aiyar*[1] and to an earlier decision in *Seshammal* v. *Muniswami Mudaliar*[3], Ramesam, J., who was one of the members of the Full Bench, observed that in those cases it did not appear that the father was a member of the joint family or had ancestral property. In *Ranganayaki Ammal* v. *Ramanuja Aiyangar*[4] the claim of a daughter-in-law, to recover the marriage expenses of her daughter from her father-in-law, who was in possession of the joint family properties was upheld.

What emerges from these decided cases is that the father has a legal obligation to meet the marriage expenses of his daughter, if it is shown that there is joint family property. But if there is no joint family property, the obligation of the father is only a moral or natural obligation, but not a legal obligation.

Therefore, the main question that arises for consideration in this appeal is whether the defendant in this case was in possession of the joint family property. Though the question of the possession of joint family property was not specifically raised either in the plaint or in the written statement, the defendant had specifically admitted that the property in his possession was ancestral property. On this admission it is not open to doubt that the property in the possession of the defendant was ancestral property, and from this flows his legal obligation to meet the marriage expenses of his daughter.

Though the attention of the lower appellate Court was drawn to the ruling in *Subbayya* v. *Ananda Ramayya*[2], it contented itself by observing that the facts of the present case were entirely different from the facts in *Subbayya* v. *Ananda Ramayya*[2]. The learned Judge does not state how the facts of the present case were different from those in *Subbayya* v. *Ananda Ramayya*[2]. The Cout below entirely overlooked the distinction pointed out in *Subbayya* v. *Ananda Ramayya*[2], between the liability

1. (1902) I.L.R. 26 Mad. 505.
2. (1928) 57 M.L.J. 826: I.L.R. 53 Mad. 84 (F.B.).
3. (1897) 8 M.L.J. 105.
4. (1911) 21 M.L.J. 600; I.L.R. 35 Mad. 728.

‹17 of 1951) for setting aside the order of t
release of an Approver (P. W. 1), and for
ding disposal of R. C. No. 17 of 1951, and
ies.

I have perused the records and heard M
er, the learned Public Prosecutor for th
approver. The learned Public Prosecut
ed, supports it. He relies upon the man
ninal Procedure Code, that an approver,
accepts the tender of the pardon (this A
detained in custody until the terminatio

Cr. M. P. No. 2437 of 1951.

: concluded, let alone any trial begun :
, no doubt in my mind that neither the in
: has got the right to set at naught the *ma*
al Procedure Code, based on very salu
: interest, and release an *approver* who is
of the tender of pardon, after the approv
gistrate's Court, that is, in the course of t
uiry has ended, and, if committal ensues
essions Court truly and fully to matters w
an accused, and cannot be made an accu
facts within his knowledge truly and full
ing false evidence. Only when he has
alse evidence, can he be treated as an ac
urt, consisting of Wallis and Munro, JJ., in
another Bench of this Court, consisting
mperor[2]. In the latter ruling it is specific
the approver is tendered a pardon is bro
ourt statements made before the committi
n his examination-in-chief in the Sessio
if committal ensues, the stage at which
kept his condition or not is the stage of
it of his evidence in chief-examination, cro
Sessions Court compared with his sta
also obvious from section 337 (3), Crim
used is "*trial*" and not "*enquiry*". In *R*
JJ., have observed as follows:

don also accepts the grave risk of departing from th
uses the privilege granted to him. The statemen
in evidence against him under section 339 (2), Cr

law of confessions. So, it is clear to me th
position as an accused, and the provisions
ure Code, cannot aply to him. Like a
crime but is not convicted and punished
t the time he committed the act, an app
indirectly concerned in or privy to the o
Procedure Code, and is let off without
epts the tender of a pardon and makes a
lating to the crime within his knowledge
inal Procedure Code, apply, it would no
n bail in a murder case like this.

as to be kept in safe custody till the co
mittal ensues) like a sealed will in a wi
ding to merits. He is not to be allowe
ail at the time he is tendered a pardon, b
lice control or influence, or the influence
er he has given a statement in the enquir
ent given by him before the District M
the accused can both get at him freely
that he will give out the whole truth at th
trial, in the case of an approver, does no
by him before the District Magistrate or
the true facts as they occurred, for Tru
ecutor, before he can make an approve
339 (1), Criminal Procedure Code, that,
concealed anything essential or given fal

ot complied with the conditions on which the tender of pardon was made. of vital importance both to the accused and to the public that an approver sho ot be treated like an ordinary accused or witness, but strictly according to rovisions of the Criminal Procedure Code, section 337 (3) being the prime pr on regarding him. There may be a little doubt whether an approver can be ased after he has given his full evidence in the Sessions Court, and where ublic Prosecutor does not certify that there is anything concealed or false, e efore the trial is over; but there is no doubt at all that he cannot be relea n bail at an earlier stage (if committal ensues) when he was not on bail at the t e was tendered the pardon and accepted it. Usually, a Sessions Court rele n approver in a murder case after the whole trial is over, and the verdict is gi nd judgment delivered, because only at that stage can it be seen whether pprover's evidence has been a full and true disclosure, of all the facts he kn t not.

I have no doubt whatever, therefore, in agreeing with Mr. Rajagopalach ne learned counsel for the petitioner, and with the learned Public Prosecu nd in disagreeing with the contentions of the learned counsel for the appro nd cancelling the order of the Sessions Judge, Madurai, releasing this appro n bail. I accordingly cancel that order and direct his re-arrest and deten safe custody in a separate cell in Madura Jail pending disposal of R. C. No 1951 on the file of the Stationary Sub-Magistrate, Nilakottai, and the conclu the trial (if committal ensues).

The inquiry and trial (if committal ensues) of the case may be expedite r as practicable, as the learned counsel for the approver says that there are ne o witnesses, and many exhibits, and this approver has the prospect of being l custody for several months unless an order for expedition is given by me.

K.S. ——— *Petition allo*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SUBBA RAO.

han Bahadur A. Abdul Karim Sahib .. *Petitioner**

informing him that he had taken over the premises for allotment to Government officials; and that orders regarding the allotment would issue shortly. On 11th June, 1951, the first respondent made an order allotting the said premises to Mr. S. A. Venkatesan, Assistant Engineer, P. W. D., Madras, for residential purposes and directed the petitioner to hand over possession to the said Mr. Venkatesan. Learned counsel for the petitioner contends that the said order was made by the Accommodation Controller without jurisdiction, as under the Madras Buildings (Lease and Rent Control) Act, 1949, the Accommodation Controller has no power to convert a non-residential building into a residential building and *vice versa*.

To appreciate the contentions of the parties, I shall read the relevant sections of the Act.

Section 2 (1) : "Building means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes . . . . . ."

* * * * * * *

Section 3 (1) (*a*) : "Every landlord shall, within seven days after the building becomes vacant by his ceasing to occupy it, or by the termination of a tenancy, or by release from requisition give notice of the vacancy in writing to the officer authorised in that behalf by the State Government (hereinafter in this section referred to as the 'authorised officer')."

* * * * * * *

Section 3 (3) : "If, within ten days of the receipt by the authorised officer of a notice under sub-section (1) or sub-section (2) the State Government or the authorised officer does not intimate to the landlord in writing that the building is required for the purposes of the State or Central Government or of any local authority or of any public institution under the control of any such Government or for the occupation of any officer of such Government, the landlord shall be at liberty to let the building to any tenant or to occupy it himself.

* * * * * * *

Section 3 (5) : "If the building is required for any of the purposes, or for occupation by any of the officers, specified in sub-section (3), the landlord shall deliver possession of the building to the authorised officer and the State Government shall be deemed to be the tenant of the landlord, with retrospective effect from the "date on which the authorised officer received notice under sub-section (1) or sub-section (2); the terms of the tenancy being such as may be agreed upon between the landlord and the tenant and in default of an agreement, as may be determined by the City Civil Court in the City of Madras and elsewhere by the Subordinate Judge's Court having original jurisdiction over the area in which the building is situated or, if there is no such Court, by the District Court."

* * * * * * *

Section 3 (9) : "Nothing contained in this section shall apply :—

(*a*) to a residential building the monthly rent of which does not exceed twenty five rupees; or

(*b*) to a non-residential building the monthly rent of which does not exceed fifty rupees; or

(*c*) to any building or buildings in the same city, town or village, owned by any company, association or firm, whether incorporated or not, and *bona fide* intended solely for the occupation of its officers, servants or agents."

Section 4 provides for fixing the fair rent, and the provisions indicate that different considerations will have to be borne in mind in fixing the rent for residential and non-residential buildings. Section 7 also prescribes various conditions which entitle the landlord to evict the tenant. Section 11 reads :

"No residential building shall be converted into a non-residential building except with the permission in writing of the Controller".

Mr. Radhakrishnan, the learned counsel for the petitioner, argues that under the provisions of the Act only the owner can convert a residential building into a non-residential building and *vice versa*, with the previous permission of the Accommodation Controller, and that the Accommodation Controller *suo motu* cannot convert one class of building into another. He also further emphasises that if a non-residential building is leased out for residential purposes, it will be impossible to apply the provisions of sections 4 and 7 of the Act. The Act does not define a residential building or a non-residential building. Under section 2 (1) a building has been defined, which includes both the categories of buildings. It is true that the various sections of the Act makes a distinction between residential and non-residential buildings and also provides different rents for the two cate-

into another can only be under section 11. But section
wer to the Accommodation Controller to requisition the
es of the State or Central Government or of any local aut
nstitution under the control of any such Government or for
officer of such Government. Section 3 (3) does not say
on Controller can acquire a residential building only for r
a non-residential building, only for non-residential pur
ed for any of the purposes mentioned in sub-section (3)
, if the building is required for any of such purposes the te
ion to the authorised officer. On a fair reading of the pl
3, I find it very difficult to hold that the Accommodation C
a non-residential building for the purpose of giving it for r
ice he made the requisition, he is certainly entitled under th
he purposes for which he is authorised to take the building.

akrishnan has argued with some force that as no express
n the Accommodation Controller to convert *suo moto* one
the construction I adopt may lead to anomalies in the ap
d 7. It is true that under section 11 an owner can convert a
ission of the Accommodation Controller; but that sectio
cific powers conferred upon the Accommodation Controll
e Act. It does not also contravene the spirit underlying s
t the landlord can do with the permission of the Accom
Accommodation Controller can do *suo motu* under section
e character of the building can be ascertained by the m
commodation Controller deals with the property after he t
he gives it for residential purposes it will be a residential b
r non-residential purposes, it will be a non-residential buildi
ere will not be any difficulty in applying the provisions of

aforesaid reasons I hold that the order of the Accom
correct, and this petition is dismissed with costs, advocate's fe
very fifteen days.

Petition

HE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE RAMASWAMI.

sarathy and others . .. *Petiti*

Police Act (III of 1888), sections 45 and 46—Facts to be proved to sustain convi
y found or seized—When justified.

bring the playing of cards within sections 45 and 46 of the Madras City
all be proved that the premises raided was a common gaming-house. U
nce on record to make out the element of profit or gain to the person ow
r keeping the premises, the offence cannot be said to be made out. Th
people play cards in a house and perhaps for money does not necessar
g-house. Where certain friends one of whom was the landlord and the ot
me premises finding nothing more useful to employ their time on a holi
cards are found playing in a private room when the house was raided,
viction under sections 45 and 46 of the Act. The seizure of a petty am
ad to the conclusion that it was quota money.

so be no forfeiture in this case of the money seized, for the Act does not
ng seizure as a matter of course. Before ordering forfeiture the Mag
the money or other articles seized were used or intended to be used for g

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No. 687 of 1951. 3rd Decemb
. No. 681 of 1951.)

The Court made the following

ORDER.—The learned State Prosecutor states that he cannot support the
tions and sentences of the Special Honorary Presidency Magistrate and I ent
ee with him.

The established facts are: The accused persons T. R. Parthasarathi, S
alu, Govindaraj, Umapathi, jevenile Ponnurangam and Murugavel are c
its of a house bearing door No. 4, Thandavaraya Pillai Street. The fir
m Parthasarathi is the landlord and the others are tenants living in va
ts of the same house. This house was raided on a search warrant on 1st Octo
o, at 3-30 P.M. These six persons were found playing cards in an upstairs r
a carpet. The police detained these six persons and seized the forty pla
ds (M. O. 1), the carpet (M. O. 2), cash Rs. 7-2-6 (M. O. 4) and a small er
G. asafoetida tin box (M. O. 3) with rupee one in small change placed be
used 1. They were charged under sections 45 and 46 of the Madras
ice Act (III of 1888) (hereinafter referred to as Act).

Section 45 of the Act lays down:

"Whoever opens, keeps or uses or permits to be used any common gaming-house, or con
sists in conducting the business of any common gaming-house or advances or furnishes m
aming therein, shall be liable on conviction to fine, etc., etc."

Section 46 of the Act lays down:

"Whoever is found gaming or present for the purpose of gaming in a common gaming-l
on conviction be liable to fine, etc., etc. and any person found in any common gaming-l
ng any gaming or playing therein shall be presumed, until the contrary be proved, to have
for the purpose of gaming."

case for the accused was that they were playing cards in that upstairs r
they were doing so for mere pleasure on a holiday, that all of them were
nts and that the room in question was a private room and that they were
ing with money as quota money.

The learned Special Honorary Presidency Magistrate has by a process
oning, which is both obscure and forced, came to the conclusion that he belie
prosecution and found accused 1 guilty under sections 45 and 46 of the
the other accused guilty under section 46 of the Act.

There cannot be the slightest doubt in this case that this Honorary Spe
idency Magistrate has not understood the scope of sections 45 and 46 of
In order to bring the playing of cards within these sections it should firs
e proved that the premises raided was a common gaming-house. Sectio
ne Act defines what a common gaming-house is. It means any enclos
n or place, in which cards, dice, tables or other instruments of gaming are k
sed for the profit or gain of the person owning, occupying, using, or keep
enclosure, room or place, whether by way of charge for the use of instrume
aming or of the enclosure, etc., etc. In other words, unless there is suffici
ence on record to make out the element of profit or gain to the accused,
ce of keeping or using a room as a common gaming-house cannot be said to

no instances before of this premises being used as a common gaming-house. T petty amount found is quite consistent with the explanation put forward by accused and does not necessarily lead to the conclusion that it was quota mon The learned Honorary Presidency Magistrate without considering this essen element has embarked into a disquisition about the meaning of the word " plac and whether this was a public place, which has no relevance to this case. It ar only where the meaning of the word " public place " assumes importance and has to be considered whether the real offence, which is annoyance to wayfa and pedestrians, can be said to have been committed on account of the situat of the place, namely, accessibility and visibility to the public. There can be doubt that in this case there is no proof whatsoever that the place where this ga of playing cards was going on was a common gaming-house as laid down in *Chinn* In re[1].

On that conclusion it follows that there can be no conviction under section of the Act which prescribes a penalty for being found in a common gaming-hou see *M. E. Sheik Mohamed*, In re[2]. On this conclusion it also follows that there be no forfeiture and in fact the Act does not contemplate forfeiture following seiz as a matter of course. Before ordering forfeiture the Magistrate must be satis that the money or other articles seized were used or intended to be used for gami see *Subbier*, In re[3]. And where money is found in the pockets of the persons c victed of gaming, it must be proved that it was likely to have been used in connec with the gaming : see *Reg.* v. *Jaggopal Prasad*[4].

The net result of the analysis of the evidence is that certain friends occupy the same premises and finding nothing more useful to employ their time tha friendly game of cards were found playing and that apparently on account of wishers to them the Police have been tipped off and a raid had been arran and search warrant had been granted without adequate care and attention an wholly unnecessary prosecution had taken place and a wholly unwarranted con tion had followed. I have not therefore the slightest hesitation in setting aside convictions and sentences of the lower Court and directing the refund of the f and seizures.

Before parting with this case, I must record my anxiety about this laxity in construction of punitive provisions and the proneness to convict on wholly ina quate evidence. It is to be hoped that there will not be repetitions in future.

V.S. *Petition allo*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Trial referred by the Court of Session, Salem division, for confirmation of the sentence of death passed upon the said prisoner in C.C. No. 34 of 1951 and appeal by the said prisoner.

K. S. Sundaram for Accused.

The Assistant Public Prosecutor (*A. C. Muthanna*) for the State.

The Judgment of the Court was delivered by

Somasundaram, J.—The Additional Sessions Judge of Salem has found the accused guilty of murder of one Sellappa Goundan, uncle of the accused and sentenced him to death.

* * * * * * *

[After discussing the evidence and finding the accused guilty of murder His Lordship proceeded.]

The learned advocate (for the accused) raised a point that the Sessions Judge in this case has not complied with the provisions of section 342, Criminal Procedure Code and therefore the trial is vitiated. In the Sessions Court the statement made by the accused before the committal Court was read out to him and, after marking it as Exhibit P-5 and recording his answer that it is correct, the Sessions Judge simply asked the accused whether he wished to say anything more. The accused said he had nothing to add; and then the learned Judge proceeded to ask if the accused had any defence witnesses, to which the accused said that he had none. In the committal Court all the circumstances that appeared against the accused in the evidence given before the committing magistrate were put to the accused and his answers were obtained from him. There is not a single circumstance on which that Court could rely on against the accused that was not put to the accused. In the Sessions Court no circumstance different from what appeared in the evidence in the committing Court is found in the evidence given before the learned Sessions Judge. There has been no variation and the little variation if any was only in favour of the accused; so that all the circumstances that appeared in the evidence in the Sessions Court had been put to the accused by the committing magistrate as the same appeared in the evidence in the other Court and the answers of the accused obtained thereon. The question for consideration is whether a Sessions Judge should again put all the questions to the accused and record the answers from him. The learned advocate relied on two decisions in support of his contention; one of which is the decision of a Bench of this Court in *Sagili Solomon*, In re[1] and the other a decision of the Supreme Court in *Tara Singh* v. *The State*[2]. In view of the decision of the Supreme Court, it is unnecessary to refer to the decision of this Court reported in *Sagili Solomon*, In re[1]. In the case before the Supreme Court the scope of section 342, Criminal Procedure Code was considered; and the learned Judges pointed out how the circumstances which the Sessions Judge relied on did not appear in the evidence before the committal Court, but appeared only in the evidence before the Sessions Judge. This is what their Lordships say at page 523 of the journal (only the relevant portion is extracted here):

"Now this was evidence which was recorded exclusively in the Sessions Court. The eye witnesses before the Sessions Judge had resiled from the previous statements which they made in the committal proceedings. Accordingly a questioning by the committing magistrate would not and could not cover the point made here, and naturally, the Magistrate has not questioned the appellant about that circumstance. He next relied on the evidence of these witnesses as recorded in the Court of the committing magistrate. One point he used against them was the evidence of motive which these witnesses supplied in the committal proceedings. The appellant was not told what that evidence was nor was he asked to explain it. He was questioned about this motive in the committal proceedings by the committing magistrate, but even there he was not told who had given the evidence and the material on which the committing magistrate relied to establish the presence of motive was not disclosed.

The Sessions Judge also relied on the fact that the appellant had confessed to the three eye witnesses that he had killed his uncle and injured his father. There is not a single question regarding that either in the commiting magistrate's Court or in the Sessions Court.

Another ground on which the Sessions Judge proceeded was the extra-judicial confessions made by the appellant to Ujagar Singh, Fauja Singh and Garbaksh Singh. The appellant was questioned

1. (1951) 2 M.L.J. 423.

2. (1951) 2 M.L.J. 291 : 1951 S.C.J. 518 (S.C.).

Sessions Judge nor the committing magistrate questioned the appellant about that. The S
ge also relied on the two statements of Jakam Singh made before the Police, one of which th
rded as his dying declaration. Again not one word was put to the appellant about this."

The circumstances therefore on which the learned Sessions Judge in tha ed were not put to the accused either by the committing magistrate or l sions Judge. Their Lordships therefore held that under section 342, Cri cedure Code, for the learned Sessions Judge to rely on the circumstan uld have questioned the accused. Here such a complaint cannot be the circumstances have been put in the committing magistrate's Court a umstances on which the learned Sessions Judge relied appeared in the evi he Sessions Court, which had not already appeared in the committing which had not been put to the accused. We think therefore that o substance in the contention of the learned advocate that section 342, Cri cedure Code, has not been complied with. We must say however th sions Judge should himself put separate simple questions to the accused s trial Court itself may observe the demeanour of the accused explainin iminating circumstances alleged against him. However desirable it m . however much we may say that the Sessions Judge should follow such ure, we do not think that in this case the failure to do so either vitiates th as resulted in any prejudice to the accused.

On the evidence, as already stated, we accept the finding of the Sessions t it was the accused who dealt the stabs which resulted in the death of the dec that he is therefore guilty of murder.

But the question of sentence has given us some anxiety. We find in this lready stated, that the accused must have seen the deceased sleeping wi on the cot and he must have, therefore, acted under grave and sudden p on when he first speared him. If he had given the other injuries as well e time his act would certainly fall under Exception (1) to section 300, Indian le, and the offence would only be one under section 304, Indian Penal Code think that when he came a second time and stabbed the deceased with a did so under sustained provocation which was still grave but not su gravity of the provocation, we think, is a circumstance which can be consideration on the question of sentence. We therefore reduce the ser ransportation for life. With this modification of sentence we dismiss the app

V.S. ——— *Appeal dismissed. Sentence re*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

liam Satyam and another .. *Petitioners.**

Criminal trial—Powers of Magistrate to discharge in a calendar case and in the ca e of a offen e exc le by the Sessions Court.

There is a difference between a discharge in a calendar case and a discharge of an offence y triable by the Sessions Court and though the Magistrate has the privilege as well as th tive to weigh the evidence, still when there is *prima facie* presentable evidence which can co her tribunal to come to a different conclusion, it is the duty of the Magistrate to commit th e Sessions and not take upon himself the duty and responsibility of discharging the accused e privilege and prerogative of the Sessions Judge sitting with the assessors.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, pr t the High Court will be pleased to revise the order of the District Magis ru, in C.R.P. No. 23 of 1950 (in P.R.C. No. 1 of 1950, Stationary Sub-M e's Court, Tadepalligudem).

K. Ramamurthi for *K. Venkatarama Raju* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

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* Cr. R. C. No. 194 of 1951. 7th December, 1
(Cr. R. P. No. 193 of 1951.)

The Court made the following

ORDER.—This is a criminal revision case filed against the order made by the learned District Magistrate of West Godavari in C.R.P. No. 23 of 1950.

The facts are: The petitioners before us were charged for offences under sections 307 and 325, Indian Penal Code, of having attempted to murder P.W. 1 and causing him grievous hurt. The learned Sub-Magistrate after hearing prosecution evidence discharged the petitioners of the charge under section 307 and directed that the trial should be proceeded with under section 325, Indian Penal Code. The case was converted from a P. R. enquiry into a calendar case.

Thereupon the prosecution moved the learned District Magistrate of West Godavari, Mr. Gwynne and he came to the conclusion that the learned Sub-Magistrate was not justified in dropping the charge under section 307 and proceeding only with the offence under section 325 and directed the committal of the accused to the Sessions under sections 307 and 325, Indian Penal Code. Hence this revision petition.

In my opinion the learned District Magistrate had ample grounds for directing the accused persons to be tried under section 307 in the following circumstances. In this case there is *prima facie* evidence that these accused persons had the intention to murder P.W. 1. Secondly *ex facie* the nature of the injuries inflicted and which can be seen from the medical certificate point to the fact that it was not merely a case of causing grievous hurt. It is unnecessary to multiply the other grounds which have been clearly set out by the learned District Magistrate in his order which go to show that he properly interfered with the improper implied discharge of the Sub-Magistrate of Tadepalligudem and directed their committal.

It is contended by the learned advocate for the petitioners before me that the learned District Magistrate was not justified because the Sub-Magistrate has given ample reasons for discharging the accused under the serious offence of section 307. But in advancing the argument it is overlooked that this was not a case of discharge in a calendar case but a discharge of an offence exclusively triable by the Sessions Court and though the magistrate has the privilege as well as the prerogative to weigh the evidence, still when there is *prima facie* presentable evidence which can convince another tribunal to come to a different conclusion, it was the duty of the Magistrate to commit the case to the sessions and not take upon himself the duty and responsibility of discharging the accused which is the privilege and prerogative of the Sessions Judge sitting with the assessors. This was a clear case of clutching at jurisdiction and the improper discharge has been properly interfered with.

The Criminal Revision Petition is dismissed.

V.S. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

R. N. Vallinayagam Pillai, Proprietor of Sri Shanmugananda Touring Talkies .. *Petitioner**

v.

The State of Madras and another .. *Respondents.*

Constitution of India (1950), Article 19 (1) (f) and (6)—Refusal by licensing authority of licence to a touring cinema on ground of instructions from State Government in the shape of orders—If violation of fundamental rights under the Constitution.

Where a touring cinematograph company was refused a licence on the basis of certain instructions issued by the Provincial Government in certain orders, to ensure public health and safety, on a contention that the refusal of the licence was based on instructions which were beyond the scope of the Cinematograph Act and that the fundamental right of the party to carry on a business was violated by such a refusal,

* C.M.P. Nos. 5939 and 6660 of 1951. 17th October, 1951.

Held, that (1) the licensing authority be ng subject to the control of the Pr its powers under section 5 (3) of the Cinematograph Act can be exercised only tions that might be given by the Provincial Government. It is not strictly ac instructions given by the Provincial Government as rules made by Government Act, and

(2) there was no violation of the fundamental rights as Article 19 (6) contemplates that the State may impose reasonable restrictions in the interests in the exercise of the right conferred by Article 19 (i) (*g*) on every citizen to and the instructions of the Provincial Government are reasonable and in the i public.

Petition praying that in the circumstances stated in the affida the High Court will be pleased to issue a Writ of Mandamus dir dents to consider the petitioner's application for licence under th Act on the merits without any reference to the G.O. Ms. No. 207 ment), dated 5th May, 1950 and G.O. Ms. No. 4779 (Home De 11th November, 1950.

K. Venkataramani for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for the Sta *John*) on behalf of Respondents.

The Order of the Court was made by

The Chief Justice.—The petitioner applied to the District Ma veli, the licensing authority under the Cinematograph Act, to run called "Sri Shanmugananda Touring Talkies" at Mela Ambas He had previously obtained the necessary licence under the Place Act, paid the prescribed fee for the licence and he states in his aff complied with other rules and conditions under the Cinemato District Magistrate passed an order on 4th December, 1950, re licence to him. It is now common ground that this refusal was instructions issued by the Government in two orders, dated 5th M November, 1950. In the first of these orders, the Government ir authorities to restrict the number of touring cinemas in places permanent cinemas in order to prevent unhealthy competition an safety. In places where there was only one permanent cine authorities were instructed to use the discretion vested in them licences to touring cinemas. There were detailed instructions as of licences to permanent and touring cinemas based on the popu sought to be exploited. It was *inter alia* directed that for places of over 50,000 no touring cinema should be allowed within a miles from the nearest permanent cinema. We are not conc instructions in this application. By the later order, the Gov instructed the licensing authorities not to grant a licence to a tour three miles of a place with a population of over 50,000 even if there cinema there, as the intention of the Government was to encourag of permanent cinemas in such places. In a village, municipal c adjoining a town with a population of over 50,000 no touring cir within three miles of the nearest permanent cinema in the latter authorities were directed to strictly follow the instructions given ii of the Government as well as in the later order and that they any relaxation to suit any individual case. They were furthe they should obtain the order of the Government in border line where they had any doubt on the question of granting or refusing

On behalf of the petitioner the validity of the refusal by the L to grant a licence to the petitioner was challenged on the ground on instructions from the Government which (1) were beyond the and (2) were in contravention of the article of the Constitution a right on the petitioner to carry on the business of running a touri

There is no substance whatever in the first ground. The Cinematograph Act was passed to make provision for regulating exhibitions by means of cinematograph. Under section 4, the licensing authority outside the Presidency town is the District Magistrate. But under section 5 (3) which confers a power on the licensing authority to grant licences to such persons as it thinks fit and on such terms and conditions subject to such restrictions as it may determine the licensing authority is subject to the control of the Provincial Government. It is presumably in exercise of this power of control that the instructions abovementioned were issued by the Government to the licensing authorities. It is not strictly accurate to speak of these instructions as rules framed under section 8 of the Act, and so it is not necessary to deal with the contention that they go beyond the rule-making power contained in section 8.

The second ground evidently presupposes that the petitioner has an unfettered and unrestricted right to carry on the business of running a touring cinema at whatever place he likes. This obviously is not the correct position. Article 19 (6) clearly contemplates that the State may impose reasonable restrictions in the interests of the general public on the exercise of the right conferred by Article 19 (1) (g) on every citizen to carry on any business. As was observed in the well-known case of *Nebbia* v. *New York*[1] :

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited ; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the State's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreement, are within the State's competency."

This principle was applied in a subsequent case by the Supreme Court of the United States in the matter of granting permits for the construction of radio broadcasting stations, *Federal Communication Commission* v. *Pottsville Broadcasting Co.*[2]. In our opinion the instructions contained in the two Government orders contain restrictions which are reasonable and in the interests of the general public. It is not difficult to perceive that the said restrictions are in the interests of the safety and the health of the general public and designed to prevent unhealthy competition which itself indirectly would have deleterious influence on the general public. It was not suggested that there has been any discrimination of any sort, nor has *mala fides* been alleged. It was said during the course of the arguments that the authority erred in considering that the area for which the licence was asked for contains a population of over 50,000 ; but we cannot canvass this fact which must be peculiarly in the knowledge of the licensing authority. In any event, it is not open to us in this application to embark on an enquiry as to the correct population figure of the area. There is no reason to interfere with the order of the licensing authority refusing to grant a licence to the petitioner.

The applications must be dismissed with costs in C.M.P. No. 5939 of 1951 only which we fix at Rs. 100.

K.C. *Application dismissed.*

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1. 291 U.S. 502 : 78 Law Ed. 940.
2. 309 U.S. 134 : 84 Law Ed. 656.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VENKATARAMA AYYAR.

The Commissioner for Hindu Religious Endowments Board, Madras .. *Appellant**

v.

Sri Vinayakar Arudra Tiruppani Sabha, having its office at No. 32, Vinai Theertha Vinayakar Koil Street, Kosapet, Madras .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), section 9 (11-A)—Society the members of which by common agreement utilised the income of a property vested in it for performance of utsavam in a temple—If a specific endowment.

An unregistered society was formed in 1908 with the object of collecting funds and performing festivals in a specified temple. In 1913 a premises was purchased in the name of one of the members of the society but evidently with moneys collected by way of subscriptions from the members of the society. Subsequently the society was registered in 1929 under Act XXI of 1861. The object of the society was given as the conduct of the Arudra festival in the said temple at a cost not less than Rs. 150 out of the income which may be derived from the said property. The balance was to be kept as savings with which other immoveable properties were to be purchased. In 1947, till which year the festival was performed, the members of the society met and passed a resolution at a special meeting of the general body altering the object of the society. As altered the object ran as follows :—" To perform Arudra Archanai Abishekam and Tirupavadam every year when the day of Arudra Dharisanam occurs in the month of Margali to Sri Vinayagar installed in any temple in the locality or in any other place within or without the city of Madras as the members may be a majority decide year after year."

The Hindu Religious Endowments Board sought to collect contributions from the society treating the income of the property as a specific endowment. In a suit by the society to set aside the order of the Board declaring the income from the property as a specific endowment,

Held : It cannot be said that there was a specific endowment of the entire or part of the income of the property for a specific religious charity. There was no divesting of ownership even as regards income and there was nothing to prevent the society from changing its objects.

Decision of Rajagopalan, J., affirmed.

Appeal from the judgment and order of Rajagopalan, J., dated 12th December, 1949, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O.P. No. 275 of 1949.

M. Seshachalapathi and *T. A. Ramaswami Reddi* for Appellant.

N. K. Mohanarangam Pillai, M. V. Gopalaratnam and *N. K. Pattabhiraman* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal by the Hindu Religious Endowments Board, Madras, against the judgment of Rajagopalan, J., setting aside its order dated 22nd February, 1949, in and by which they declared that the income from the property, namely, premises No. 32, Vinaitheertha Vinayakar Koil Street, Kosapet, Madras, is intended for the performance of Arudra festival in the temple of Sri Vinaitheertha Vinayakar in the said locality and that the income is a specific endowment as defined in section 9 (11-A) of Madras Act II of 1927.

In or about 1908 some of the residents of the said locality formed themselves into an unregistered society with the object of collecting funds and performing festivals in the temple of Sri Vinaitheertha Vinayakar, Kosapet at the time of the Arudra Darsanam. In 1913 the premises in question were purchased in the name of one of the members of the society, but evidently with the moneys collected by way of subscriptions from the members of the society. There is no dispute that the property belongs to the society. Subsequently the society was registered under Act XXI of 1860 in 1929. Exhibit P-4 is the memorandum of association of this registered society. The object of this society was given as the conduct of the festival during Margali month on Arudra Nakshatram day in the temple of the said Vinayakar at a cost not less than Rs. 150 out of the income which may be derived from

* O.S.A. No. 9 of 1950. 18th October, 1951.

the said property. The balance was to be kept as savings and out of the amount saved in this manner other immoveable properties were to be purchased. The festival was being performed year after year till the year 1947 when the members of the society met and passed a resolution at a special meeting of the general body altering the object of the society. As altered the object ran as follows :

> " To perform Arudra Archanai Abishegam and Tirupavadam every year when the day of Arudra Dharisanam occurs in the month of Margali to Sree Vinayakar installed in any temple in Kosapet locality or in any other place, within or without the City of Madras as the members may by a majority decide year after year."

The Hindu Religious Endowments Board launched proceedings to collect contribution from the society treating the income from the said property as a specific endowment. There was a protest by the society and the Board decided the question under section 84 of the Act, in the manner already set out above. Thereupon the society filed an application under section 84 (2) of the Act to set aside the order of the Board. Rajagopalan, J., held on the evidence that there was no specific endowment within the meaning of the definition contained in clause (11-A) of section 9 of the Act and therefore allowed the petition and set aside the order of the Board. Hence the appeal.

We have no hesitation in agreeing with Rajagopalan, J., in his conclusion The definition of a " specific endowment " is as follows :

> " ' Specific endowment ' means any property or money endowed for the performance of any specific service or charity in a temple or math."

It is not the case of the Board that the property as such, was ever endowed. It is only the income that is said to have been endowed and before us, Mr. Seshachalapathi, the learned counsel for the Board was willing to limit it to a sum of Rs. 150 being the minimum mentioned in the articles of association. The question therefore is whether there can be said to be an endowment of the entire income or part of the income of this property for a specific religious charity. The appellant's case rested almost entirely on the terms of the memorandum of association, Ex. P-4. According to him, the fact that the object was mentioned as the conduct of the festival in a particular temple was sufficient to prove an endowment. We cannot agree. There cannot be an endowment unless there is a clear divesting of ownership by the owner in favour of a third party as trustee or by a declaration constituting the owner himself as trustee. Neither alternative has happened in this case. The property has always been treated as the property of the Sabha ; likewise the income also has been treated to be at the unfettered disposal of the Sabha, though by a common agreement, they provided for the conduct of the festival in the Vinayakar temple at a cost of not less than Rs. 150. An association registered under Act XXI of 1860 is entitled to change its objects. No doubt such a change will not operate to affect any valid trust which might have been created before the alteration, but so long as there was no irrevocable trust, there is nothing to prevent the association from changing its objects. In this case as there is no divesting of ownership even as regards the income, there was nothing to prevent the society from changing its objects. Mr. Seshachalapathi drew our attention to a decision of the Judicial Committee in *Singh Sanatan Dharm High School Trust, Indaura* v. *Singh Rajput High School, Indaura*[1]. In that case the owner of certain property constituted a committee for the management of a school which he endowed with considerable properties. In effect the owner divested himself of his ownership and transferred it to a committee which occupied the position of a trustee. Once, this position is made clear, it is not difficult to follow the ruling of the Judicial Committee, namely, that it was not permissible for this committee to give up the trust or in any manner to destroy the effect of the dedication irrevocably made by the owner. Their Lordships of the Judicial Committee accepted the statement of the law as made in the judgment of the High Court, namely, that all that was necessary for the foundation of a charitable endowment by a Hindu was that the purpose should be clearly specified and that the property intended for the endowment should be set

1. (1938) 1 M.L.J. 359 : L.R. 65 I.A. 106 : I.L.R. (1938) Lah. 63 (P.C.).

apart as dedicated to that purpose. It was necessary that the donor should divest himself of the property. Once a valid endowment was created, it could not be revoked by the donor. In the case before us, we are unable to find any divesting by the society of either the property or the income therefrom. There was therefore no endowment within the meaning of the definition. The learned Judge was right in setting aside the order of the Board in the circumstances.

The appeal fails and is dismissed with costs.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

S. P. Shaik Abdul Khadar & Co., by Partner Abdul Khadar .. *Petitioner**

v.

A. R. Subramania Pillai and another .. *Respondents.*

Imports and Exports (Control) Act, 1947—Restrictions imposed by—If violates fundamental rights under Article 19 of Constitution of India, 1950.

The Imports and Exports (Control) Act, 1947, was enacted for the purpose of continuing for a limited period powers to prohibit or control imports and exports. Under section 3, the Central Government was authorised to make an order prohibiting, restricting or otherwise controlling in all cases, or, in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the import, export, carriage coastwise or shipment by ships, stores of goods of any specified description. The policy was designed to conserve essential supplies for civilian consumption in this country. Provision is made for regulation by permits and appeal is provided as regards grant or refusal of permits. The restrictions imposed are "reasonable" within the meaning of Article 19 (6) of the Constitution and the machinery provided for the implementation of the policy is not unsatisfactory. The act does not violate the fundamental rights under the Constitution.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in D.C.C.E. No. 32274 of 1951 Prov. in the office of the Deputy Chief Controller of Exports, Custom House, Madras, dated 13th November, 1951 and quash the order therein.

M. K. Nambiar for *K. C. Jacob* and *S. K. L. Ratan* for Petitioner.

N. Rajagopala Aiyangar and *V. V. Raghavan* for Government Pleader (*P. Satyanarayana Raju*) for Respondents.

The Court made the following

ORDER.—This is an application for issuing a writ of *certiorari* to quash the order of the Deputy Chief Controller of Exports, Custom House, Madras. The petitioner is a registered partnership firm carrying on business at Tirunelveli Pettai. The petitioner entered into a partnership with the first defendant on terms and conditions set out in the partnership deed dated 1st December, 1950. The partnership deed was executed subsequent to the agreement, dated 30th September, 1950. The scope of the agreement, the partnership deed and the terms thereof are in dispute. During September, 1950, two lots of hundred tons of chillies were exported under two contracts with the Co-operative Wholesale Establishment, Ceylon. Subramania Pillai, the respondent, had shipped the goods in his own name and realised the sale proceeds through bank.

The petitioner's case is that two consignments were made pursuant to the aforesaid partnership entered into between the parties.

The first respondent does not deny the export but states that he paid a share in the proceeds to the petitioner's firm as brokerage and that by reason of that payment it was never intended that the petitioner's firm should become partners with him. The first respondent applied for a quota that was to be allotted to him on the strength of the aforesaid exports. The petitioner wrote a letter, dated 26th

* Writ Petition No. 713 of 1951. 14th December, 1951.

October, 1951, to the second respondent claiming that he was entitled to a moiety in the said quota. The second respondent replied that as the first respondent had shipped the goods in his own name, and duly realised the sale proceeds through bank, and as the petitioner retired from the partnership, the quota would be allotted to the parent firm or the individual, who retained the goodwill. This application is filed as aforesaid for quashing that order.

Learned counsel for the petitioner raised before me the following two points :

1. The order of the second respondent violates the fundamental rights under Article 19 (1) (*g*) of the Constitution of India.

2. The order is, on the face of it, vitiated by an error.

Article 19 (1) of the Constitution reads as follows :

" 19. (1) All citizens shall have the right—

(*g*) to practise any profession, or to carry on any occupation, trade or business."

" 6. Nothing in sub-clause (*g*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business."

Therefore, under sub-section (6) the fundamental right guaranteed does not prevent the State from making any law imposing in the interests of the general public, reasonable restrictions on the exercise of the right.

The learned counsel's contention is that the petitioner is carrying on export business, and that by the order of the second respondent, he is precluded from carrying on the business. He also argued that the law imposing the restrictions on the export trade was unreasonable.

The Imports and Exports (Control) Act, 1947, was enacted for the purpose of continuing for a limited period powers to prohibit or control imports and exports. Under section 3, the Central Government was authorised to make an order prohibiting, restricting or otherwise controlling in all cases, or, in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the import, export, carriage coastwise or shipment by ships, stores of goods of any specified description. On the 21st of February, 1949, the Government of India issued a notification. It reads :

" In exercise of the powers conferred by sub-rule (3) of the rule 84 of the Defence of India Rules and in supersession of the Notification of the Government of India in the Department of Commerce, No. 91-C.W. (1) 44, dated the 29th January, 1944, the Central Government is pleased to prohibit the export to any place outside India, of any goods of the description specified in the schedule annexed, except the following, namely :

(*e*) any goods of the description specified in Part D of the said schedule and covered by an export licence issued by or under the order of the Central Government in the Ministry of Commerce or the Chief Controller of Exports or an Export Trade Controller or Deputy Chief Controller of Imports and Exports appointed in this behalf by the Central Government."

The Exports control policy was designed to conserve essential supplies for civilian consumption in this country. It also made possible the fair distribution of available exportable surplus among India's customers at controlled prices. A person or firm desirous of exporting any controlled commodity must comply with the Export Control Regulations and Procedure. To that effect general instructions were given by the Ministry of Commerce prescribing the procedure and also the conditions for the issue of permits. Some of the said instructions are found in the Export Trade Control Circular No. 289 of 1951. It says that it has been decided to regulate the export of chillies to all permissible destinations on the principle of established shippers and under cover of licences issued by the office. One of the important rules prescribed for guidance is that those shippers, who have effected the export of chillies during any of the three financial years 1948-49, 1949-50 and 1950-51, may choose any one of the three years as their basic year and that allot-

ments will be made to those shippers in proportion to their basic exports subject to the maximum limit of 15 tons per quarter per individual shipper. Under the general instructions given it is also provided that exporters, who are not satisfied with the decision of the licensing authorities, or those, who have not received any reply from them within a reasonable time, may appeal, in the case of commodities included in Part D to the Chief Controller of Exports, New Delhi. Under the provisions of the Imports and Exports (Control) Act, 1947, the notification issued thereunder and the general instructions forwarded to the officers restrictions were imposed in the interests of the general public, having regard to the imperative necessity to control export trade for the economic stability of the country. Specific and reasonable instructions were given to the officers and an appeal also was provided to rectify the orders of the subordinate officers. I cannot say that the restrictions imposed are not reasonable within the meaning of Article 19 (6) of the Constitution of India, nor is the machinery provided for the implementation of the policy unsatisfactory.

It was then contended that the order of the Controller of Exports was vitiated by an error on the face of the record. The Controller has construed the partnership deed and had come to the conclusion that, in the circumstances of the case, the proper course was to allot the quota to the parent firm, or the individual, who retained the goodwill. It was argued that, as the Controller found that 200 tons of chillies were exported by the partners on 30th September, 1950, quota should have been allotted to each of them for exporting 100 tons of chillies, as each of the persons must be deemed to have exported 100 tons in 1950-51. The Controller construed the terms of the partnership and held that the partnership was either continued by the 1st respondent or that he was carrying on the business with the goodwill of the partnership. He, therefore, took the view that the quota should be given to the 1st respondent, who was continuing the business. I cannot say that the order is vitiated by an error on the face of the record.

Further it was represented to me that a suit is now pending in respect of the partnership business and that the rights of the parties will be decided therein. Any observations that may have been made by the Controller of Exports or by me, in the course of this order will not preclude the Court from deciding the rights of the parties therein, or appointing a Receiver, if a case is made out for one.

Further, the general instructions issued provide for an appeal against the order of the Exports Trade Controller to the Chief Controller of Exports, New Delhi. It is true that there is no statutory right of appeal as contended by the learned counsel for the petitioner. But the same instructions, which regulate the conditions under which the permits are issued, also provide for an appeal. If the Export Trade Controller is wrong because he has not followed the instructions strictly, his order certainly can be questioned by preferring an appeal provided for under the same instructions.

For the aforesaid reason, the application fails and is dismissed with costs. Advocate's fee Rs. 100.

K.S. —————— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR.

Pajerla Krishna Reddi .. *Petitioner.**

Criminal Procedure Code (V of 1898), section 337 (3)—Approver—If can be released on bail.

Approvers are approvers whether they are true to their word or turn hostile. Their character cannot be changed till the termination of the trial or inquiry in which they have been tendered and have accepted a pardon.

An approver who was in remand when a pardon was tendered and accepted by him, must be detained in custody under section 337 (3), Criminal Procedure Code, till the termination of the trial if committal ensues or till termination of the inquiry if the committal does not ensue. The fact that the other accused have been let off is immaterial.

* Cr.M.P. No. 2481 of 1951. 13th December, 1951.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to release him on bail pending enquiry in P. R. C. No. 6 of 1950, on the file of the Stationary Sub-Magistrate's Court of Gudur.

A. Ramachandran instructed by *Row and Reddy* for Petitioner.

Santhanam for the Public Prosecutor (*V. T. Rangaswamy Aiyangar*) for the State.

The Court made the following

ORDER.—The petitioner is an approver, and neither an accused nor a mere witness. He was in remand when he was tendered a pardon as an approver and accepted it. So he must be detained in custody under section 337 (3), Criminal Procedure Code, till the termination of the trial if committal ensues, or till the termination of the enquiry if committal does not ensue.

The fact that he is said to have turned hostile is immaterial. Approvers are " approvers " whether they are true to their word or turn hostile. Their character cannot be changed till the termination of the trial or enquiry in which they have been tendered and have accepted a pardon. They cannot throw away the pardon and get rid of their obligations like an advocate throwing away his brief. There are certain legal statuses like husband, wife, father, mother, son, approver, etc., which cannot be thrown away at will. As even the enquiry is not yet over, the approver must remain in detention, if committal ensues, the detention will be till the termination of the trial. That other accused have been let off on bail is immaterial as he is not an accused ; that other witnesses are not detained in custody is immaterial as he is not a mere witness but an approver-witness subject to the mandatory provisions of section 337 (3), Criminal Procedure Code. This petition deserves to be and is hereby dismissed.

K.C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Sengayyan Chettiar .. *Petitioner**

v.

M. Rasu Chettiar .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7 (3) (a) (ii)—Oral lease for five years—If can be relied on in defence to an application for eviction.

Prima facie an agreement, which affords protection under the proviso to section 7 (3) (a) (ii) of the Madras Buildings (Lease and Rent Control) Act must be a valid agreement. As under section 107 of the Transfer of Property Act a lease of immoveable property for more than a year can be created only by a registered instrument, an oral lease for five years is invalid and the tenant cannot rely upon it in regard to the period of the tenancy.

There is no provision in Madras Buildings (Lease and Rent Control) Act which enacts that leases for more than a year could be executed without a registered document nor is there any provision indicating that the statutory provisions of the Transfer of Property Act in respect of leases are abrogated. Without any express provision in the Act validating leases invalid under the Transfer of Property Act, it cannot be held the term of five years fixed under an oral lease of a non-residential building can be taken advantage of by a tenant in an application for eviction under section 7 (3) (a) (ii) of the Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in C. M. A. No. 30 of 1950, on the file of the Subordinate Judge's Court, Kumbakonam, preferred against the order of the Court of the Rent Controller, Kumbakonam, in R. C. A. No. 47 of 1950 and quash the order in the said C. M. A. No. 30 of 1950.

K. S. Desikan for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

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* C.M.P. No. 11496 of 1950. 21st August, 1951.

The Court made the following

ORDER.—This is an application for issuing a writ of *certiorari* to quash the order of the Subordinate Judge of Kumbakonam made in an appeal against an order of the Rent Controller.

The petitioner is the landlord. He filed an application No. 47 of 1950 before the Rent Controller for evicting the respondent from a non-residential building on the ground that he required the premises for his own trade. The respondent contended that the application was not *bona fide* and that the petitioner had another building in which he could carry on his business. The Rent Controller made an order of eviction. In appeal the learned Subordinate Judge set aside that order mainly on the ground that there was an agreement between the landlord and tenant for a period of five years within the meaning of the proviso to section 7 (3) (*a*) (ii) of Madras Act XXV of 1949. The agreement alleged was an oral contract of tenancy for a period of five years. The Subordinate Judge finds that there was such an agreement.

Mr. Desikan, the learned counsel for the petitioner, contended that an oral lease for a period of five years is invalid under section 107 of the Transfer of Property Act and therefore any such alleged oral agreement, even if true, would not protect a tenant under the said proviso. Section 7 (3) (*a*) (*ii*) reads :

"(*a*) A landlord may apply to the Rent Controller for an order directing the tenant to put the landlord in possession

(ii) in the case of a non-residential building if he is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village, concerned which is his own or to the possession of which he is entitled :

Provided that where the tenancy is for a specified period agreed upon between the landlord and the tenant, the landlord would not be entitled to apply under this sub-section before the expiry of such period."

Prima facie an agreement, which affords protection under the said proviso, must be a valid agreement. A lease of immoveable property for more than one year can be created under section 107 of the Transfer of Property Act only by a registered instrument. It is true that under section 116 of the Transfer of Property Act if a lessee of property remains in possession thereof after the determination of the lease granted to the lessee and the lessor accepts rent from the lessee or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year or from month to month, according to the purpose for which the property is leased. The rights of the lessee under this section are not derived under any agreement but by reason of the provisions of this section. As the oral lease relied on is invalid under the provisions of the Transfer of Property Act, the tenant cannot rely upon it in regard to the period of the tenancy.

The learned counsel for the respondent then broadly contended that Madras Act XXV of 1949 is a self-contained one and the provisions of the Transfer of Property Act cannot be invoked for applying the provisions of the former Act. In support of this argument, he has relied upon two Bench decisions of this Court. In *Krishnamurthi* v. *Parthasarathi*[1], Horwill and Rajagopalan, JJ., held that section 111 (*h*) of the Transfer of Property Act has no place in the scheme of procedure laid down in section 7 of Madras Act XV of 1946, and that notice to quit is not necessary before filing an application for eviction under section 7 of Madras Act XV of 1946. In *Kuppuswami Aiyar* v. *Mahadeva Chettiar*,[2] Horwill and Balakrishna Aiyar, JJ., held that the Transfer of Property Act can have no application to the state of affairs governed by the Rent Control Act and section 116 of the Transfer of Property Act cannot be divorced from the other provisions of the Act. In that case pending an appeal by the tenant against the order of eviction passed by the Rent Controller for default in the payment of rent, the landlord accepted, without prejudice to the order of eviction and as damages for use and occupation

1. (1949) 1 M.L.J. 412.
2. (1950) 1 M.L.J. 72 : I.L.R. (1950) Mad. 844.

an amount sent to him as rent in pursuance of an order fixing fair-rent passed by the Rent Controller. The learned Judges held that the acceptance of such an amount is no ground for holding that by virtue of the provisions of section 116 of the Transfer of Property Act, the payer is to be regarded as a tenant of the landholder, from month to month entitled under the Rent Control Act to continue in possession. The first judgment is based on the principle that if there is a conflict between the express provisions of Madras Act XXV of 1949 and that of the Transfer of Property Act, the provisions of the former Act shall prevail. The latter decision holds that section 116 of the Transfer of Property Act refers only to a determination of tenancy as provided by section 111 of the said Act and that cannot apply to a determination of a tenancy under any other Act. These judgments in my view have no bearing on the question to be decided in this case. There is no provision in Madras Act XXV of 1949 which enacts that leases for more than a year could be executed without a registered document nor there is any provision indicating that the statutory provisions of the Transfer of Property Act in respect of leases, are abrogated. Without any express provisions in Madras Act XXV of 1949 validating leases invalid under the Transfer of Property Act, I cannot hold that the term fixed under an oral lease can be taken advantage of by a tenant in an application for eviction under section 7. The learned counsel's argument based upon the definition of landlord and tenant also does not carry the matter further. For the purpose of Act XXV of 1949, a tenant includes a person continuing in possession on the termination of the tenancy in his favour but that definition cannot by implication legalise tenancies otherwise invalid under statutory law. I therefore hold that there is no valid agreement between the parties fixing a specified period for the tenancy. In the view expressed by the learned Judge on the aforesaid question, he did not think fit to give specific findings on the other questions raised. The order of the Subordinate Judge is hereby quashed and he is directed to dispose of the appeal in accordance with law. The respondent will pay petitioner's costs. Advocate's fee Rs. 50.

K.C. ——— *Order quashed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Nune Panduranga Rao, minor by next friend Nune Sivaiah .. *Petitioner**

v.

Divvala Gopala Rao and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7 (2) (i)—Suit for eviction on the ground of default—Fixing of fair rent in the meanwhile leaving an excess with landlord to cover the rent—If amounts to payment of rent.

Under the express provisions of section 7 (2) (1) of the Madras Buildings (Lease and Rent Control) Act if the tenant had not paid or tendered the rent due by him within the prescribed time he is liable to be evicted. The section does not compel a landlord to adjust the excess amounts in his hands towards any arrears of rent if the said amounts were not paid by the tenant towards the rent of any particular month. It is true that on the date when the tenant authorises the landlord to adjust amounts with him towards the rent of any particular month or months the amount will be deemed to have been paid on that date towards rent. But till that adjustment is made and the amount is so appropriated, any amounts in excess of the rent due with the landlord will only be payments made in suspense. The fact that such excess came into the hands of the landlord by reason of the Rent Controller fixing the fair rent does not really affect the question arising under section 7 (2) (1). Therefore the amount not paid towards rent of any particular month and the amount not agreed to be adjusted towards any rent of a particular month is not payment of rent within the meaning of section 7 (2) (1) of the Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the Subordinate Judge, Bapatla, in C. M. A. No. 8 of 1950, preferred against the order of the Rent Controller of Ongole, dated 16th January, 1950, and made in R. C. P. No. 56 of 1949 and quash the order therein.

* C.M.P. No. 14009 of 1950. 13th August, 1951.

N. Subramaniam and *J. V. Krishna Sarma* for Petitioner.

B. S. Ramachandra Rao for Respondents.

The Court made the following

ORDER.—The petitioner is the landlord, and the first respondent is the tenant. The petitioner filed R. C. P. No. 56 of 1949 for evicting his tenant under section 7 (2) (*i*) of Madras Act XXV of 1949. The application for eviction was based upon two grounds: (1) that the tenant was committing nuisance and (2) that he made a default in payment of rent from February, 1948. The tenant filed an application a few days prior to the application filed by the petitioner, for fixing the fair rent. The Rent Controller fixed the fair rent and also held that the said rate should come into force from 11th March, 1947. As the excess rent paid by the tenant on the basis of the pre-existing rate of rent fixed by the Rent Controller would be much more than the rent actually due to him, the Rent Controller dismissed the application for eviction. In appeal the Subordinate Judge also took the same view and dismissed the appeal.

Mr. Subramaniam, the learned counsel for the petitioner, contended that the Rent Controller could not take into consideration the unadjusted amounts in the possession of the landlord, and that as a default to pay rent was committed within the meaning of section 7 (2) of the Act, he had no jurisdiction to refuse eviction. Section 7 (2) (*i*) reads:

"(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied—

(i) that the tenant has not paid or tendered the rent due by him in respect of the building, within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord, or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable,

the Controller shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application."

Under the express provisions of this section, if the tenant has not paid or tendered the rent due by him within the time prescribed therein, he is liable to be evicted. The section does not compel a landlord to adjust the excess amounts in his hands towards any arrears of rent, if the said amounts were not paid by the tenant towards the rent of any particular month. It is true that on the date when a tenant authorises the landlord to adjust the amounts with him towards the rent of any particular month or months the amount will be deemed to have been paid on that date towards rent. But till that adjustment is made and the amount is so appropriated, any amounts in excess of the rent due with the landlord will only be payments made in suspense. The fact that such excess came into the hands of the landlord by reason of the Rent Controller's order fixing the fair rent does not really affect the question. I am therefore of opinion that the amount not paid towards rent of any particular month and the amount not agreed to be adjusted towards any rent of a particular month is not payment of rent within the meaning of section 7 (2) (*i*) of the Act. A Bench of this Court consisting of Rajamannar, C.J. and Balakrishna Aiyar, J., held in *Navaneethammal*, In re[1], that in the case of amounts paid in advance, in the hands of a landlord, such amounts could not be treated as payments made towards rent due for any particular month. The learned Judges observe at page 579:

"The learned advocate for the petitioner also urged upon us another point not dealt with by the learned Judge, namely, that the landlord had with him two months' rent in advance and he could adjust it towards arrears of rent under section 6 (*c*). But to invoke the provisions of that sub-section of section 6 the tenant should exercise the option and call upon the landlord in time to make the adjustment. There is no evidence in this case of the exercise of such a choice."

In the present case also the amount paid in excess was not authorised by the tenant in time to be adjusted towards the rent due for any particular month; but

1. (1950) 2 M.L.J. 579.

this will not dispose of the application before me. Learned counsel for the respondent contended that his case was that he tendered the rent due to the landlord every month and he refused to accept the same. He further argued that the learned Judge accepted his case and found on the evidence that he made the tender every month and that therefore he was not liable to be evicted. It is true that a perusal of the judgment discloses that such an argument was advanced ; but I cannot say that the learned Judge has given any definite finding on the said contention. The learned Subordinate Judge will have to decide on the evidence on record whether the respondent tendered the rent due till the application for eviction was taken out against him.

The order of the lower Court is quashed, and it is directed to dispose of the appeal in accordance with law. The petitioner will have his costs, advocate's fee Rs. 50.

K.C. *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Sri Balusu Prabhakara Pattabhi Ramarao .. *Appellant**

v.

Chintapalli Venkata Subbamma .. *Respondent.*

Civil Procedure Code (V of 1908), section 60 (1) (c)—Person carrying on cultivation through paid servants—If an agriculturist'.

Where a judgment-debtor is found to be dependent upon her lands and unable to maintain herself otherwise, the fact that the whole of the cultivation was carried on through paid servants would not make the judgment-debtor any the less an agriculturist within the meaning of section 60 (1) (*c*) of the Civil Procedure Code.

Appeal against the order of the District Court, East Godavari, Rajahmundry, dated 14th November, 1949 (in E. A. No. 84 of 1949 in O. S. No. 130 of 1947, District Munsiff Court of Ramachandrapur).

M. P. Somasundaram for Appellant.

D. Narasaraju for Respondent.

The Court delivered the following

JUDGMENT.—The appellant was the decree-holder in O. S. No. 130 of 1947 and the respondent in appeal was one of the judgment-debtors. When four items of property belonging to the judgment-debtor, respondent in this appeal, were attached in execution of the decree, she applied for exemption of those items from attachment under section 60 (1) (*c*) of the Civil Procedure Code. There was little dispute about item 4 even in the trial Court. The learned District Munsiff held that the judgment-debtor was entitled to the benefit of clause (*c*) but only with respect to item 1, the house and item 2, the vacant site attached to the house, but not with reference to item 3, a detached vacant site. Against that order of the learned District Judge, the decree-holder has preferred this appeal.

The learned District Judge has found that the judgment-debtor, Venkatasubbamma, had a small piece of agricultural property of her own. Besides, she cultivated 13 acres of land on lease. In fact she was a joint lessee in the Kadappas executed in favour of the decree-holder himself. These findings of fact are binding upon me in second appeal.

Learned counsel for the appellant contends that in view of the admission of the judgment-debtor's husband examined as P. W. 1, that the judgment-debtor herself never came out of the house and never herself actually cultivated any portion of the lands in her possession, she could not be an agriculturist within the meaning of section 60 (1) (*c*) of the Civil Procedure Code. Learned counsel relied upon

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* A.A.A.O. No. 88 of 1950. 23rd November, 1951.

Lakshmayya v. *Official Receiver of Krishna at Masulipatam*[1]. The Full Bench no doubt said :

"An agriculturist within the meaning of section 60 (1) (*c*), Civil Procedure Code, must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise."

The learned Judges did not lay down as one of the conditions that the person claiming the benefit of section 60 (1) (*c*), Civil Procedure Code, must himself or herself actually cultivate the land, and the cultivation of the land through any agency in part or in whole would be sufficient to take him or her outside the scope of section 60 (1) (*c*), Civil Procedure Code. Applying the test formulated by the Full Bench, in the case cited above, it has to be found that the judgment-debtor, Venkatasubbamma, in this case "is dependent upon the cultivation of the lands and is unable to maintain herself otherwise." That the whole of this cultivation is carried on through paid servants does not make her any the less an agriculturist within the meaning of section 60 (1) (*c*), Civil Procedure Code. She is still dependent upon the lands, and but for the lands and the income therefrom she will be unable to maintain herself is the finding of fact recorded by the learned District Judge.

The second appeal fails and is dismissed with costs.

(Leave to appeal is refused.)

K.C. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT:—S. FAZL ALI, MEHRCHAND MAHAJAN AND N. CHANDRASEKHARA AIYAR, JJ.

Chinnathayi *alias* Veeralakshmi Ammal .. *Appellant**

v.

V. Kulasekara Pandiya Naicker and six others .. *Respondents.*

Impartible estate—Succession—Property ceasing to be joint family property—Facts to be proved—Arrangement amongst the members as to enjoyment of the properties—Effect—Holder of estate if has a right to bring about a partition—Renunciation of right of succession by a member of joint family owning an impartible estate—Requisites for validity.

To establish that an impartible estate has ceased to be joint family property for purposes of succession it is necessary to prove an intention, express or implied on the part of the junior members of the family to give up their chance of succeeding to the estate. In each case it is incumbent on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch in the estate was determined so that it became the separate property of the last holder's branch. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and an intention to impress upon the zamindari the character of separate property. The mere circumstance that by an arrangement amongst the members, one or two villages out of the zamindari were given to the different brothers is not inconsistent with the zamindari remaining part of the common family property.

On the facts it was held that the arrangement between members of the family did not evidence a partition amongst the members of the joint family or prove an intention on the part of the junior members of the family to renounce their expectancy of succession by survivorship on failure of male lineal descendants in the branch of the family which then owned the estate.

The right to bring about a partition of an impartible estate cannot be inferred from the power of alienation that the holder thereof may possess. From the existence of the latter power the former cannot be deduced as it is destructive of the very nature and character of the estate and makes it partible property capable of partition.

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1. (1937) 2 M.L.J. 11 : I.L.R. (1937) Mad. 777 (F.B.).

*Civil Appeals Nos. 28 to 33 and 89 and 90 of 1949. 14th December, 1951.

There can be no doubt that a member of a joint family owning an impartible estate can on behalf of himself and his heirs renounce his right of succession; but any such relinquishment must operate in favour of all the branches of the family or in favour of the head of the family as representing all its members.

General words of release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed.

Decision of the High Court reported in (1946) 1 M.L.J. 164: I.L.R. (1946) Mad. 599, affirmed.

Appeals from the judgment and Decree dated the 30th October, 1945 of the High Court of Judicature at Madras (Lionel Leach, C. J. and Rajamannar, J.) in Appeals Nos. 230, 300-302, 355, 356 and 413 of 1943[1].

G. S. Pathak, Senior Advocate (*T. S. Santhanam*, Advocate with him) for Appellant in Civil Appeals Nos. 28 and 29 of 1949, for Respondent No 1 in Civil Appeals Nos. 30, 32 33 of 1949, for Respondents Nos. 2 and 3 in Civil Appeal No. 31 of 1949.[1]

V. V. Raghavan, Advocate for Appellants in Civil Appeals Nos. 31 to 33 of 1949, for Respondent No. 1 in Civil Appeals Nos. 28 and 29 of 1949 and for Respondent No. 2 in Civil Appeal No. 30 of 1949.

B. Somayya, Senior Advocate (*K. Subramaniam* and *Alladi Kuppuswami* Advocates with him) for Appellant in Civil Appeals Nos. 30, 89 and 90 of 1949, Respondent No. 1 in Civil Appeal No. 31 of 1949 and Respondent No. 2 in Civil Appeals Nos. 28, 29, 32 and 33 of 1949.

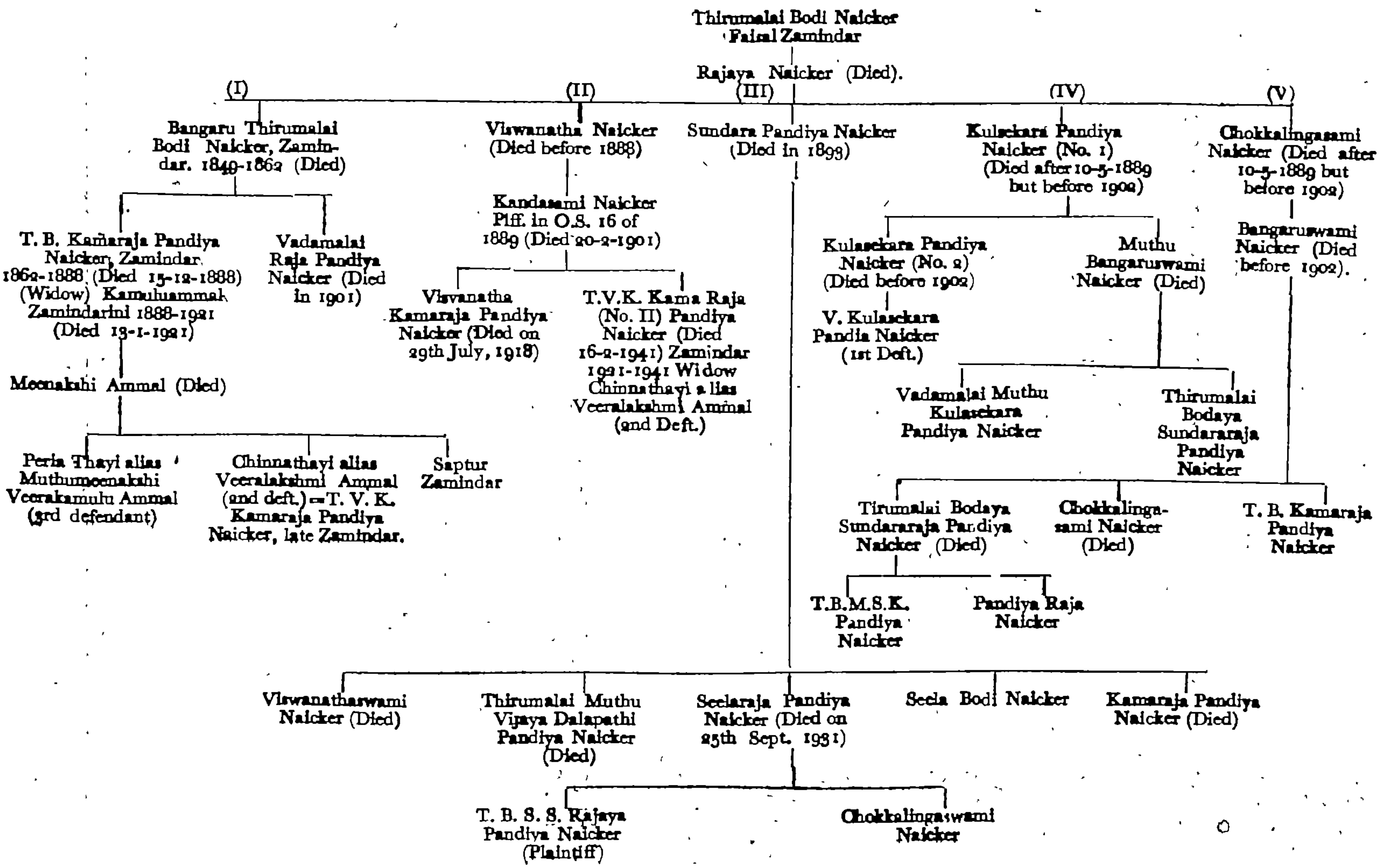
G. S. Pathak, Senior Advocate (*T. S. Santhanam*, Advocate with him) for Respondents Nos. 1 and 2 in Civil Appeals Nos. 89 and 90 of 1949.

The Judgment of the Court was delivered by

Mahajan, J.—These eight appeals arise out of a common judgment of the High Court of Madras dated 30th October, 1945,[1] given in seven appeals preferred to it against the judgment of the District Judge of Madura in four suits, O.S. Nos. 2, 5, 6 and 7 of 1941, all of which related to the Zamindari of Bodinaickanur in the Madura district and the properties connected therewith. The appeals were originally before the Privy Council in England, some by leave of the High Court and others by special leave and are now before us for disposal.

The zamindari of Bodinaickanur is an ancient impartible estate in the district of Madura, owned by a Hindu joint family. The genealogical tree of the family is as follows:—

1. (1946) 1 M.L.J. 164: I.L.R. (1946) Mad. 599.


Thirumalai Bodi Naicker
Faial Zamindar
Rajaya Naicker (Died).
(I)
(II)
(III)
(IV)
(V)
Bangaru Thirumalai Bodi Naicker, Zamindar. 1849-1862 (Died)
Viswanatha Naicker (Died before 1888)
Sundara Pandiya Naicker (Died in 1893)
Kulsekara Pandiya Naicker (No. 1) (Died after 10-5-1889 but before 1902)
Chokkalingasami Naicker (Died after 10-5-1889 but before 1902)
T. B. Kamaraja Pandiya Naicker, Zamindar. 1862-1888 (Died 15-12-1888) (Widow) Kamuluammal Zamindarini 1888-1921 (Died 13-1-1921)
Vadamalai Raja Pandiya Naicker (Died in 1901)
Kandasami Naicker Pltf. in O.S. 16 of 1889 (Died 20-2-1901)
Kulasekara Pandiya Naicker (No. 2) (Died before 1902)
Muthu Bangaruswami Naicker (Died)
Bangaruswami Naicker (Died before 1902).
Viswanatha Kamaraja Pandiya Naicker (Died on 29th July, 1918)
T.V.K. Kama Raja (No. II) Pandiya Naicker (Died 16-2-1941) Zamindar 1921-1941 Widow Chinnathayi alias Veeralakshmi Ammal (2nd Deft.)
V. Kulasekara Pandia Naicker (1st Deft.)
Meenakshi Ammal (Died)
Vadamalai Muthu Kulasekara Pandiya Naicker
Thirumalai Bodaya Sundararaja Pandiya Naicker
Peria Thayi alias Muthumeenakshi Veerakamulu Ammal (3rd defendant)
Chinnathayi alias Veeralakshmi Ammal (2nd deft.) = T. V. K. Kamaraja Pandiya Naicker, late Zamindar.
Saptur Zamindar
Tirumalai Bodaya Sundararaja Pandiya Naicker (Died)
Chokkalingasami Naicker (Died)
T. B. Kamaraja Pandiya Naicker
T.B.M.S.K. Pandiya Naicker
Pandiya Raja Naicker
Viswanatharswami Naicker (Died)
Thirumalai Muthu Vijaya Dalapathi Pandiya Naicker (Died)
Seelaraja Pandiya Naicker (Died on 25th Sept. 1931)
Seela Bodi Naicker
Kamaraja Pandiya Naicker (Died)
T. B. S. S. Rajaya Pandiya Naicker (Plaintiff)
Chokkalingaswami Naicker

The zamindari was last held by Kamaraja II of the second branch. He died on 16th February, 1941, without male issue, but leaving him surviving a widow Chinnathayi *alias* Veeralakshmi Ammal, and members of the family belonging to the third, fourth and fifth branches. Succession to the zamindari is admittedly governed by the rule of lineal promogeniture modified by a family custom according to which the younger son by the senior wife is preferred to an elder son by a junior wife. According to this custom T. B. S. S. Rajaya Pandiya Naicker of the third branch was entitled to the zamindari after the death of Kamaraja II of the second branch. His claim was denied by the widow and by Kulasekara Pandiya Naicker of the fourth branch, both of whom claimed the zamindari on different grounds. It was alleged by the widow that the zamindari was the separate and exclusive property of her husband and that being so, she was entitled to it under the rule of Mitakshara applicable to devolution of separate property. Kulasekara of the fourth branch claimed it on the basis that Sundara Pandiya Naicker of the third branch who died in 1893, had separated from the family and had renounced his and his descendants' rights of succession to the zamindari and the third branch having thus lost all interest in the joint family zamindari, he was the next person entitled to it by survivorship.

On 28th April, 1941, the revenue officer allowed the claim of Kulasekara and held that he was entitled to possession of the zamindari and the pannai lands (home-farm lands) which were in the possession of Kamaraja II. As regards one of the villages comprised in the zamindari, *viz.*, Boothipuram, the title of the widow was recognised. In pursuance of this order, Kulasekara got into possession of the zamindari and the pannai lands after the death of Kamaraja II. Boothipuram village remained in the possession of the widow. Dissatisfied with the order of the revenue officer, the parties have instituted the suits out of which these appeals arise.

On the 22nd June, 1941, the widow (Chinnathayi) brought suit No. 5 of 1941, for possession of the zamindari against Kulasekara of the fourth branch, Rajaya and his uncle Seelabodi Naicker, of the third branch, and T. B. M. S. K. Pandiya Naicker and Kamaraja Pandiya Naicker of the fifth branch on the allegations set out above.

On the 4th July, 1941, she and her sister instituted suit No. 2 of 1941 against the same set of defendants for cancellation of the deed of release that had been executed by her and her sister in favour of Kamaraja II on the 9th June, 1934, in respect of the pannai lands that were in possession of Kulasekara of the fourth branch under the order of the revenue officer.

The third suit, O. S. No. 6 of 1941, was brought by Rajaya of the third branch on 27th August, 1941, for possession of the zamindari, Boothipuram village and the pannai lands, against Kulasekara of the fourth branch and the two plaintiffs in suit No. 2 of 1941, on the allegation that under the rule of lineal primogeniture he was the person next entitled to succeed to the zamindari after the death of Kamaraja II.

The last suit, O. S. No. 7 of 1941, was instituted by Kulasekara of the fourth branch on 13th October, 1941, against the widow and Rajaya, his rival claimants to the zamindari for a declaration that he was the rightful heir and successor to the zamindari and was entitled to possession of Boothipuram village registered in the name of the widow.

The zamindari of Bodinaickanur originally consisted of fifteen villages mentioned in schedule (A) to the plaint in O. S. No. 6 of 1941 and of certain pannai (home-farm) lands and buildings. Tirumalai Bodi Naicker was the holder of this impartible raj. He was succeded by his son Rajaya Naicker who died in 1849, leaving him surviving five sons, Bangaru Tirumalai Bodi Naicker, Viswanatha Naicker, Sundara Pandiya Naicker, Kulasekara Pandiya Naicker and Chokkalingaswami Naicker, representing the first, second, third, fourth and fifth branches respectively. Rajaya Naicker was succeeded by his eldest son Bangaru Tirumalai Bodi Naicker who died on 27th October. 1862, and was succeeded by his son T. B. Kamaraja Pandiya Naicker (Kamaraja I) who remained as zamindar till his death on 15th December, 1888. He had no son and on his death his widow Kamulu Ammal got into possession of the estate. Proceedings for transfer were taken in the revenue court for registry of the zamindari and statements of the male members of the family belonging to the second, third, fourth and fifth branches and of the widow were recorded by the Deputy Collector. On 18th December, 1888, the representatives of these branches stated that they had no objection to Kamulu Ammal enjoying the zamindari. On the 19th Kamulu Ammal asserted that her husband by his will had bequeathed the zamindari to her and had given her permission to make an adoption. On the same date the representatives of all branches of the family made a joint statement before the Deputy Collector. The relevant portion of it is in these terms:—

"We four persons are his heirs to succeed and yet we agree to his widow Kamulu Ammal taking and enjoying the above said zamin and all other properties save the undermentioned lands set apart for our maintenance. Remission of the tirwah of the said lands allowed to us and of the tirwah of the lands registered in our names and enjoyed till now, should be granted to us."

544 kulies of pannai lands under the Bangaruswami tank and the Marimoor tank were earmarked for the maintenance of the four branches. The widow made a statement on 20th accepting this arrangement. The Deputy Collector submitted his report on the 5th of January, 1889 to the Collector upholding the will. The Collector in his turn also recorded the statements of the representatives of the several branches of the family. Persons representing the third, fourth and fifth branches adhered to the previous statements made by them but Kandasami of the second branch resiled from his earlier statement and asserted that the family being divided he was the next heir to the zamindari. No notice was taken in these proceedings of Vadamalai, the half-brother of Kamaraja I. Sundara Pandiya's statement before the Collector on the 9th January, 1889 was in these terms:—

"The wish of the family is that the widow should be in charge of the estate. I know nothing about the execution of the will. After the death of the widow, the next heir should succeed. He is Kandaswami, son of Viswanathaswami Naicker, my elder brother, deceased."

To the same effect were the statements of Kulasekara of the fourth branch and of Chokkalingaswami of the fifth branch. Kandasami's statement was recorded on the 14th January, 1889 and he said as follows:—

"I am the next heir to the zamin, the family being undivided. I must get it."

He repudiated his earlier statement on the ground that at that time he was ill and was drowned in sorrow and "some rogue imitated his signature" and put it on his previous statement. The revenue officer ordered that the widow's name be

registered as the next person entitled to the zamindari subject to any order that the civil Court might make in the case.

On the 1st May, 1889, Kandasami filed O. S. No. 16 of 1889 in the Court of the Subordinate Judge of Madura impleading the widow and the Collector as defendants for recovery of the entire zamindari as it then existed, including the villages of Boothipuram and Dombacheri and the pannai lands. He alleged that he as a member of the undivided Hindu family, was entitled to succeed to the zamindari by survivorship and in accordance with the established rule applicable to devolution of this zamindari. Kamuluammal denied this claim and asserted that the zamindari was the separate property of her husband and she was entitled to it in preference to her husband's collaterals. She also based her claim on the alleged will of her husband. Sundara Pandiya of the third branch laid a claim to the zamindari and the pannai lands on the ground that he as senior in age amongst the family members was entitled to them in preference to Rajaya on the rule of simple primogeniture. In view of the pending and threatened litigation the contesting parties thought it fit to end their disputes by a mutual settlement beneficial to all of them. Sundara Pandiya was the first to strike a bargain with the widow. On the 6th May, 1890, a deed of release (Ex. P-17) was executed by him in favour of Kamuluammal incorporating the terms of the agreement. He managed to get from her in consideration of the release the village of Dombacheri absolutely for himself and his heirs. She bound herself to pay the peishkush and road cess of the said village without any concern about that on the part of Sundara Pandiya. He was also allowed to enjoy free of rent from generation to generation with power of alienation by way of gift, sale, etc. the one fourth share in the pannai lands under the irrigation of the Bangaruswami tank and the Marimoor tank and mentioned in the joint statement made by the several branches of the family before the Deputy Collector in December, 1888. Over and above this, he received a cash payment of Rs. 3,000. With the exception of Dombacheri village and of the one-fourth share in the said pannai lands, all the other properties which belonged to Kamaraja I were to be held and enjoyed with all rights by Kamuluammal and her heirs with the power of alienation thereof by way of gift, sale, etc. absolutely. The fourth clause of the release is in these terms:—

"Whatever rights over the said zamin properties and in all the other abovementioned properties, the said Sundara Pandiya Naicker Avargal might possess, he gives up such rights absolutely in favour of the said Kamuluammal Avargal and her heir enabling them to enjoy them with the power of alienation thereof by way of gift, sale, etc. and, whatever rights the said Kamuluammal might possess over the Dombacheri village and over the lands lying under the irrigation of the Bangarusami tank and the Marimoor tank and specified in the third column of the schedule hereto, which are given up to the aforesaid Sundara Pandiya Naicker Avargal, the said Kamuluammal Avargal hereby gives up such rights absolutely in favour of the said Pandiya Naicker Avargal and his heirs, enabling them to enjoy them with the power of alienation thereof by way of gift, sale, etc."

Clause 5 runs thus:

"The said Kamuluammal and her heirs shall have no claim at all to the properties shown as belonging to Sundara Pandiya Naicker Avargal as aforesaid and the said Sundara Pandiya Naicker Avargal and his heirs shall have no claim at all to the properties shown as belonging to the said Kamuluammal Avargal."

This deed was presented for registration on 10th May, 1890. On the same day O. S. No. 16 of 1889, *i.e.*, Kandasami's suit, was also compromised. Exhibit

P-18 contains the terms of that compromise. The following are its important provisions:—

(a) The zamindari shall be enjoyed by Kamuluammal till her lifetime and she shall have no right to mortgage those properties in any way prejudicial to the plaintiff.

(b) Kandasami and his heirs shall after the lifetime of Kamuluammal, enjoy the zamindari excepting Dombacheri village together with such rights if any as the first defendant Kamuluammal may have acquired under the deed of release executed between her and Sundara Pandiya.

(c) Boothipuram village shall be given to the plaintiff by Kamuluammal so that he may enjoy it with absolute rights. The entire peishkush and the road cess for the entire zamindari inclusive of the said village shall be paid by Kamuluammal.

(d) The one-fourth share in pannai lands situated in the irrigation areas of Bangaruswami tank and Marimoor tank shall be enjoyed by Kandasami and his heirs with powers of alienation and with absolute rights.

(e) Rs. 35,000 shall be paid to Kandasami by Kamuluammal.

(f) All the other pannai lands, buildings and movables which belonged to the deceased Kamaraja Pandiya Naicker shall be held and enjoyed by Kamuluammal and her heirs with powers of alienation, etc. and with absolute rights free from any future claim on the part of Kandasami and his heirs.

(g) The movable and immovable properties which may be acquired by Kamuluammal from out of the income of the zamindari shall belong to her with power of alienation, etc. and shall go to her own heirs after her lifetime.

(h) Kamuluammal shall not make an adoption.

By the proceedings taken before the Collector and by the arrangement made under Exhibits P-17 and P-18, the disputes that had then arisen in the family were settled. Kamuluammal, however, did not with good grace part with the properties which she had agreed to give to others under the arrangement. The terms of the compromise had to be enforced against her by a number of suits and actions one by one. Be that as it may, it is not denied now that the arrangement arrived at was eventually acted upon. Kandasami and his sons enjoyed Boothipuram village and one-fourth of the pannai lands in the two tanks absolutely. Sundara Pandiya and his descendants enjoyed Dombacheri and one-fourth pannai lands, the fourth and fifth branches obtained possession of one-fourth share of the pannai lands under the two tanks. Kamuluammal secured revenue registration and remained in possession of the property down to the date of her death on 13th January, 1921. On her death the estate became vested in the possession of Kamaraja II, the sole male representative of the second branch, his father Kandasami and his brother Viswanathaswami having predeceased Kamuluammal. He had been married to Chinnathayi (Veeralakshmi) one of the grand-daughters of Kamuluammal during her lifetime.

In the year 1925, the zamindar of Saptur, the son of Kamulu's deceased daughter Meenakshi, instituted O.S. No. 7 of 1925 against his sisters, Chinna-

thayi and Periathayi and Kamaraja II, for recovery of the pannai lands and buildings which had vested absolutely in Kamulu under the compromise decree, on the allegation that these were held by her as a widow's estate and that he as the daughter's son was entitled to succeed to them. The suit was resisted by the two sisters on the plea that these lands were stridhanam properties of Kamulu and they as stridhanam heirs were entitled to them in preference to their brother. Kamaraja II contended that he was entitled to these lands and buildings as they formed an integral part of the zamindari and were treated as such by Kamulu. This suit was dismissed and the plea of the two sisters was upheld. On 9th June, 1934 both of them executed a deed of release in favour of Kamaraja II whereby they conceded his claim to the pannai lands and the buildings as being appurtenant to the zamindari in consideration of his agreeing to pay Rs. 300 per mensem for life to each of them.

On the death of Kamaraja II on the 16th February, 1941, as already stated, the second branch of the family became extinct and disputes arose in regard to the succession to the zamindari, pannai lands, buildings, etc. and the village of Boothipuram. As above stated, the claimants to the zamindari are three in number, Rajaya of the third branch, Kulasekara of the fourth branch, and Chinnathayi *alias* Veeralakshmi, the widow of the late zamindar. The District Court and on appeal the High Court have concurrently held that Rajaya was the person entitled to the zamindari. The District Court further held that the village of Boothipuram continued to be part of the zamin and decreed the same to the plaintiff Rajaya. As regards the pannai lands, it was held that these had been conveyed absolutely to Kamulu under Exhibit P-18 and that her daughter's daughters, Periathayi and Chinnathayi succeeded to the same as her stridhan heirs and that the release deed executed by them on the 9th June, 1934, was invalid and inoperative to convey a valid title to Kamaraja II. On appeal the High Court confirmed the findings of the District Court as regards the pannai lands and buildings but reversed its findings as regards succesion to Boothipuram. It held that Kandasami obtained Boothipuram village as his self-acquired property and that Chinnathayi was entitled to succeed to the same on the demise of her husband Kamaraja II. The various sets of parties have preferred the above appeals against the decision of the High Court to the extent it goes against them.

The points for determination in these appeals are the following:—

1. Who out of the three claimants is entitled to the zamindari.

2. Whether Boothipuram village is still an integral part of the zamindari or did it become the self-acquired property of Kandasami by the compromise, Ex. P-18.

3. Whether the pannai lands and buildings are part of the zamindari or became the stridhanam of Kamuluammal by the compromise decree and did not merge in the zamindari by the release deed of 1934.

The question relating to the pannai lands and buildings can be shortly disposed of. Both the Courts below have held that under the arrangement arrived at amongst the members of this family in the year 1890, these lands become the stridhanam of Kamuluammal and passed on to her stridhanam heirs, *i.e.*, her grand-daughters Chinnathayi and Periathayi, and that the deed of release executed by the two

sisters in favour of Kamaraja II was vitiated by fraud and was not binding on Chinnathayi and the other heirs. This finding could not be seriously disputed by Mr. Somayya appearing for Rajaya or by Mr. Raghavan appearing for Kulasekara. It was faintly argued that the pannai lands were left with the widow in the same status in which she was allowed to retain the zamindari. This contention is contrary to the clear recitals of the compromise deed. Kamuluammal was a forceful personality and it seems clear that she agreed to accept the title of Kandasami as next entitled to the estate and give up her contention based on the will because she was given the zamindari for her lifetime and these pannai lands and buildings absolutely. Kandasami in whom the inheritance had vested was competent in view of the decision in *Sartaj Kuari's case*[1], to alienate these lands in her favour and to vest her with absolute interest in them. It has therefore been rightly held that Kamulu became the absolute owner of the lands which in due course devolved on her grand-daughters and ceased to be part of the joint family estate. Moreover, it does not lie in the mouth of Sundara Pandiya's descendants to challenge Kamuluammal's absolute title to these lands while retaining absolute title in the village of Dombacheri which under the same arrangement Sundara Pandiya got absolutely with rights of alienation. It was conceded that to the family arrangement arrived at in the year 1890 and evidenced by the statements made before the Collector, the recitals contained in the release deed, Ex. P-17, and those made in the compromise deed, Ex. P-18, all the members of the family were either parties or they accepted it and acted upon it. The result is that the widow, Chinnathayi, is entitled to the possession of those lands and no other person has any right to them whatever.

As regards Boothipuram village, the point is a simple one. Under the compromise, Ex. P-18 this village was left with Kandasami, the person next entitled to the zamindari after the death of Kamaraja I. It was separated from the zamindari estate which remained in the possession and enjoyment of Kamuluammal for her lifetime. It was said in the compromise that Kandasami would be the absolute owner of this village. It was argued by Mr. Somayya, and the same was the view taken by the trial Judge, that Kandasami being the holder of an impartiable estate could not by his own unilateral act enlarge his estate and take a part of this estate in a different right than the right of a holder of an impartible zamindari and that he could not make it separate property by his own act. The High Court did not accept his view but reached the decision that all the branches of the family agreed to Kandasami having his village as his private property and that by common consent it was taken out of the zamindari and given to him absolutely and it was thus impressed with the character of separate property. On Kandasami's death it devolved on his son by succession and not by survivorship and Chinnathayi has a widow's estate in it after the death of her husband. In the High Court it was conceded that all the members of the family were aware of the terms of the family arrangement and were bound by them. In view of this concession it seems to us that it is not open to any of the parties to these appeals to deny at this stage the right of the widow to this village as an heir to her husband's estate.

The main fight in all these appeals centres round the title and heirship to the zamindari. The question for our determination is, whether the zamindari

1. (1888) L.R. 15 I.A. 51: I.L.R. 10 All. 272.

by some process became the separate property of Kandasami and that of his son Kamaraja II. If it became the separate property of Kamaraja II, then Chinnathayi, his widow, would succeed to it on his death; on the other hand, if the zamindari retained its character of joint family property in the hands of Kamaraja II, then the question to decide is whether as a result of the arrangement made in 1890 Sundara Pandiya relinquished his right to succeed to the family zamindari on the failure of nearest male heirs of Kandasami. If such relinquishment on his part is held satisfactorily established, then Kulasekara of the fourth branch would be entitled to succeed to the zamindari; otherwise Rajaya of Sundara Pandiya's branch alone is entitled to it under the rule of succession applicable to the devolution of the zamindari.

The claim made by the widow that the zamindari became by the arrangement of 1890 the separate property of Kandasami was disallowed by the High Court on the short ground that the documents, Exhibits P-17 and P-18, read along with the various statements made in 1889 cannot be read as changing the character of the estate from that of an impartible estate belonging to the joint family to an estate owned by Kandasami in his individual right. In the view of the High Court the only change effected by the arrangement so far as the estate was concerned was to defer the right of Kandasami to its possession as the next in succession until after the death of Kamuluammal. Kandasami could not himself make it his own private property and this was conceded by all. After hearing Mr. Pathak at considerable length we are in agreement with the High Court on this point.

Mr. Pathak argued that on the true construction of Exhibits P-17 and P-18 and on the evidence furnished by these two documents and the statements made antecedent to their execution and also in view of the subsequent conduct of the parties, the correct inference to draw was that all the five branches of family separated in the year 1890 and thus put an end to the joint family character of the zamindari; that Kandasami was allotted the zamindari, Boothipuram village and one-fourth pannai lands under the two tanks, Sundara Pandiya was allotted Dombacheri village and one-fourth of the pannai lands and that the fourth and fifth branches in lieu of their share were assigned one-fourth of the pannai lands irrigated by the two tanks mentioned above and by these allotments the joint family was completely disrupted and the properties allotted to the different branches became their separate properties.

Reference was made to the decisions of the Privy Council in *Vadrevu Ranganayakamma* v. *Vadrevu Bulli Ramaiya*,[1] *Sivagnana Tevar* v. *Periyasami*[2], *Thakurani Tara Kumari* v. *Chaturbhuj Narayan Singh*[3], and it was contended that the present case was analogous to the facts of those cases and should be decided on similar lines. We are of the opinion that the facts of none of those cases bear any close resemblance to the facts of the present case. The decision in each one of those cases was given on their own peculiar set of circumstances.

In the first case the owner of an impartible zamindari forming part of family property died leaving four sons and an infant grandson by his eldest son.

1. 5 C.L.R. 439.
2. L.R. 5 I.A. 61.
3. (1915) 29 M. L. J. 371: L.R. 42 I.A. 192: I.L.R. 42 Cal. 1179.

During the minority of the grandson the four surviving sons executed a sanad which directed that the zamindari should be held by the grandson and that they should take an equal share of the inam lands and also manage the zamindari during the infancy of the grandson, which on his attaining majority had to be handed over to him, each confining himself to the share of the inam lands allotted to them. Certain family jewellery was also divided in a similar manner. This grandson then died leaving a son who also died without any issue but leaving a widow. Her title to the zamindari was denied by the descendants of the four sons of the zamindar. It was held that the sanad amounted to an agreement by which the joint family was divided and that on the death of the last holder his widow was entitled to the zamindari. It was observed in this case that having partitioned the lands, the parties to the sanad proceeded to partition the jewels and this circumstance was inconsistent with the supposition that the document was executed with the intention of merely providing allotments in lieu of maintenance. It is clear from the facts of this case that the family owned other coparcenary properties besides the zamindari and the zamindari in dispute fell to the lot of the grandson as his separate property. There were other materials in the case indicating that there was complete separation between the members of this family.

In the next case an impartible zamindari had devolved on the eldest of three undivided Hindu brothers. He executed an instrument appointing his second brother to be zamindar. The instrument recited that if the widow of the deceased who was pregnant did not give birth to a son but a daughter, he and his offspring would have no interest in the zamindari of which his younger brother would be the sole zamindar who would also allow maintenance to the third brother. The widow gave birth to a daughter and the second brother took over the zamindari. The third brother also died without issue. On the death of the second brother his son succeeded and the zamindari devolved on him who died leaving a widow. The son of the eldest brother who had renounced the zamindari sued to recover the estate against the widow. It was held that the instrument executed by the eldest brother was a renunciation by him for himself and his descendants of all interests in the zamindari either as the head or as a junior member of the joint family and consequently it became the separate property of the second brother and the widow was entitled to succeed to it in preference to the line of the eldest brother. The document on the interpretation of which this decision was given was in these terms:—

> "I and my offspring shall have no interest in the said palayapat, but you alone shall be the zamindar and rule and enjoy the same, allowing, at the same time, as per former agreement to the younger brother, P. Bodhagurusami Tevar,—who in the pedigree is called Chinnasami,—the village that had been assigned to him before."

These words were interpreted as amounting to a renunciation of all interest in the palayapat either as the head of or as a junior member of the joint family. The rights of the youngest brother Chinnasami were expressly reserved. It was said that the effect of the transaction was to make the particular estate the property of the two instead of the three brothers, with, of course, all its incidents of impartibility and peculiar course of the descent and to do so as effectually as if in the case of an ordinary partition between the elder brother on the one hand and the two younger brothers on the other, a particular property had fallen to the

lot of the other two. Other clauses in the deed and the attending circumstances fully corroborated the construction placed upon it.

In the last case the holder of an impartible estate of a joint Hindu family made a mokurari grant to his younger brother for maintenance. The grantee built a separate house, divided from his brother's by a wall, established therein a tulsi pinda and thakurbari, and lived there separately from his brother. He defrayed the marriage expenses of his daughter subsequently to the grant. Upon these facts it was held that there was a complete separation between the brothers, and that the impartible estate consequently became separate property of the holder whose widow was entitled to succeed and have a widow's estate in the zamindari. It was observed that the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, food and estate. In our opinion, the decision in this case must be limited to the facts therein disclosed and can have no general application to cases of impartible estates where the only right left to the junior members of the family is the right to take the estate by survivorship in case of failure of lineal heirs in the line of the last zamindar. The junior members can neither demand partition of the estate nor can they claim maintenance as of right except on the strength of custom, nor are they entitled to possession or enjoyment of the estate.

In our opinion, division amongst the members of the family by allotment of properties was not possible as the only property known to belong to the family was the impartible zamindari of which partition could not be made or demanded. To establish that an impartible estate has ceased to be joint family property for purposes of succession it is necessary to prove an intention, express or implied, on the part of the junior members of the family to give up their chance of succeeding to the estate. In each case, it is incumbent on the plaintiff to adduce satisfactory grounds for holding that the joint ownership of the defendant's branch in the estate was determined so that it became the separate property of the last holder's branch. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment of the right of succession and an intention to impress upon the zamindari the character of separate property.

Reference in this connection may be made to the decision of the Privy Council in *Konammal* v. *Annadana*.[1] In that case on the death of a holder his elder son being feeble in mind, his younger son succeeded to the zamindari by an arrangement with the adult members of the family in the year 1922. The estate then descended from father to son till 1914 when the junior branch became extinct and possession was taken by a senior member of the branch who claimed it by survivorship, while the mother of the last holder claimed the estate as an heir to separate property, and it was held that the setting aside of the elder son in 1822 did not deprive his descendants of their rights as members of the family to succeed on failure of the junior branch. In this case there was complete passing over of one branch of the family and succession vested in the next junior branch; yet when that branch failed, the members of the senior branch were held yet to possess their right to succeed to the zamindari by survivorship.

1. (1927) 54 M.L.J. 504: L.R. 55 I.A. 114: I.L.R. 51 Mad. 189 (P.C.).

In *Collector of Gorakhpur* v. *Ram Sundar Mal*[1], the claim of a Hindu to succeed by survivorship to an ancestral impartible estate was in issue in the suit. The family admittedly had been joint. It appeared that the common ancestor of the deceased holder and of the claimant had lived 200 years before the suit, that for a long period there had been a complete separation in worship, food and social intercourse between the claimant's branch of the family and that of the deceased holder, and that upon the death of the holder the claimant had not disputed that the widow of the deceased was entitled to succeed. It was held that there was not to be implied from the circumstances stated above a renunciation of the right to succeed so as to terminate the joint status for the purpose of that right.

In *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Suryanarayana Dhatrasu Bahadur Garu*[2], the last zamindar died without any issue in 1888, and when his widow was in possession, the suit was brought for possession by a male collateral descended from a great-grandfather common to him and to the last zamindar. The plaintiff claimed to establish his right as a member of an undivided family holding joint property against the widow who alleged that her husband had been the sole proprietor. In proof of this she relied on certain arrangements as having constituted partition, *viz.*, that in 1816, two brothers, then heirs, agreed that the elder should hold possession, and that the younger should accept a village, appropriated to him for maintenance in satisfaction of his claim to inherit; again, that in 1866, the fourth zamindar compromised a suit brought against him by his sister for her inheritance, on payment of a stipend to her, having already, in the claim of his brother, granted to him two villages of the estate; and by the compromise, this was made conditional on the sister's claim being settled; again, that in 1871, the fourth zamindar having died pending a suit brought against him to establish the fact of an adoption by him, an arrangement was made for the maintenance of his daughter, and two widows, who survived him, the previous grant for maintenance of his brother holding good, the adoption being admitted, and the suit compromised. It was held that there was nothing in the arrangement which was inconsistent with the zamindari remaining part of the common family property and that the course of the inheritance had not been altered. The facts of this case were much stronger than those of the present one. The mere circumstance that by an arrangement a village out of the zamindari was given to one of the brothers was not inconsistent with the zamidari remaining part of the common family property. The document executed by the brother in the reported case was in these terms:—

> "I or my heirs shall not at any time make any claims against you or your heirs in respect of property movable or immovable, or in respect of any transaction. As our father put you in possession of the Belgaum Zamindari, I or my heirs shall not make any claim against you or your heirs in respect of the said zamindari."

It was observed by their Lordships that they did not find any sufficient evidence in the arrangement made by these documents of an intention to take the estate out of the category of joint or common family property so as to make it descendible otherwise than according to the rules of law applicable to such property, that the arrangement was quite consistent with the continuance of that legal

1. (1934) 67 M.L.J. 274: I.L.R. 56 All. 468: L.R. 61 I.A. 286 (P.C.).
2. (1897) L.R. 24 I.A. 118: I.L.R. 20 Mad. 256 (P.C.).

character of the property, that the elder brother was to enjoy the possession of the family estate, and the younger brother accepted the appropriated village for maintenance *in satisfaction of such rights as he conceived he was entitled to* and that it was nothing more in substance than an arrangement for the mode of enjoyment of the family property which did not alter the course of descent.

The evidence in the present case is trivial and inconclusive and from the documents above mentioned no intention can be deduced on the part of the junior members or on the part of any other member of the family of disrupting and dividing the family and renouncing their expectancy of succession. On the other hand, the statements made in 1889 and 1890 by the members of the family clearly indicate that none of them had any intention of giving up his rights of heirship to the zamindari. There was no change of this frame of mind at any later stage of the family arrangement. Sundara Pandiya on the 9th January, 1889 clearly stated that the wish of the family was that the widow should be in charge of the estate and after her the next heir should succeed and that it was Kandasami. Kandasami said that he was the next heir, the family being undivided. In the compromise this statement was reiterated. Their intention was to preserve their rights to take the zamindari if the line of Kandasami became extinct.

Mr. Pathak then put his case from a different point of view. He urged that Kandasami had the power to alienate the zamindari or any part of it and by an act of alienation he could defeat the right of survivorship vesting in the other members to claim the zamindari on failure of his line. Similarly he said he could divide the impartible estate amongst the different members of the family and that is what he must be presumed to have done in the present case. The argument, though plausible is fallacious. The right to bring about a partition of an impartible estate cannot be inferred from the power of alienation that the holder thereof may possess. In the case of an impartible estate the power to divide it amongst the members does not exist, though the power in the holder to alienate it is there and from the existence of one power the other cannot be deduced, as it is destructive of the very nature and character of the estate and makes it partible property capable of partition.

It seems to us that Kandasami instead of intending to separate from the family was by his actions consolidating the family unity. By the family arrangement he no doubt successfully got himself declared as the next person entitled to hold the joint family zamindari, but he evinced no intention of converting it into his own separate property. He preserved the estate for the family by saving it from the attack of the widow who wanted to take it under the will of her husband and antagonistically to the family. By the suit which he brought and which was eventually compromised he successfully avoided that attack on the family estate at the sacrifice of his right of enjoying it during the lifetime of the widow. He also by this arrangement safeguarded himself against the attack of Sundara Pandiya on his title as an heir. By his act the rule of descent of lineal primogeniture prevailing in the family with regard to the zamindari was firmly established. It would be unjust and uncharitable to conclude from the circumstances that the actions of Kandasami in 1890, were in any way hostile to the interests of the family. As he was throughout acting for the benefit of the family his actions were approved by all the members and they

got a provision made for themselves for their maintenance in the arrangement. In the suit that he filed against Kamuluammal, he in unambiguous terms alleged that he was claiming the zamindari as a member of the undivided Hindu family and it was in that status that he made the compromise with her and agreed to obtain possession of the estate after her death.

After Kandasami's death when the zamindari came by descent to Kamaraja II he also followed in the footsteps of his ancestor. During the period of his stewardship of the estate he tried to implement it by recovering the paunai lands which under the compromise had gone out of the estate to Kamulu absolutely. He was successful in his efforts though as a result of the decision in the present case his labours in this direction have proved futile as the release deed has been held to be vitiated by fraud.

For the reasons given above we hold that there exist no satisfactory grounds for holding that the arrangement made in 1890 evidences a partition amongst the members of the joint family or proves an intention on the part of the junior members of the family to renounce their expectancy of succession by survivorship on failure of male lineal descendants in the second branch of the family. The question whether there was separation among the members of the family is primarily a question of fact and the courts below having held that it is not proved, there are no valid grounds for disturbing that finding. Chinnathayi's claim therefore to the zamindari must be held to have been rightly disallowed.

As regards the claim of Kulasekara to the zamindari, it has been disallowed in the two courts below on the ground that the deed of release, Ex. P-17, does not extinguish the right of survivorship of the third branch to take the estate on the second branch becoming extinct and that the document could not be read as evidencing an intention on the part of Sundara Pandiya to surrender the right of succession of his branch. It has been further held that the release was not executed in favour of the head of the family or in favour of all the members of the family in order to be operative as a valid relinquishment. There can be no doubt that a member of a joint family owning an impartible estate can on behalf of himself and his heirs renounce his right of succession; but any such relinquishment must operate for the benefit of all the members and the surrender must be in favour of all the branches of the family or in favour of the head of the family as representing all its members. Here the deed was executed in favour of the widow of a deceased coparcener who as such was a stranger to the coparcenary, the family being admittedly joint at the death of Kamaraja I. It was contended that in view of the attitude taken by the parties before the High Court that the deed of release and the compromise evidenced only one arrangement to which all the members were in reality parties, it should be held that the surrender of his rigts by Sundara Pandiya was made in favour of Kandasami, the head of the family and it extinguished the rights of the third branch in the family zamindari. We think, however, that Kandasami in dealing with Sundara Pandiya was safeguarding his own right of succession against the attack personally directed against him and was successful in buying him off by agreeing to hand over to him a village. Both of them were claiming headship of the family on different grounds and both were asserting that the zamindari belonged to the joint family. In the compromise Kandasami was

acting for his own benefit and was not making any bargain with Sundara Pandiya on behalf of the family. The family as such could not have been prejudiced in any way by the circumstance that succession went to one or the other. Be that as it may, we think the decision of this case can be made to rest on a more solid foundation than furnished by the consideration set out above.

The whole emphasis of Mr. Raghavan who represented Kulasekara was on the words of the deed contained in clause 5 set out above. Sundara Pandiya by this clause stipulated that he will have no right to the property shown as belonging to the widow. Sundara Pandiya was then agreeing that the widow should retain the zamindari absolutely, his mind being influenced by the will. Later on by the compromise made in Kandasami's suit what had been given absolutely to the widow was converted into a life estate with the exception of the pannai lands and Kandasami was acknowledged as the rightful heir. The recitals in the release deed therefore have to be read in the light of the terms and conditions of the deed of compromise and the proper inference from these is that Sundara Pandiya relinquished his rights to succeed to the zamindari immediately as the seniormost member of the family but that he did not renounce his contingent right of succeeding to it by survivorship if and when the occasion arose. It is well settled that general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed. (Vide *Directors, etc., of L. & S.W. Ry. Co.* v. *Richard Dodridge Blackmore*)[1]. In that case it was said that general words in a release are limited to those things which were specially in the contemplation of the parties when the release was executed. This rule is good law in India as in England. The same rule has been stated in Norton on Deeds at page 206 (2nd Edn.) thus:—

> "The general words of a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given, though they were not mentioned in the recitals."

In Hailsham's Edition of Halsbury's Laws of England, Vol. VII, at para. 345, the rule has been stated in these terms:—

> "General words of release will be construed with reference to the surrounding circumstances and as being controlled by recitals and context so as to give effect to the object and purpose of the document. A release will not be construed as applying to facts of which the creditor had no knowledge at the time when it was given."

In *Chowdhry Chintaman Singh* v. *Mst. Nowlukho Kunwari*[2], where the document was drafted in almost the same terms as Ex. P-17, it was said that though the words of the petition of compromise were capable of being read as if the executants were giving up all rights whatever in the taluka of Gungore, yet in the opinion of their Lordships the transaction amounted to no more than an agreement to waive the claim to a share in and to the consequent right to a partition of the taluka and there was no intention to change the character of the estate or the mode in which it was to descend. The parties in the year 1890 were not thinking of their future rights of survivorship at all. What Sundara Pandiya must be taken to have said by this release was

> "I am giving up my present rights as a senior member in favour of Kandasami whom I recognize as the rightful heir to the zamindari as a member of the joint Hindu family."

1. L.R. 4 H.L. 610.
2. (1875) I.L.R. 1 Cal. 153: L.R. 2 I.A. 263.

Kandasami agreed to give him the village of Dombacheri in lieu of recognition of his title by him. It was not within the ken of the parties then as to what was to happen to the zamindari in case Kandasami's line died out.

For the reasons given we are of the opinion that by the release Sundara Pandiya did not renounce his rights or the rights of his branch to succeed to the zamindari by survivorship in case the line of Kandasami became extinct. We hold therefore that Kulasekara's claim was rightly negatived in the Courts below and that of Rajaya was rightly decreed.

In the result all these Appeals fail and are dismissed with costs.

Agent for Appellant in Appeals Nos. 28, 29: *M. S. K. Sastri*.

Agent for Appellant in Appeals Nos. 31 to 33: *M. S. K. Aiyangar*.

Agent for Appellant in Appeals Nos. 30, 89, 90: *S. Subramaniam*.

Agent for Respondent No. 1 in Appeals Nos. 30, 32, 33 and for Respondents in Nos. 2 and 3 in Appeal No. 31: *M. S. K. Sastri*.

Agent for Respondent No. 1 in Appeals Nos. 28, 29 and Respondent No. 2 in Appeal No. 30: *M. S. K. Aiyangar*.

Agent for Respondent No. 1 in Appeal No. 31 and Respondent No. 2 in Appeals Nos. 28, 29, 32, 33: *S. Subramaniam*.

Agent for Respondents Nos. 1 and 2 in Appeals Nos. 89, 90: *V. P. K. Nambiar*.

G.R./V.S. *Appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. SATYANARAYANA RAO, MR. PANCHAPAGESA SASTRY, MR. VISWANATHA SASTRY, MR. RAGHAVA RAO AND MR. PANCHAPAKESA AYYAR.

K. Peramanayakam Pillai .. *Appellant.**

v.

S. T. Sivaraman and another .. *Respondents.*

Hindu Law—Alienation by father or manager—Binding portion of consideration very much less than the necessity or benefit—Equities between the alienee and the non-alienating co-parcener—How to be adjusted.

It is always difficult for the father or manager of the family to sell exactly that extent of property which is sufficient to meet the particular necessity. Some margin, therefore has to be allowed and if a large part of the consideration for the sale or mortgage has been applied for purpose binding on the family and if the alienee acts in good faith and it can be shown that the sale was justified by legal necessity, the same may be upheld in its entirety. It is not always easy to fix the proportion of the consideration which must be established to justify the sale in such circumstances. It is a question which must be decided on the facts of each case. (*Vide* cases referred to in footnote at page 468 of Mayne's Hindu Law, latest edition.)

If however the binding portion of the consideration is very much less, the equities of the alienee will be adjusted in the suit by the alienee for partition or suit by a co-parcener impeaching the sale. The entire item sold may be allotted, if it does not otherwise prejudice the rights of the co-parceners, to the share of the manager or the father who alienated the property and the burden discharged from and out of the consideration may be adjusted between the father or manager on the one hand and the other co-parceners on the other as the debts due by the family have to be considered in such an action. The alienee may also get the share of the alienor allotted to him with a direction that the other co-parceners should pay to the alienee their proportionate share of the burden. The co-parcener disputing the alienation may institute a suit for partition claiming his share in the alienated item thereby admitting the right of the alienee to the share of the alienor. Where the suit is for a general partition in which the debts and liabilities have to the adjusted, even in such an action the co-parceners disputing the alienation may be made liable to pay to the alienee the proportionate part of their liability which has been discharged from the consideration for the sales (assuming that the property was not undersold by the manager or the father). Even if it is established that in fact the consideration for the sale

*S.A. No. 2187 of 1947. 22nd March, 1951.

was grossly inadequate, there is no reason for not allowing the alienee to retain possession of the share of the alienor which is admitted by the very frame of the suit. It makes no difference even if the frame of the suit was for a general partition without the qualification *viz.*, that the co-parcener impeaching the transaction admits the right of the alienee to the extent of the alienor's share. The alienor himself in such a contingency cannot get rid of his own act in underselling the property and there is no reason or justification for permitting a third party like a co parcener to impeach the transaction on the ground that it was undersold so long as the share of the alienor bears the proportionate share of the common burden which, of course, is to be met by the alienee who stands in the shoes of the alienor. It is the undoubted right of a co-parcener under Hindu Law to alienate for consideration his interest in the property, but it is not open to him to make a gift of it, as the very foundation of the alienee's equity, is the payment of consideration.

Obiter. The law as laid down in *Vadivelam* v. *Natesam*, (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435 is to be preferred to the law as laid down in *Venkatapathi* v. *Pappia*, (1928) I.L.R. 51 Mad. 824 : 55 M.L.J. 489 and *Marappa Gaundan* v. *Rangasami Gaundan*, (1899) I.L.R. 23 Mad. 89.

Even as amended by the Act of 1929, section 44 of the Transfer of Property Act has not the effect of overriding the Hindu Law and would not entitle the alienee from a member of the joint Hindu family to claim joint possession of the alienor's share as a tenant-in-common by virtue of that section and his only right is to obtain by a suit for partition the share to which his alienor would be entitled. *Venkatarama* v. *Meera Labai*, (1889) I.L.R. 13 Mad. 275 and *Kota Balabadra Patro* v. *Khetra Dass*, (1916) 31 M.L.J. 275 are still good law.

The alienation by a coparcener of his share has not the effect of dividing the status of the family. Nor does the status of the insolvency of a coparcener bring about a division in the status of the family.

Per *Raghava Rao, J.* (1) *Marappa Gaundan* v. *Rangaswami Gaundan*, (1899) I.L.R. 23 Mad. 89 cannot be accepted as good law in so far as it refuses equities altogether to the alienee in the suit for partial partition by the non-alienating co-parceners; (2) *Vadivelam* v. *Natesam*, (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435 cannot be accepted as good law in so far as, while rightly sanctioning the working out of equities in such a case, the rule adopted by it for the purpose is one opposed to fundamental conceptions pertaining to the nature of a co-parcener's interest in the family estate as well as to the nature of the right which the alienee acquires; (3) *Venkatapathi* v. *Pappiah*, (1928) 55 M.L.J. 489 : 51 Mad. 824 must be accepted as good law as sanctioning the working out of equities in accordance with such fundamental conceptions and within and only within the limits set by law.

Appeal against the decree of the District Court, Tirunelveli, in A.S. No. 310 of 1946, preferred against the decree of the Court of the Subordinate Judge of Tirunelveli, in O.S. No. 43 of 1945.

T. M. Krishnaswami Aiyar, R. Sethurama Sastri and *P. Boopathi* for Appellant.

K. V. Venkatasubramania Aiyar, K. Veeraswami and *V. P. K. Nambiar* for first Respondent.

The Court delivered the following

JUDGMENTS: *Satyanarayana Rao, J.*—The third defendant is the appellant in this second appeal. The facts are not seriously in dispute and are not complicated. The question raised is also a simple one, though the arguments before us ranged and covered a wider ground not strictly germane to the disposal of the case. The case itself was heard in the first instance by Panchapagesa Sastri, J., who directed the papers to be placed before the Hon'ble the Chief Justice for the case to be heard either by a Bench or a Full Bench in view of the conflicting decisions relating to the method of adjusting the equities between the alienee and the non-alienating co-parcener under a sale, part of the consideration of which was applied for purposes binding on the family. The case then came up for hearing before a Full Bench of three Judges who referred the case to a Fuller Bench of five Judges. When the matter was referred to the Fuller Bench, the case itself and not any particular question was referred and therefore the scope of the hearing before the Full Bench was not restricted or confined to any particular question or questions. The case was argued ably on both sides for about six days and all the available authorities including the Hindu Law texts were placed before us.

The plaintiff is the son of the first defendant. The father sold under Exhibit D-1, dated the 28th November, 1934, six acres, 56 cents, of lands specified in schedule II attached to the plaint for a consideration of Rs. 13,400 out of which, as has now been concurrently found by the Courts below, only a sum of Rs. 7,022 was applied for discharge of binding debts of the family. The father was adjudicated an insolvent in I.P. No. 17 of 1935, Sub-Court, Tirunelveli, and the properties specified in schedules IV to XII appended to the plaint were sold by the Official Receiver

in whom the interest of the insolvent had vested by reason of the adjudication. The present suit was filed by the son on the 11th January, 1945, impleading all the alienees of the father as well as the Official Receiver as defendants. The relief claimed in the suit is partition and separate possession of each item of property in each of the schedules I to XII into two equal parts and for an allotment to him his share, one of the parts in each item. The plaint proceeds on the footing that on the date of the action, the plaintiff and the first defendant were members of a Mitakshara joint family and that the alienations made, either by the first defendant or the Official Receiver, do not bind the plaintiff's interest in the family properties specified in schedules I to XII of the plaint. The plaintiff examined on his side, the first defendant, his father, as P.W. 1 who admitted in his evidence that he and the plaintiff were undivided on the date of the suit and that the properties were ancestral properties allotted to the father's share in a partition between himself and his elder brother in 1930. In this appeal we are concerned only with the alienation by the father in 1934 in favour of the third defendant of schedule II properties. The plaintiff attacked the sale in favour of the third defendant alleging that it was neither for necessity nor for the benefit of the joint family and that it was an under-sale. It has been found that the value of the properties conveyed under Exhibit D-1 was not Rs. 13,400 but Rs. 16,400 on the date of the sale and that the consideration from out of this sale was binding on the family only to the extent of Rs.7,022. As a result of this finding a preliminary decree for partition and recovery of possession of the plaintiff's half share in the properties comprised in schedule II was granted in favour of the plaintiff without making any provision for payment by the plaintiff of a proportionate share of the binding consideration. This decree was affirmed on appeal by the District Judge. Both the Courts, in rejecting the claim of the third defendant for a provision for payment by the plaintiff of a proportionate share of the binding consideration as a condition precedent for the recovery of a half share in the properties, followed *Venkatapathi* v. *Pappia*[1].

In this second appeal by the third defendant, there is no dispute regarding the decree which recognised the right of the third defendant to a half share of the properties conveyed under Exhibit D-1, as the plaintiff claimed in the suit itself to recover only a half-share in the properties. The question debated is whether or not the third defendant is entitled to a conditional decree making it obligatory upon the plaintiff to pay a half share of the binding consideration before he is allowed to recover possession of his half share after partition of the properties by metes and bounds. The appellant invokes, in support of his contention, the decision of this Court in *Vadivelam* v. *Natesam*[2], while the respondent maintains that that case was wrongly decided and that the decision proceeded on an erroneous assumption of Hindu Law and should not therefore be followed and that the appellant is not entitled to any equity and his right is only to the half share admitted by the plaintiff. In other words, learned counsel for the respondent stated the position he takes up as follows :—The alienee from a co-parcener of joint family property is entitled only to work out his rights by way of a general partition and is not entitled to claim to retain any specific item of property or a portion of it conveyed to him. Secondly, if without marshalling and a general partition, the alienee is allowed by the consent of the non-alienating co-parcener to remain in possession of a share of the property alienated, any claim that he may have against the joint family in respect of the binding portion of the consideration must be regarded as satisfied *pro tanto* by the value of the property allowed to be kept by him. This, according to his contention, exhausts the entire equity which an alienee from a co-parcener is entitled to under Hindu Law. Of course, during the progress of the arguments, he did not stick to this extreme contention.

Though the case itself may be disposed of on a narrow ground, as the arguments before us covered a larger ground, relating to the rights of the alienee from a member of a joint family, it is necessary to advert in this judgment to the whole topic and examine the basis of the equity which an alienee has under Hindu Law, in respect of

1. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824. 2. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.

an alienation by a co-parcener. The decisions dealing with the question of equities in favour of an alienee are not many, though they are not wholly reconcilable.

It is necessary to go back to the very foundation of the right of a co-parcener to alienate his interest in the family property, in order to appreciate the later developments in the law relating to it. Apart from the inroads made by decisions into the strict view of the rights of members in a co-parcenery in respect of the family properties, it may be stated that the joint undivided family is the normal feature where the law of Mitakshara obtains. The joint family has a corporate character and a status of its own and can exist as a legal entity without owning joint family property. There is no presumption that the family owns joint property. The family can exist without property vide *Janakiram Chetti* v. *Nagamony Mudaliar*[1]. It is open to the members by mutual consent to hold or own any of the properties of the family in severalty without affecting their status as members of a joint family. But so long as the property continues undivided, there is a community of interest and unity of possession among all the members, with its consequent right to joint possession and joint enjoyment. Every co-parcener has a proprietary right in the property of the family subject, however, to a similar right in others and in this respect, there is a fundamental difference between Mitakshara Law and the Dayabhaga Law. The member of the family has no ascertained share in the property which is capable of being dealt with by him. The interest he possesses in the property is a fluctuating interest liable to be diminished by births in the family and equally liable to be increased by deaths. Each member by his birth acquires an interest in the property and the death of a member passes on his interest to the other members by survivorship. As observed by Lord Westbury in the well-known case of *Appovier* v. *Rama Subba Aiyan* :[2]

> "According to the true notion of an undivided family in Hindu Law, no individual member of that family whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member has a certain definite share . . . . . . but when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with ; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty although the property itself has not been actually severed and divided."

And later he pointed out the two-fold application of the word ' division ;'

> "There may be a division of right ; and there may be a division of property."

The division of right is brought about by division of the status of the family by methods known to law which have the effect of converting ; to use an expression known to English law, a joint tenancy into a tenancy-in-common. The division of the right does not amount to a division of the property by metes and bounds. The unity of title under which the property is held by the family as a corporate unit is broken so as to bring about a severance of the right though not of the property. This indicates that the title to the joint property, *i.e.*, jointness of the status of the family is one thing and the division of the property is separate and distinct. Of course, it is open to the members to divide a portion of the property without affecting the status of the family and confining the breaking up of the unity of title only to the extent of the property so divided. Every co-parcener is, of course, entitled to have the property divided by metes and bounds either by agreement or by suit or he may merely get this status as a member of the family severed so as to bring about a definition of his share in the property. Of course, this severance in status may be brought about by agreement or by a unilateral declaration of his to hold the property in severalty in which case he would have undoubted right to alienate his ascertained share. Until a division either of the right or of the property takes place, a co-parcener, according to the strict Hindu Law, has no right to alienate his interest in the property except with the consent of the other co-parceners. The power, however, of the father or the manager of a joint family to alienate the property

1. (1925) 50 M.L.J. 413: I.L.R. 49 Mad. 98. 2. (1866) 11 M.I.A. 75.

of the family, not merely his shares for purposes binding on the family, such as an existing necessity or benefit, has been recognised by the Mitakshara.

In Madras and Bombay, from early in the 19th century the right of a co-parcener, not being a father or a manager of the family, to alienate his interest in the family property began to be recognised and this was the first inroad upon the strict law of Mitakshara. This right of alienation by way of sale or mortgage was evolved and first recognised by Sir Thomas Strange in 1813 in *Ramasami* v. *Seshachala*[1]. He was supported in that view by Mr. Ellis and also by Mr. Colebrooke. In Volume I of Strange's Hindu Law, 1830 edition, the rule is stated at page 202 :

> " In favour of a *bona fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due, out of the share of him, with whom he had dealt (*i. e*, the alienee) ; and for this purpose, a Court would be warranted in enforcing a partition."

Volume II of Strange's Hindu Law, at page 349, 1830 edition contained a case where a member of a family disposed of a village belonging to the family. It was held that the sale was without authority, general or special, but in setting aside the sale on the ground of want of authority, it was pointed out that equity would require redress to be afforded to the purchaser by enforcing a partition of the whole or a sufficient portion of it, so as to make amends to the purchaser out of the vendor's share and that the sale was valid only so far as seller's share in the property was concerned. The distinction between a gift of a co-oparcener's share and a sale or mortgage is noticed at page 433 of Volume II (Strange's Hindu Law) and it was pointed out that in the case of gratuitous alienation, there is no kind of equity but in the case of a transfer for consideration, the injustice to the alienee, may, however, be prevented by making the alienor repay the money or valuable consideration received by him and partitioning the property for the purpose of enforcing payment from his share. The opinion of Colebrooke in support of the view of Sir Thomas Strange is to be found at page 344, Volume II of Strange's Hindu Law where it is stated that the

> "consent of the sharers, express or implied, is indispensable to a valid alienation of joint property beyond the share of the actual alienor ; and that an unauthorised alienation by one of the sharers is invalid, *beyond the alienor's share*, as gainst the alienee."

This takes us back to 1827 and 1830. In 1863 both the Madras and Bombay High Courts recognised the right. The decision of the Madras High Court is *Viraswami Gramani* v. *Ayyaswami Gramani*[2] by Scotland, C.J. and Bittleston, J. and in the Course of the judgment, reference was made to the earlier decisions of 1853 and 1855 which decided that one of several co-parceners may bind his own share by alienation and that it is liable for his individual debt. The opinion of Sir Thomas Strange and the decision in *Ramaswami* v. *Seshachala*[1], were referred to in the course of the arguments by Mr. Mayne. The decision arose out of a suit on the Original Side of this Court and related to two houses on the Chule Bazaar Road. The sale itself was an execution sale but in dealing with the execution sale, the Court had to consider the right of the co-parcener to alienate his share and it is stated in the judgment that the purchaser or execution creditor of the co-parcener is entitled to the share to which if a partition took place, the co-parcener himself would be individually entitled, the amount of such share, of course, depending on the state of the family. To a similar effect is the decision of the Bombay High Court in *Damodar Vithal Khare* v. *Damodar Hari Soman*[3] about the same year. In 1864 and 1868 there were two decisions of this Court in *Peddamuthulaty* v. *Timma Reddy*[4] and *Rayacharlu* v. *Venkataramaniah*[5]. The decision in *Viraswami Gramani* v. *Ayyaswami Gramani*[2] was followed. In *Peddamuthulaty* v. *Timma Reddy*[4] the suit was by one of the three brothers, the eldest of an undivided family, for setting aside of a sale of family property made by the father and his third son. The sale, of course, was not binding on the non-alienating co-parceners. The decree actually passed

1. Notes of Cases, Vol. II, 234 (74), 1827 Edn.
2. (1863) 1 M.H.C.R. 471.
3. 1 B.H.C.R. 182.
4. (1864) 2 M.H.C.R. 270.
5. (1868) 4 M.H.C R. 60.

in that case was a declaration that the plaintiffs were entitled to a three-fifth share of land sued for, divided, from that acquired by the defendant alienee and delivered to the plaintiffs. It was not even a suit for partition but was one to set aside the sale. The decision in *Rayacharlu* v. *Venkataramaniah*[1] arose out of a peculiar suit by the son for a declaration that after the death of the father, he was entitled to the whole of the ancestral property, movable and immovable, then in the possession of the father. Of course, such a declaration could not be granted but in the course of the judgment, the decisions above referred to were cited with approval. Westropp, C.J., in 1873 dealt with this question elaborately in *Vasudev Bhat* v. *Venkatesh Sanonay*[2] and recognised the right of a co-parcener to alienate his share in undivided property approving an earlier decision of that Court.

All these decisions, it must be observed were before the decision of the Judicial Committee in *Deendyal Lal* v. *Jugdeep Narain Singh*[3] which established for the first time that

> "a purchaser of an undivided share of property at an execution sale during the life of the debtor for his separate debt does acquire his share in such property with the power of ascertaining and realising it by partition."

Sir James Colvile who delivered the judgment in the case referred to the two decisions of the Madras High Court in *Veeraswami Gramani* v. *Ayyaswami Gramani*[4] and *Palani Velappa Gounden* v. *Mannaru Naicken*[5] and also to the view of the Bombay High Court in *Damodar Vithal Khare* v. *Damodar Hari Soman*[6] and *Trimback Anant* v. *Gopal Shet M. Mahadev*[7]. It was there pointed out that

> "all these cases, however, affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his co-parceners. This latter proposition is certainly opposed to several decisions of the Courts of Bengal."

The form of the decree granted by the Judicial Committee in that case is a declaration in favour of the purchaser at the execution sale, that he had acquired the share and interest of the judgment-debtor in the property and that he is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition. This decision, therefore, is important in two respects. It established for the first time the right of a creditor to seize the share of an undivided member of the family in execution for the satisfaction of the debt due by the member and this rule applies to all the Provinces—and secondly, it established that both in Madras and in Bombay a co-parcener is entitled to alienate his share. The right of the alienee, however, is to work out his rights under the alienation by a suit for partition. In 1874 there were two decisions of the Bombay High Court in *Pandurang Anandrav* v. *Bhaskar Shadashiv*[8] and *Udaram Sitharam* v. *Ranu Panduji*[9]. The first of these cases related to a voluntary alienation and the case is also important as it was decided by West and Nanabhan Haridas, JJ., who are undoubted authorities on Hindu Law. This case is important as it lays down the principles and the manner in which the rights of a purchaser have to be worked out and the equities adjusted. This, in my opinion, is the first considered judgment on the rights of an alienee and his equities. The facts in that case were: in 1848 two members of an undivided Hindu family mortgaged a portion of the joint family property. In due course, the mortgagee obtained a mortgage decree and brought to sale a portion of the mortgaged property on account of the right and interest of one of the mortgagors and the property was purchased by the plaintiff in the suit. The purchaser then instituted a suit against the third member of the undivided family for possession of the extent which he had purchased in the Court sale. Notwithstanding the fact that the purchase in Court auction was of a specific extent of property, it was held that the right of the purchaser was to sue for partition and

1. (1868) 4 M.H.C.R. 60.
2. 10 B.H.C.R. 139.
3. (1877) L.R. 4 I.A. 247 : I.L.R. 3 Cal. 198 (P.C.).
4. (1863) 1 M.H.C.R. 471.
5. (1864) 2 M.H.C.R. 416.
6. 1 B.H.C.R. 182.
7. 1 B.H.C.R. 27.
8. 11 B.H.C.R. 72.
9. 11 B.H.C.R. 76.

not for recovery of possession of the extent purchased. West, J., stated the position in the course of his judgment in these terms :

"Whether Nilo (the mortgagor whose interest was sold) had any interest at all in the land in 1848, and if he had, what was the extent of that interest, are questions which, as there was other family property do not admit of an answer without an inquiry into the extent and value of the joint property at large, the incumbrances resting on it, the members entitled to shares, and their respective aliquot portions. Nilo's share was not, supposing the family a united one, in any particular part of the estate, but in the estate as a whole, and could be ascertained only by taking a general account and making a distribution in accordance with its results.

In making such distribution without advertence to the claims or interest of any third party it might well happen that no part of the particular field now in dispute would be allotted to Nilo. But Nilo having affected to deal with this land as empowered to mortgage it, it would be only equitable that, *cateris paribus*, his share should, if Baskar " (the auction-purchaser) takes his place be so made up as to embrace wholly or so far as possible the 20 guntas which Baskar has bought as his."

It was pointed out that without prejudice to the rights of the other members of the family the 20 guntas purchased by Baskar may be allotted to him in the partition. This judgment, in my opinion, has laid down succinctly and clearly the manner in which the alienee has to work out his rights and that decision holds the field even now as will be shown later.

The next important landmark in this branch of the law is the decision of the Judicial Committee in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[1]. It is a decision under the Mitakshara Law as it obtains in the Province of Bengal and arose out of a suit by the sons, members of a joint family, against an execution purchaser of property sold in execution of a decree against the father. The prayer in the suit was that the purchasers should be restrained from obtaining delivery of possession and that the possession of the sons should be confirmed. The execution sale took place after the death of the father but by the time of the death of the father, the property was attached and even an order for sale of the property was made in execution of the decree. There were other questions considered by the Judicial Committee but one of the important questions for decision was whether by the death of the father the sons acquired the property by survivorship, thus putting an end to the rights of the Court auction-purchaser. After referring to the decisions of the Madras and Bombay High Courts, Sir James Colvile who delivered the judgment stated that it was settled law in Madras and Bombay that one co-parcener may dispose of ancestral undivided estate even by private contract or conveyance to the extent of his own share and that it followed that such a share may be seized and sold in execution for his separate debt. It was recognised in that decision that such alienations, voluntary or compulsory, are inconsistent with the strict theory of joint undivided Hindu family and that the law in the two Presidencies, Madras and Bombay, has been one of gradual growth. The rule is stated to have been

"founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights by means of partition."

Strange's Hindu Law was cited in support of this. It was held that the right of survivorship was defeated by the attachment and order for sale of the properties and that the auction-purchaser was entitled to the share of his judgment-debtor. The actual decree made in that judgment was in favour of the plaintiffs confirming their possession with a declaration for the benefit of the auction-purchaser that he was entitled to the share of his judgment-debtor with a power of getting the extent of that share ascertained by means of a partition, the share which the judgment-debtor possessed in his lifetime. By this decision pronounced in 1878, therefore, it has been firmly established, that in Madras and Bombay a member of a joint family is entitled to dispose of his undivided interest either by contract or conveyance to the extent of his own share and that his share would be answerable for his personal debt during his lifetime and to make that share available for discharge of his debts after his death, there should be at least an attachment of that share during the lifetime of the judgment-debtor (co-parcener) to defeat the claim of the right by survivorship

1. (1878) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).

by the other members. The alienee had to face several difficulties in working out the right acquired by him under a conveyance by a member of the joint family and his path was not smooth. The right as stated by the Judicial Committee in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[1] is to step into the shoes of the alienor and work out his rights in a suit for partition. Suppose after the alienation, another co-parcener was born in the family. Is the alienee entitled to the share of his vendor as on the date of the alienation or is it liable to decrease by reason of the subsequent birth of a son before the suit for partition was instituted. The interest of a co-parcener in the family properties is undoubtedly a fluctuating interest and so it was contended before the Full Bench in *Rungasami* v. *Krishnaien*[2], that the alienee's share is subject to a similar disability and a similar fluctuation. No co-parcener had a right to a definite share in the family property until there was severance of the joint estate. It was held, in *Rungasami* v. *Krishnaien*[2] which was a case of a birth of a co-parcener, that the share should be computed with reference to the date of the suit for partition instituted by the alienee. As a corollary to this principle, two other questions were mooted before the Full Bench in *Rungasami* v. *Krishnaien*[2]. If the interest purchased is liable to diminution by births in the family subsequent to the alienation, was it liable also to increase when there was a diminution in the number of co-parceners by deaths and is the alienee to lose the right altogether if by the date of the institution of the suit, his alienor died leaving no shoes to the alienee to step in? The opinion, though obiter, was expressed in that case that the alienee was not entitled to take advantage of the increase in the share by the diminution in the number of co-parceners as what he bargained for was a specific share or a quantum of interest and not the vendor's co-parcenery interest, such as it might be when the partition was effected. The question as to what would happen if the alienor should die by the date of the suit, was answered by saying that the interest carved out by the sale vested in the purchaser at once and that the subsequent death of the alienor had not the effect of divesting what once vested. The rights under the sale should be worked out on the footing that the vendor was alive when the purchaser made a demand for partition. This opinion, though obiter on both the hypothetical questions, does not appear altogether logical and sound. If what was conveyed to the alienee was the fluctuating interest of the co-parcener in the family property, it should logically follow that if the interest should be diminished by subsequent births it should also increase by deaths. If, on the other hand, it became vested and fixed once for all on the date of the alienation so as not to defeat to rights of the alienee even if the alienor were to die, it must follow that the fraction of the interest which he had acquired under the purchase must be treated as once for all having been fixed on the date of the alienation. There is less reason to postpone the determination of that fraction to the date when the purchaser made a demand for partition.

The subject received an exhaustive and logical treatment in the illuminating judgment of Bashyam Ayyangar, J., in the Full Bench case in *Aiyyagiri Venkataramayya* v. *Aiyyagiri Ramayya*[3]. It arose out of a suit by a purchaser of an undivided moiety in two plots of land from one *V*, a member of an undivided family consisting of himself and his two nephews, brother's sons. The suit was instituted after the death of *V*, against the nephews for a general partition of the whole of the family properties and for an allotment of the alienor's share, half the interest in the property and to recover the half share in the two plots conveyed to him by *V*. The objection raised by the nephews was that as the alienor died, the plaintiff's right based on equity was at an end. The right of the purchaser is defined at page 716 thus:

"The law as now settled is that the purchaser can enforce the sale only by a partition of the entire family property and if in such a partition the property sold can, with due regard to the interests of the other sharers, to the debts due by the family and to an equitable allocation of the various items of family property to the shares of the several co-parceners be wholly allotted to the vendor's

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1. (1878) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).
2. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
3. (1902) I.L.R. 25 Mad. 690 (F.B.).

share, the purchaser will be entitled to the whole property which the vendor professed to convey to him."

The vendee's right is a transferable right and vested present interest. By describing it as a vested interest it is not as if, as was considered in some decisions, that the learned Judge ignored the nature of the right which the transferee from a co-parcener acquired under the transfer for, at page 710, the learned Judge adverts to the fact that the transfer

"is no doubt an equitable claim in the sense that he must be a transferee for value and in cases where the transfer relates to a specific portion of the family property, he has no legal right, any more than his transferor himself, to insist on that specific portion being allotted to the share of the vendor. Being a purchaser for value he will have an equity to have such portion or so much thereof as is practicable so allotted, if that can be done without prejudice to the interest of the other sharers. In any suit which may be brought by him to enforce the sale, all the members of the family should be joined as parties in a partition suit, the subject-matter of the suit being the family property as it existed at the date of transfer. Such a suit may, at the option of the members of the family, assume the character of a family partition suit and a decree may be passed for partition among all the members of the entire amily property".

It must be observed that unless all the members agree to have a partition *inter se*, a suit by an alienee for a general partition is not analogous to a suit for partition in the technical sense in which it is understood under Hindu Law as such a suit can be instituted only by an undivided member of the family and by none else. It is said that the learned Judge proceeded on the assumption that the alienee became a co-tenant or tenant-in-common as was assumed in *Venkatachela Pillay* v. *Chinnaiya Mudaliar*[1]. The passage above extracted clearly indicates and dispels any doubt regarding the view of the learned Judge. He, on the other hand, pointed out that the view taken in *Venkatachela Pillay* v. *Chinnaiya Mudaliar*[1], that a purchaser can recover the share of the vendor by confining his suit for partition to the specific property sold to him has not been accepted in subsequent decisions, *Venkatarama* v. *Meera Labbai*[2]: and *Palani Konan* v. *Masa Konan*[3] in which the view of West, J., in *Pandurang Anandrao* v. *Bhasker Shadashiv*[4] was adopted. The learned Judge also pointed out on the basis of the decisions of the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Singh*[5] and *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[6] that the share of the undivided member which was conveyed to the purchaser must be determined as *on the date of the* alienation and not as on the date when the suit for partition was filed by the purchaser. He also considered the decision in *Rungasami* v. *Krishnaien*[7] and expressed the opinion that the actual decision in that case is opposed to principle and that there is nothing to support the contention that the interest conveyed by an undivided member will lapse to the family after the death of the alienor unless the purchaser instituted the suit before the alienor's death.

The question whether the mortgagee of a Hindu father is entitled to proceed against the share of a son subsequently born in the family property mortgaged by him, was referred to a Fuller Bench of five Judges in *Chinnu Pillai* v. *Kalimuthu Chetti*[8], in view of the observations of Bashyam Ayyangar, J., in *Aiyyagiri Venkataramayya* v. *Aiyyangiri Ramayya*[9] throwing doubts on the correctness of the decision in *Rungasami* v. *Krishnaien*[7]. The case was heard by Sir Arnold White, C.J., Benson, Munro, Sankaran Nair, and Krishnaswami Ayyar, JJ., but before the judgment was delivered, Krishnaswami Ayyar, J., resigned his office and became the law member. The case was, therefore, again heard by the four Judges excluding Mr. Krishnaswami Ayyar and the opinion prepared by Krishnaswamu Ayyar was, under the direction of the Chief Justice, appended as a note to the judgment. The learned Chief Justice, on the strength of the decision of the Judicial Committee in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[6] and the decision of the Full Bench in *Aiyyagiri Venkataramayya* v. *Aiyyagiri Ramayya*[9] of which he was also a member answered the question referred to the Full Bench holding that the quantum of the interest

1. (1868) 5 M.H.C.R. 166.
2. (1889) I.L.R. 13 Mad. 275.
3. (1896) I.L.R. 20 Mad. 243.
4. 11 B.H.C.R. 72.
5. (1877) L.R. 4 I.A. 247 : 3 Cal. 198.
6. (1878) L.R. 6 I.A. 88 : 5 Cal. 148 (P.C.).
7. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.)
8. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
9. (1902) I.L.R. 25 Mad. 690 (F.B.).

which vests in the alienee is not affected by subsequent changes in the number of co-parceners.

"As the doctrine is based on equity" observed Sankaran Nair, J., at page 56: "it is more consistent with equitable principles to hold that the purchaser gets the share which his vendor was entitled to at the time of the alienation rather that that he gets the fluctuating share with the result that it will depreciate the value of the property and impart to the alienation the nature of a gambling transaction."

There was no doubt certain observations in the opinion of Mr. Krishnaswami Ayyar which are no longer good law. For example, he states that the

"joint tenancy is destroyed by severance and an alienation by joint tenants effects a severance"

on the analogy of the real property law in England. This view, however, was not expressed in the other judgments. In his conclusion, however, Mr. Krishnaswami Ayyar agreed with the view of the other Judges. This decision is taken in this Court as having settled finally the law on the point and the question was not re-opened in *Dharma Rao* v. *Bapanayya*[1]. In the Full Bench decision in *Baluswami Aiyar* v. *Lakshmana Aiyar*[2], Kumaraswami Sastri, J., treated it as settling the law and all the decisions in which the decision in *Chinnu Pillai* v. *Kalimuthu*[3] was followed were collected in the judgment in *Dharma Rao* v. *Bapanayya*[1]. No doubt, a dissentient note was sounded by Jackson and Mockett, JJ., in *Muthukumara Sthapathiar* v. *Sivanarayana Pillai*[4] but as pointed by the learned editor of Mayne's Hindu Law, at page 494 in the footnote, the decision in *Muthukumara Sthapathiar* v. *Sivanarayana Pillai*[4] is contrary to the Full Bench in *Chinnu Pillai* v. *Kalimuthu*[3] and as a matter of fact, was not followed in later decisions in Madras. *See also* the observations of Wadsworth and Govindarajachari, JJ., in *Krishnamurthy Iyer* v. *Nataraja Iyer*[5]. Leach, C.J., in *Dharma Rao* v. *Bapanayya*[1] refused to reopen the question on the ground that in numerous decisions extending over a period of 26 years (nearly 30 years) by that date, the decision in *Chinnu Pillai* v. *Kalimuthu*[3] was accepted as settled law and there was no need for further consideration of that case as was thought by Jackson and Mockett, JJ., in *Muthukumara Sthapathiar* v. *Sivanarayana Pillai*.[4] The decision in *Rungasami* v. *Krishnaien*[6] has always been treated as no longer good law after the decision in *Chinnu Pillai* v. *Kalimuthu*[3]. An attempt was made on behalf of the respondent by his learned advocate to reopen the question but in view of the fact that the decision in *Chinnu Pillai* v. *Kalimuthu*[3] was treated as having settled the law in this Presidency for so long a time and was followed in innumerable decisions, it would be wholly unjust and inequitable to reopen the question which might have the effect of unsettling titles already acquired. The principle of *stare decisis* must be applied and we, therefore, were not inclined to reopen the question.

"A co-parcener may alienate," as stated by Mayne in section 386, page 487, of the latest edition, "either his undivided share in the whole of the family property or his undivided share in certain specific family property or the whole of a specific item of the family property. In all these cases, the alienee does not acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession, but only an equity to stand in his vendor's shoes and to work out his rights by means of partition."

Learned counsel for the respondent does not take exception to this statement of the law, and to this definition of the right of the alienee, whether the alienation was of the entire interest of the alienor in the whole of the family property or whether it was confined to a share in a specific item or even extended to a whole of the specific item of the family property. In fact, he himself relied on this position even at the commencement of the arguments in the case and relied very strongly on a decision of Horwill, J., in *Subbiah* v. *Venkateswarlu*[7] where at page 480, the learned Judge defined the right of an alienee of an item of joint family property as a right to sue for a general partition and to ask that the item of property alienated to him,

1. (1941) 1 M.L.J. 15.
2. (1921) 41 M.L.J. 129 : I.L.R. 44 Mad. 605.
3. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
4. (1932) 64 M.L.J. 66 : I.L.R. 56 Mad. 534.
5. (1948) 1 M.L.J. 430 at 434.
6. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
7. (1948) 1 M.L.J. 478.

be allotted to the share of his alienor. As observed by me earlier in this judgment, this definition of the right was first made by West, J., in *Pandrang Anandrav* v. *Baskar Shadashiv*[1] and followed in *Venkatarama* v. *Meera Labbai*[2] and *Palani Konan* v. *Masakonan*[3] and other decisions.

No doubt, some of the Judges of this Court held the view that a purchaser of an undivided share of a member of a joint family became a tenant-in-common with the members of the family and was even entitled to possession along with them. This view was taken in *Venkatachala Pillai* v. *Chinniya Mudaliar*[4], by Benson and Sundara Iyer, JJ., in *Subba Row* v. *Ananthanarayana Aiyar*[5] by Krishnaswami Iyer, J., in *Chinnu Pillai* v. *Kalimuthu*[6] and by Sadasiva Iyer, J., in *Soundararajan* v. *Arunachalam Chetti*.[7] If this view were to be accepted the alienee would be entitled to joint possession of the specific item of the property conveyed to him and would also be entitled to mesne profits from the date of alienation. But the preponderance of authority is in favour of the view that he does not become a tenant-in-common with the other co-parceners. Sankaran Nair, J. and Bakewell, J., in *Manjaya Mudali* v. *Shanmuga Mudali*[8] considered the question and held that the alienee does not acquire any interest in the property and does not become a tenant-in-common as was held by Benson and Miller, JJ., in *Srinivasa Sundara Thathachariar* v. *Krishnaswami Ayyangar*[9] and Benson and Sundara Iyer, JJ., in *Subba Rao* v. *Ananthanarayana Ayyar*[5] following the opinion of Krishnaswami Iyer, J., in *Chinnu Pillai* v. *Kalimuthu*[6] and the right of the alienee is defined as a right to institute a suit for partition and to have the property alienated set apart to the share of the alienating co-parcener if it is possible to do it without injustice and prejudice to the other co-parceners. This, it is emphasised, is only *an equity* and not a *right*. If it is not possible to set apart property in the aforesaid manner, the only right of the alienee is to recover that property allotted to the vendor for his share though it may not be the identical property alienated in his favour. This is on the principle of substitution and the earlier decisions beginning from *Pandrang Anandrav* v. *Baskar Shadashiv*[1] were referred to and followed. The same view was taken in *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*[10] by Wallis, C.J. and Kumaraswami Sastri, J. As the alienee is not a tenant-in-common he is not entitled to any mesne profits in respect of his share between the date of his purchase and the date of the institution of the suit for partition. The learned Judges in *Kota Balabadra Patro* v. *Khetra Doss*,[11] followed these two decisions. See also *Balusami Aiyar* v. *Lakshmana Aiyar*[12] and *Subba Goundan* v. *Krishnamachari*[13].

From the foregoing review of the decisions it is abundantly clear that if the alienee wishes to enforce his rights whether he is a purchaser of the entirety of the interest of a co-parcener in the joint family property or a purchaser of the interest of a co-parcener in an item of property or even a purchaser of the whole of a specific item, his only right is to institute a suit for general partition the object being to work out his equity as against the other non-alienating co-parceners, subject to the burden which the alienor as a member of the co-parcenery, has to bear along with the other co-parceners and subject to an allotment of the property purchased if possible, without prejudice to the rights of the other members of the family. Even if he is a purchaser of a specific item of property or even of the interest of a co-parcener in a specific item, he cannot sue for recovery of possession of that item in its entirety or a share in that item alone after partition. If the non-alienating co-parcener institutes a suit for a general partition impeaching the validity and binding nature of an alienation, made by the manager or the father and if it is found that the alienation is not supported by any necessity or is supported only by

1. 11 B.H.C.R. 72.
2. (1889) I.L.R. 13 Mad. 275.
3. (1896) I.L.R. 20 Mad. 243.
4. (1868) 5 M.H.C.R. 166.
5. (1912) 23 M.L.J. 64.
6. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
7. (1916) 29 M.L.J. 816 : I.L.R. 39 Mad. 159.
8. (1913) 26 M.L.J. 576: I.L.R. 38 Mad. 684.
9. (1912) 15 I.C. 354.
10. (1916) 27 M.L.J. 409: I.L.R. 39 Mad. 265.
11. (1916) 31 M.L.J. 275.
12. (1921) 41 M.L.J. 129: I.L.R. 44 Mad. 605.
13. (1921) 42 M.L.J. 372 : I.L.R. 45 Mad. 449.

partial necessity the right of the alienee to step into the shoes of his alienor and work out his rights at least to the extent of his alienor's share, can be dealt with in such a comprehensive suit. Even if the alienation is by a co-parcener other than the manager or the father, either of a specific item or interest in a specific item, if the alienee is impleaded as a party to such an action, his equity can be worked out and adjusted in that suit. It has been recognised in *Chinna Sanyasi* v. *Suriya*[1] that a non-alienating co-parcener may sue to recover his interest in a parcel of family property which was conveyed away by a co-parcener to a purchaser. In such a case the co-parcener has got the option of repudiating the transaction altogether and recovering the property from the alienee who was put in possession for the benefit of the joint family, (see *Subba Goundan* v. *Krishnamachari*[2]) or he may elect to affirm the transaction and sue to recover possession of his share of the property after partition. In such a case, it is held that the suit is not liable to be dismissed on the ground that it is bad for partial partition. Where the member repudiates the transaction, he can recover the property only for the benefit of the joint family and the property when recovered continues to be joint family property. But what is the position if he affirms the transaction and sues only to recover his share. In a case where the members of a family are two and two alone, the share so recovered would be the separate property of the plaintiff as held in *Chinna Sanyasi* v. *Suriya*[1] followed in *Kadegan* v. *Periya Munusami*[3]. If, however, there is more than one non-alienating co-parcener, a suit to recover the share in the property cannot be instituted by one alone without the concurrence of the co-parceners who should be impleaded either as plaintiffs or as defendants unless it be that the co-parcener suing is the manager and head of the family. When there are more than one co-parceners who did not join in the alienation, if the right of recovering possession of their share is to be exercised after affirming the transaction it can be done only by all of them and not by any one of them. The property so recovered therefore would be the joint property of all the non-alienating co-parceners. The question therefore of deciding the character and nature of the share recovered in such cases presents no difficulty.

In case of an alienation by a member of the family of an item of property, the non-alienating co-parcener may sue to recover possession of the property without admitting the right of the alienee to the alienor's share. It has been held in *Subba Goundan* v. *Krishnamachari*[2], that if the alienation was by the father or manager of the property of the family, in a suit instituted by the co-parceners to recover possession of the property on the ground that it is not supported by necessity, the proper procedure is to decree to the plaintiffs recovery of possession of the entire property conveyed under the sale to the alienee and it is not permissible to the alienee defendant in the suit to insist that his equity should be worked out in that very suit. This strict view was not followed in two later cases *Davud Beevi Ammal* v. *Radhakrishna Aiyar*[4] and *Ramasami Aiyar* v. *Venkatarama Aiyar*[5]. In these two decisions the rule was not treated as an inflexible one and must be applied according to the circumstances of the case. If for example, there was only one surviving co-parcener the plaintiff, and the property alienated was less than that of the alienor's share in the entire family properties at the time of the alienation, there is no necessity to drive the alienee to a separate suit and that the equities could be worked out even in that very suit. This view is based upon the observations of the Privy Council in *Ramkishore Kedarnath* v. *Jainarayan Ramrajpal*[6]. The same view was adopted in *Davud Beevi Ammal* v. *Radhakrishna Aiyar*[4], by a Bench. A co-parcener alienating his share of the property cannot escape from his liability to bear the common burden of debts and other obligations of the family. The liability, the alienee who steps into the shoes of the co-parcener, has to bear is the proportionate burden, proportionate of course to the value of the property purchased by him. Of course, if once the sale is effected for discharge of the binding debts

1. (1882) I.L.R. [illegible] Mad. 196.
2. (1911) 42 M.L.J. 372 : I.L.R. 45 Mad. 449.
3. (1903) 13 M.L.J. 477.
4. (1922) 44 M.L.J. 309.
5. (1923) 45 M.L.J. 203 : I.L.R. 46 Mad. 85.
6. (1913) 25 M.L.J. 512 : L.R. 40 I.A. 213 : I.L.R. 40 Cal. 966 (P.C.).

or for the necessity or benefit of the estate the property in the hands of the alienee cannot be made once more liable for the obligation and the other debts of the family. Vide *Sreeramulu* v. *Subharami Reddi*[1]. So far, the principles of law are well settled and present no difficulty.

The more difficult question, however, is when a father or manager of a family alienates an item or whole of the family property purporting to be for the benefit or necessity of the estate or in the case of the father for his antecedent debts. If the alienation is ultimately found to be supported by partial necessity or benefit, what are the rights of the alienee in such a case in respect of that portion of the consideration which has been applied for purposes binding on the family? It is always difficult for the father or manager of the family to sell exactly that extent of property which is sufficient to meet the particular necessity. Some margin, therefore, has to be allowed and if a large part of the consideration for the sale or mortgage has been applied for purposes binding on the family and if the alienee acts in good faith and it can be shown that the sale was justified by legal necessity, the sale may be upheld in its entirety. It is not always easy to fix the proportion of the consideration which must be established to justify the sale in such circumstances. It is a question which must be decided on the facts of each case. This has been established by a number of decisions of the Judicial Committee and also of the High Courts in India beginning with *Krishna Das* v. *Nathu Ram*[2], which are found collected and referred to in the footnote at page 468 of Mayne's Hindu Law (Latest Edition).

If, however, the binding portion of the consideration is very much less, what are the equities of the alienee in such circumstances? If the suit instituted is one for partition either by the alienee or by a co-parcener impeaching the alienation, the equities of the alienee will be adjusted in that suit. The entire item sold may be allotted, if it does not otherwise prejudice the rights of the co-parceners, to the share of the manager or the father who alienated the property and the burden discharged from-out of the consideration may be adjusted between the father or manager on the one hand and the other co-parceners on the other as the debts due by the family have to be considered in such an action as pointed out by Bashyam Ayyangar, J., in *Aiyyagiri Venkataramayya* v. *Aiyyagiri Ramayya*[3]. The alienee may also get the share of his alienor allotted to him with a direction that the other co-parceners should pay to the alienee their proportionate share of the burden. All this flows from the right which an alienee acquires under the conveyance in his favour, *viz.*, a right to institute a suit for general partition and to have, if possible, the particular property allotted to the share of his alienor in the partition with due regard, of course, to the interests of the other sharers and the debts due by the family. This equity, it is not disputed, is the only equity which the alienee is entitled to in such circumstances and has been established by the decisions which have been considered so far. The latest case is the decision in *Krishnamurthi Iyer* v. *Nataraja Iyer*[4] by Wadsworth and Govindarajachari, JJ.

Two situations, however, may arise. The co-parcener disputing the alienation may institute a suit for partition claiming, as in the present case, a half share in the alienated item thereby admitting the right of the alienee to the other half belonging to the alienor. As the suit is for a general partition in which the debts and liabilities have to be adjusted, even in such an action the co-parceners disputing the alienation may be made liable to pay to the alienee the proportionate part of their liability which has been discharged from the consideration for the sale. I am, of course, assuming in such cases, that there is no further complication that the property was under-sold by the manager or the father. Even if it is established, in such a case, that in fact the consideration for the sale was grossly inadequate, there is no reason for not allowing the alienee to retain possession of the share of

1. (1942) 2 M.L.J. 90: I.L.R. (1942) Mad. 738 (F.B.).
2. (1926) I.L.R. 49 All. 149.
3. (1902) I.L.R. 25 Mad. 690 at p. 716 (F.B.).
4. (1948) 1 M.L.J. 430 at 434.

the alienor which is admitted by the very frame of the suit. It makes no difference, in my opinion, even if the frame of the suit was for a general partition without the qualification, *viz.*, that the co-parcener impeaching the transaction admits the right of the alienee to the extent of the alienor's share. The alienor himself in such a contingency cannot get rid of his own act in underselling the property and there is no reason or justification for permitting a third party like a co-parcener to impeach the transaction on the ground that it was undersold so long as the share of the alienor bears the proportionate share of the common burden which, of course, is to be met by the alienee who stands in the shoes of the alienor. It is the undoubted right of a co-parcener under Hindu Law to alienate for consideration his interest in the property, but it is not open to him to make a gift of it as the very foundation of the alienee's equity is the payment of consideration. In the present case, the plaintiff expressly claimed recovery of possession after partition of a half share in the properties annexed to the schedule and the suit was framed as one for partition under Hindu Law on the basis that the family was joint till the date of the institution of the suit. During the father's insolvency, the other debts of the family must have been wiped out, at any rate, there is no evidence in this case that there are any debts of the family which remained undischarged. The only burden is that which was discharged out of the consideration for the sale. There is no doubt a finding of the courts below that the consideration for the sale was not adequate and was more. But that does not, in my opinion, make any difference and would not in any way affect the adjustment of equities in the case. For the entire consideration that the third defendant paid, he gets only the father's half share in the property in Schedule II, *i.e.*, half out of the extent of six acres 56 cents, *i.e.*, for the sum of Rs. 13,400. The common burden is Rs. 7,022. Out of this, the share of the plaintiff, there being no other co-parceners, is Rs. 3,511. As the case is not complicated by the existence of other debts which have to be taken into consideration, as no difficulty arises even in alloting the share of the first defendant to the alienee, the third defendant and as the plaintiff himself had admitted by the plaint and recognised the right of the third defendant to a half share, there is no reason for refusing to the third defendant the relief that the plaintiff should, as a condition precedent for recovery of possession of his half share, be made to pay his quota of the common burden of which he had the benefit from and out of the consideration for the sale, *viz.*, the sum of Rs. 3,511. The whole argument of the respondent throughout was that the alienee is not entitled to get any equity except in a suit for general partition, perhaps overlooking the fact that the present suit is one of such description and that it is impossible for the plaintiff to get out of his pleadings and the evidence he adduced in the case. Strictly speaking, therefore, the question which was debated before us, *viz.*, whether *Vadivalam* v. *Natasam*[1] was correctly decided or whether the view in *Venkatapathi* v. *Pappia*[2], should be applied as did the lower courts, does not arise for consideration but as the point was fully argued and considerable time was spent in considering the correctness of these decisions, particularly as the matter was placed before this Bench for a consideration of this particular question, it is not proper that I should refrain from considering it. The difficulty presented by that and the other decisions is whether in a suit instituted by a co-parcener or co-parceners for recovery of his or their share in an item of property alienated by the manager or the father purporting to be for legal necessity impeaching the transaction as not binding on them, if it is found that a portion of the consideration was applied for discharging a common burden, the alienee could insist that the co-parcener or co-parceners should not be allowed to recover their interest in the property without paying their share of the common burden as a condition precedent for recovery of possession. I am not complicating the case by assuming that the sale was for an inadequate consideration as I propose to deal with the situation separately though I have already expressed my opinion about it in the earlier part of this judgment.

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1. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435. 2. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.

Subramania Ayyar and Bodham, JJ., in *Marappa Gaundan* v. *Rangasami Gaundan*[1] aimed at a simple rule to meet such a situation and held that

> "If the vendee wishes to stand by a sale which is valid only partially, such as the present he must be content with the vendor's share, but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed. This view will, on the one hand, avoid now all necessity for enquiry, into matters alluded to before and on the other, tend to act as a check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto".

That was a suit for ejectment of the purchaser of certain lands belonging to a joint family consisting of the father and two sons, the plaintiffs. The alienation was by the father and it did not comprise all the properties of the family. The object of the alienation was for the discharge of a debt of Rs. 120 secured by a mortgage on the land and for discharge of sundry debts incurred by the father from the vendee. It was found that the only consideration paid was Rs. 120 for the discharge of the mortgage debt. The suit itself was instituted after a long delay amounting to nearly 12 years after the alienation. The suit was decreed on appeal for two-thirds share of the plaintiffs without making them liable to contribute proportionately to the common burden. The contention of the defendant before the High Court was that as a sum of Rs. 120 went to discharge a mortgage debt, the plaintiffs should be made liable to pay Rs. 80, *i.e.*, two-thirds of Rs. 120. The contention was rejected by the learned Judges. In the first place, it was held that the alienee was a volunteer and was not entitled to claim reimbursement. If under the conveyance, the alienee had acquired an interest in the property, whatever may be the quantity of that interest, it is difficult to treat him as a volunteer. The decision in *Sivaganga Zamindar* v. *Lakshmana*[2] which was relied on by the learned Judges in support of the view taken by them proceeded on the footing that the zamindari which was sold was ancestral property and the Court sale conveyed to the purchaser only the life interest of the zamindar and that the court sale passed to the purchaser nothing more than the life interest of the zamindar which terminated on his death. The purchaser in the Court sale bought only the late zamindar's interest whatever that was for the money which he advanced as purchase money. There was, therefore, no basis for making the son liable to reimburse the purchaser the amount of the money which was applied for discharging the father's debt. In my view, therefore, the purchaser in *Marappa Gaundan* v. *Rangasami Gaundan*[1] was not a mere volunteer and the principle of *Sivaganga Zamindar* v. *Lakshmana*[2] has no application. The learned Judges then adverted to the practical inconvenience that would result in accepting the contention of the defendant. It was conceded that the sale was valid to the extent of the vendor's share. But it was argued that if the share was really worth the whole of the amount paid by the vendee as the price, why should he be allowed to get anything more? If, on the other hand, the share was worth less than the price paid, the vendee was not entitled to insist on a charge for more than the difference between the real value of the share which he had purchased and the price paid. The inconvenience indicated was that the court in such a case would have to embark, upon an inquiry regarding the valuation of the property, which it was pointed out, was not always capable of easy or even satisfactory settlement. It is for this reason that the learned Judges aimed at simplification of the law though it results in injustice to the purchaser. The real value of the property even if it is deemed relevant for adjusting the equities of the alienee, is not difficult to ascertain. The Courts are very often called upon to decide questions of valuation of property for various purposes such as the Land Acquisition Act, for court-fees and for other purposes. This difficulty, therefore, should not have been allowed to stand in the way of doing justice to the alienee. But is the question of valuation really relevant if it is once conceded that a co-parcener is entitled to sell his interest in the property for value though he cannot make a gift of it? The question even of the adequacy of consideration for such a sale is, in my opinion, not relevant. The non-alienating co-parcener, who impugns the sale, is not entitled

1. (1899) I.L.R. 23 Mad. 89. 2. (1885) I.L.R. 9 Mad. 188.

to dispute the adequacy of consideration for the sale of the alienor's interest so long as the alienation for value is not a device to defeat the right of the co-parceners to get the property by survivorship, if during the lifetime of the alienating co-parcener that right was not put an end to. The price to be paid for the share alienated is a matter entirely between the purchaser and the vendor and a third party is not entitled, to question its adequacy. Nor is the reason that if the price paid was equal to the real value of the share, the purchaser should not get the benefit of the proportionate share of the common burden discharged from the consideration, tenable. The alienee stepping into the shoes of the alienor is undoubtedly bound to bear the common burden of the family proportionate to the extent of the value of the share he purchased since an undivided member of a family cannot escape from his liability to bear the obligations binding on the family. But if, at his expense and at the expense of the alienee, the undivided member impeaching the transaction had derived benefit, there is no justification for allowing him to retain the benefit without returning it to the person justly entitled to it. If once an inroad into the strict theory of joint family has been allowed and the alienee's right based on equity is recognised by law, there is no reason for not applying that equity in an equitable manner so as to adjust the rights of all parties in a just manner. Simplicity, no doubt, in evolving a principle of law is good as an ideal but it should not be achieved at the expense of justice and equity. For these reasons, it is difficult to accept the decision in *Marappa Gaundan* v. *Rangasami Gaundan*[1] as laying down the law correctly.

The decision in *Rottala Runganatham Chetty* v. *Pulicat Ramasami Chetti*[2], turned on the peculiar facts of that case. Simplifying the facts of the case and stating them in so far as they are relevant to the present discussion, it was a case where the joint family consisted of a father and two sons. The father conveyed to the first defendant under a sale deed property for a sum of Rs. 1,000 in discharge of an antecedent debt of his which was due to the first defendant. The property, it was found, was of the value of Rs. 11,000 on the date of the conveyance and the father, it was stated in the sale deed, was induced to sell the property for a low consideration in view of the fact that the first defendant rendered—considerable assistance to the father in prior litigations relating to the family properties. The learned Judges who decided the case, Benson, Bashyam Ayyangar and Moore, JJ., treated the conveyance as one for value to the extent of Rs. 1,000 and a conveyance by way of a gift to the extent of Rs. 10,000 of the property conveyed. In view of the principle of Hindu Law that a gift by an undivided member of his share or part thereof is void *in toto*, it is not open to an undivided member to evade the principle by purporting to make an alienation for value which is grossly inadequate and inequitable. In such a case, it would be inconsistent with the principle of Hindu Law, even to recognise the conveyance as good to the extent of the alienor's share. As the sum of Rs. 1,000 was applied for discharge of the antecedent debt of the father, the only relief which the first defendant in the case was entitled to according to the learned Judges, was to have an equitable charge over the whole of the property for return of the amount with interest. According to my understanding of this judgment, it proceeded entirely on the footing that the conveyance was only a gift and not an alienation for value to any extent. Bashyam Ayyangar, J., who was a party to the decision in *Aiyyagiri Venkataramayya* v. *Aiyyagiri Ramayya*[3] also took part in this case and it cannot be reasonably assumed that in this case the learned Judge intended to go behind the principles—enunciated by him so clearly and cogently in the earlier decision. This case, therefore, is not an authority on the question as to the manner and the mode in which the equities of an alienee have to be worked out in a case where the consideration for a sale or mortgage is only partly binding on the joint family.

I now come to the decision in *Vadivalam* v. *Natasam*[4] which has been made the target of a severe attack by the learned counsel for the respondent. The facts

1. (1889) I.L.R. 23 Mad. 89.
2. (1903) I.L.R. 27 Mad. 162.
3. (1920) I.L.R. 25 Mad. 690 at p. 716 (F.B.).
4. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.

were very simple. The joint family consisted of an uncle and a nephew. The uncle sold certain lands belonging to the family for a sum of Rs. 500 which, it was not disputed was the real value of the property at the time. Out of this consideration, Rs. 250 was applied for discharge of debts borrowed for the purposes of the family. The nephew instituted the suit to recover one half share of the lands conveyed under the sale deed by his uncle, thereby admitting that the sale was valid to the extent of his uncle's half as he was undoubtedly entitled to alienate his own share for value. The question raised in the appeal was whether the plaintiff should be made liable to any extent for the binding portion of the consideration. Two extreme contentions were urged. Mr. Seshagiri Ayyar for the appellant urged that the entire amount of Rs. 250 which was found to be binding must be treated as a charge on the plaintiff's share of the property. While Mr. Natesa Iyer for the plaintiff contended that the uncle should be treated as having sold his interest in the property only for the binding portion of the consideration. These two extreme contentions were rejected by the learned Judges Sundara Iyer and Sadasiva Ayyar, JJ. They formulated at page 437 the principle applicable to such cases in these words :

"According to accepted equitable principles, in the absence of anything appearing to the contrary, the consideration for the sale must be distributed over the whole of the property sold in proportion to the value of each part. On this principle the whole of Rs. 500 must be distributed over the shares belonging to the plaintiff and Chinnappa (the uncle) respectively. There is no ground for supposing that one portion of the consideration was allocated to a particular half share and the other portion to the other half share. The valid portion of the consideration as well as the invalid portion must be distributed over each of the half shares of the plaintiff and Chinnappa respectively."

Applying this principle, the result was that the plaintiff was bound to pay one half of the Rs. 250 held binding on the family, that is to say as a condition precedent for recovery of possession of the half share claimed by the plaintiff in the suit, he should pay Rs. 125. This principle so enunciated by the learned Judges, in my opinion, accords with equity and justice. The decision in *Marappa Goundan* v. *Rangasami Gaundan*[1] was also considered by the learned Judges who dissented from the view of Subramania Ayyar, J., in that case. It was pointed out at page 438, after quoting the passage from the judgment of Subramania Ayyar, J., in which he pointed out the practical inconveniences, as follows :—

"The whole of this reasoning proceeds on the assumption that when a co-parcener sells his share as well as the share of other members the other coparceners are entitled to raise the question as to what is the real value of the share of the alienor. It cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases. It is equally clear that as between the vendor and the vendee in the absence of any contract to the contrary the consideration for a sale will be apportioned between all the items of the property sold in case of dispute. There seems to be no reason for allowing the alienor's co-parceners to ask the Court to adopt any other principle."

The argument that the valuation was not capable of easy or satisfactory settlement, was rejected on the ground that as the right of a co-parcener to sell his interest was recognised, the equities must be adjusted in the best manner possible and that the remedy indicated by Subramania, Ayyar, J., in *Marappa Gaundan* v. *Rangaswami Gaundan*[1] may in very many cases be altogether useless as the alienor may not have any interest in the family properties. The above passage from the judgment had been, if I may say so with respect, misunderstood and it is this misconception of his that was responsible for the severe criticism by the learned counsel for the respondent. The learned advocate, in the first place, argued that the view of the learned Judges was entirely coloured and is based upon the view now held to be untenable, that an alienee from an undivided member of a family becomes a tenant-in-common by reason of his purchase. No doubt, this view was shared by Sadasiva Ayyar, J., in a later case already referred to. But on a careful perusal of the judgment, it is impossible to accept the contention and to hold that the decision was based upon such an erroneous assumption. The sentence in the above passage recognising the right of a co-parcener to part with his share in the family property

1. (1899) I.L.R. 23 Mad. 89.

for consideration is stated to be the justification in support of that contention. That proposition itself, as it stands, cannot be taken exception to. The decisions reviewed in this judgment beginning from 1813 have firmly established the right of a co-parcener to alienate his interest in the undivided property for value and that right was accepted by the Judicial Committee in more than one case. The use of the expression "his own share" does not indicate or convey the idea that the learned Judges were treating either the alienor or the alienee as a tenant-in-common with the other members of the family. No doubt, it may not be strictly accurate to describe the interest of a co-parcener in an undivided family as "*his share*", because, as pointed out in this judgment and by the Privy Council in *Appovier* v. *Rama Subba Ayyan*[1] no co-parcener has a defined share in the property until there is a partition. But this expression was used by several eminent Judges and also by the Judicial Committee as meaning the interest of the co-parcener in the undivided property. The learned Judges in enunciating the principle, were not stating and were not called upon to state the limitations under which the power to alienate is to be exercised and enforced. One of such important qualifications is that such a transfer would not result in exempting the property from bearing the proportionate share of the common burden whether the property is in the hands of the alienor or in the hands of his alienee. The consideration of the question by the learned Judges did not necessitate the stating of the qualification of the rule as they were not dealing with all the principles governing the adjustment of the equities of an alienee. The decision, in my opinion, steers clear of all the difficulties and recognises the equities of all parties and gives effect to them. The rule is simple and capable of easy application without causing hardship to either the alienee or the non-alienating co-parceners.

It is unnecessary to drive the alienee to a further suit when the co-parcener challenging the alienation had elected to treat the alienation as valid to the extent of the alienor's share. If really there is any difficulty, it was up to the person challenging the alienation to institute a suit for general partition which is wider in its scope and in which all the rights of the parties could be adjusted and provision for debts could be made as pointed out by the Privy Council in *Sat Narain* v. *Sri Kishen Das*[2] approving the decisions of this Court on the point.

This decision was followed by Wallis, J., in *Seetharam Naidu* v. *Balakrishna Naidu*[3] in preference to the decision in *Marappa Gaundan* v. *Rangaswami Gaundan*[4] and by Sadasiva Aiyar and Spencer, JJ., in *Subbayya Mudaliar* v. *Thulasi Mudaliar*[5] and was applied without referring to it in *Muthu Krishna Naidu* v. *Muthan Krishnappa Naidu*[6] by Sadasiva Ayyar and Spencer, JJ. Jackson, J., sitting as a single Judge applied this decision in *Adinarayana Reddi* v. *Subbarayal Reddi*[7], where he also observed that the manager was entitled to sell his own share *for what he likes* and stated that the point to keep in view in working out equities is that the Courts always held the vendor to his sale and "*are not in the least concerned with the merits of his bargain.*" This, if I may say so with respect, is a correct statement of the law. Though in the latest edition of Mayne's Hindu Law, this decision is not referred to but only the later decisions which followed it, in the edition by Coutts-Trotter, J., at page 514 it was accepted as laying down the law correctly and it was also noticed by Trevelyan on Hindu Law, 1929 edition at page 322. This decision was also noticed by the Privy Council in *Masit Ullah* v. *Damodar Prasad*[8] but on the facts of the case before their Lordships of the Judicial Committee, the necessity to apply or consider the correctness of that decision did not arise. The Bombay and Nagpur High Courts have followed the principle in *Vadivalam* v. *Natasam*[9], vide *Madhavrao Ganpat* v. *Shankar Hari*[10] and *Suraj Mal* v. *Bapurao*[11] following *Radhakrishan* v. *Bisam Singh*[12].

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1. (1866) 11 M.I.A. 75.
2. (1936) 71 M.L.J. 812 : L.R. 63 I.A. 38 : I.L.R. 17 Lah. 644 (P.C.).
3. (1913) 26 M.L.J. 604.
4. (1899) I.L.R. 23 Mad. 89.
5. (1914) M.W.N. 16.
6. (1917) M.W.N. 273.
7. A.I.R. 1927 Mad. 1116.
8. (1926) 51 M.L.J. 792 : L.R. 53 I.A. 204 : I.L.R. 48 All. 518 (P.C.).
9. (19 2) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
10. A.I.R. 1943 Bom. 278.
11. A.I.R. 1929 Nag. 311.
12. A.I.R. 1927 Nag. 379.

It remains to consider the decision of Kumarasami Sastri and Ramesam, JJ., in *Venkatapathi* v. *Pappia*[1] in which the judgment of the Court was delivered by Ramesam, J. It arose out of a suit by a minor plaintiff to set aside a deed of sale executed by his father in favour of the first defendant. The consideration stated in the sale deed was Rs. 600. The vendee was also a near relation of the plaintiff's father. At the time of the sale the plaintiff's grandfather was alive. Therefore the plaintiff's father's share on the date of the alienation could only be a quarter. It was found that the property, on the date of the sale, was really worth Rs. 2,000 and that the vendee did not pay the entire consideration but paid only a sum of Rs. 400 for discharge of the binding obligations of the family. It was held by Ramesam, J., that regarding the sale as a sale of the father's share, the share was really worth Rs. 500 and that the consideration of Rs. 400 paid under the document was not grossly inadequate so as to treat the transaction as one of gift within the principle in *Rottala Ranganathan Chetti* v. *Pulicat Ramasami Chetti*[2]. The learned Judges, therefore, were prepared to allow the alienee to retain a quarter share of the property but the further question that had not been decided was whether the alienee was entitled to ask the plaintiff to refund any portion of the consideration paid which was undoubtedly found to be binding, *viz.*, the sum of Rs. 400. The decisions in *Marappa Gaundan* v. *Rangasami Gaundan*[3], *Rottala Ranganathan Chetti* v. *Pulicat Ramasami Chetti*[2] and *Vadivalam* v. *Natasam*[4] were considered by the learned Judge, Ramesam, J. The proposition enunciated in *Vadivalam* v. *Natasam*[4] that

> "it cannot be doubted that a co-parcener is entitled to part with his own share in any family property for any consideration he pleases"

was taken exception to by the learned Judge. He seems to think that the principle so stated would apply only where the vendor is a divided member and that where he is still a member of the joint family, the proposition conflicts with the statement of law in *Rottala Ranganathan Chetti* v. *Pulicat Ramasami Chetti*[2]. It is difficult to follow and accept this criticism. The decisions in this High Court and of the Judicial Committee have clearly established that a co-parcener governed by the Mithakshara Law is entitled to part with his interest in any family property. As regards the consideration for such a transfer so long as the vendor and purchaser agree and fix the price it is not open to a third party to canvass its adequacy or its fairness. It is, therefore, wrong in my opinion, to state that a member of an undivided family cannot, so long as he is undivided, alienate his share. If the emphasis, however, is on the statement, "for any consideration he pleases" and what was meant was that by adopting the device of stating some nominal consideration a co-parcener cannot make a gift so as to defeat the right of survivorship of other members, it can no doubt be accepted. I think this is what the learned Judge meant when he added that the principle so stated conflicts with the decision in *Rottala Ranganathan Chetti* v. *Pulicat Ramasami Chetti*[2]. I do think that the learned Judges in *Vadivalam* v. *Natasam*[4] when they stated the law in those terms intended to encourage gifts in the cloak of an unreal or nominal consideration. In the sentence at page 830

> "The result would be if the consideration is distributed over all the shares and if we then try to uphold the sale even as regards the alienor's share, the sale of that share should (sic) be for a grossly inadequate consideration,"

in my opinion, the word "not" is omitted after the word "should" and before the words "be for a grossly inadequate consideration", in which case the sentence will mean that if the alienor's share is not undersold, the sale may be upheld. But then in the next sentence, the learned Judge seems to think that as the real value of the father's one-fourth share was of Rs. 500 and as the alienee paid only Rs. 400, one-fourth of the binding consideration being Rs. 100 and the sale of the one-fourth share was therefore for an inadequate consideration and therefore it should not be upheld on the principle laid down in *Rottala Ranganathan Chetti* v.

1. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.
2. (1903) I.L.R. 27 Mad. 162 (F.B.).
3. (1899) I.L.R. 23 Mad. 89.
4. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.

Pulicat Ramasami Chetti[1]. At page 829 the learned Judge found that the sale could not be regarded as for a grossly inadequate consideration and

" As practically effecting a gift of his share and there is no objection to upholding the sale as one of the father's share only."

This seems to conflict with the view stated in the next page, 830, but then in the next sentence the learned Judge states :

" In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share."

In this sentence, in my opinion, the learned Judge has in view the sum of Rs. 400 which was found to be the binding consideration and the equity suggested is that the burden should be thrown entirely upon the alienor and the alienee, for in the succeeding sentence, he added that if the value was less than the alienor's share, no further equity in favour of the vendee arose while if it was more, a charge may be given for the excess over the share of the co-parceners. It is rather difficult to follow the reasoning of the learned Judge, but throughout the discussion, he seems to have been considering not the real value of the property but only the binding consideration for at page 831, in the second sentence, he stated that

" when the consideration is so allotted, if it is grossly inadequate compared with the value of the alienor's share, it may be that the sale cannot be upheld, even for his share."

It is unnecessary to pursue the consideration of the judgment further as the learned Judge has summarised his conclusions in three propositions at pages 831-832. These propositions again are not very clear and intelligible. The case before them was treated as falling under the second of the above propositions, as the vendor's share was worth Rs. 500 and the consideration proved was only Rs. 400, *i.e.*, the binding consideration. The first of the three possible cases enumerated by the learned Judge does not present any difficulty, as it is based on *Rottala Ranganathan Chetti* v. *Pulicat Ramasami Chetti*[1] which proceeds on the conclusion that the alienation in question was really a gift and not a transfer for consideration. In the second of the three cases, the learned Judge seems to have had in mind the binding consideration when he speaks of the whole consideration and so also in the case of proposition No. 3 at page 832. The effect of propositions 2 and 3 is to throw the entire burden on the alienor and alienee and to benefit the co-parcener or co-parceners impugning the transaction as not binding though they derived the benefit from the consideration paid to the extent it was applied for discharging a binding debt. So long as the alienation is by an undivided co-parcener or where the father or the manager purports to transfer for a binding necessity or benefit but only a partial necessity was established, his transfer is not for a grossly inadequate consideration and is not a cloak or a device really to make a gift though under the guise of an alienation for consideration, there is no justification or reason to canvass the adequacy and fairness of the price paid by the purchaser to the alienor. If from the consideration paid under a transaction by the father or manager a portion of it had been utilised for discharging a common burden, there is no justification for throwing the entire burden upon the father or the manager and to allow the other co-parcener to escape free from the liability. As the property is equally distributed, the burden on the property must also be distributed in the same manner. This is in consonance with the principles of equity and justice. In my opinion *Venkatapathi* v. *Pappia*[2] has been wrongly decided and must be overruled as well as the decision in *Marappa Gaundan* v. *Rangasami Gaundan*[3]. The law is correctly stated in *Vadivalam* v. *Natasam*[4] and must be followed.

Before I deal with the other branch of the arguments of the learned counsel for the respondent, it is necessary to advert to another question which arises incidentally. In *Venkatarama* v. *Meera Labbai*[5] and *Kota Balabadra Patro* v. *Khetra Doss*[6], it was decided by this Court that section 44 of the Transfer of Property Act,

1. (1903) I.L.R. 27 Mad. 162 (F.B.).
2. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.
3. (1899) I.L.R. 23 Mad. 89.
4. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
5. (1889) I.L.R. 13 Mad. 275.
6. (1916) 31 M.L.J. 275.

before the amendment of that Act by the Transfer of Property (Amendment) Act of 1929 had not the effect of overriding the Hindu Law and would not entitle the alienee from a member of the joint Hindu family to claim joint possession of the alienor's share as a tenant-in-common by virtue of that section and that his only right is to obtain by a suit for partition the share to which his alienor would be entitled. The learned editor of Mayne's Hindu Law at page 499, latest edition, expressed the opinion that since by virtue of the Transfer of Property (Amendment) Act, 1929, the section is made applicable to Hindus and Buddhists by omitting the words "Hindu or Buddhist" in the concluding portion of section 2 of the principal Act, the alienee from a co-parcener would be entitled to the benefit of that section and claim joint possession. But this view is not accepted by Mulla in his commentary on the Transfer of Property Act, 3rd edition at page 216. The section itself applies to co-owners of immoveable property and an alienee from a co-parcener does not become an owner or a co-tenant by reason of the purchase. Further, the words

> "subject to the conditions and liabilities affecting at the date of transfer the share or interest so transferred"

saves the principles established by Mitakshara Hindu Law that the right of an alienee is only to institute a suit for partition to work out his equities, subject to the charges and encumbrances affecting the co-parcenary property or the interest of the alienor at the time of the transfer. These principles are not in any manner and to any extent affected or altered by section 44 of the Transfer of Property (Amendment) Act and section 2 of the principal Act. The last clause in the section relating to the transfer of a dwelling house cannot be treated as indicating that the "co-owner" referred to in the opening words of the section is applicable to an alienee from an undivided co-parcener in a Mitakshara joint Hindu family. The view taken by Mulla in his commentrary on the Transfer of Property Act was followed in preference to that of Mayne by Chandrasekhara Ayyar, J., in *Ramasami Chettiar* v. *Subramania Chettiar*[1] and by Thiagarajan, J., in *Thimmu Reddiar* v. *Sennappa Reddiar*[2]. The last decision was affirmed on Letters Patent Appeal by Horwill and Balakrishna Ayyar, JJ., in *Thimmu Reddiar* v. *Sennappa Reddiar*[3]. With great respect I am inclined to accept the view taken by Mulla in his commentary on the Transfer of Property Act in preference to the view of the learned editor of Mayne's Hindu Law at page 493 of the latest edition and the earlier decisions in *Kota Balabadra Patro* v. *Khetra Doss*[4] and *Venkatrama* v. *Meera Labbai*[5] as still good law.

The last contention urged on behalf of the respondent was that by reason of the insolvency of the father, the first defendant, there was a disruption of the joint family status and that, therefore, it is not open to the alienee, the third defendant, to insist in this action, for any adjustment of the equities in his favour as his only right which was a right to institute a suit for partition for the purpose of establishing his equity, is gone. In the first place, in my opinion, this contention is not open to the plaintiff-respondent as he had specifically admitted in his plaint that the family was joint and undivided on the date of the institution of the suit and it was supported by the evidence of the father examined on his side as P.W. 1. It is impossible to accede to the request of the learned counsel for the respondent that he should be granted an indulgence to amend his plaint so as to enable him to go behind his pleading and his evidence. In the next place, the contention itself seems to me wholly untenable. The subsequent insolvency of the father does not take away the right of the alienee which had already vested in time.

The learned advocate to be logical in the attitude so taken, had to urge that even an alienation by a co-parcener of his entire interest in the joint family property or part of it, would bring about a division in status while he all along maintained that the alienee's right was not a specific defined right in the property but was only an unqualified fraction representing the share of the alienor. Somewhat

1. Second Appeal 940 of 1945.
2. Second Appeal 2339 of 1945 and 95 of 1946.
3. L.P. Appeals 2 and 3 of 1948.
4. (1916) 31 M.L.J. 275.
5. (1889) I.L.R. 13 Mad. 275.

inconsistently in this branch of the argument, he maintained that the share becomes crystallised by reason of the alienation or insolvency practically converting the alienee into a tenant-in-common along with the other members of the family. The crux of the argument, as I understand it, is that if the share of a member becomes defined in whatever manner it may be, such a definition of the share would operate to disrupt the status of the family and make the other members tenants-in-common along with the alienee or the Official Receiver in the case of insolvency. This position, he attempted to maintain by reference to the Mitakshara definition of vibhaga or partition and the recognition by the later commentators of the conversion of the joint family status into a tenancy-in-common even by what is now described as a unilateral declaration of an intention which, according to him, is equivalent to Buddhivisesha and by a reference to a statement of the Privy Council in *Venkatapathi Raju* v. *Venkatanarasimharaju*[1].

It is no doubt true as stated previously in this judgment, that some of the judges of this Court held the view that by reason of the alienation, the alienee becomes a tenant-in-common. That an alienation by a co-parcener does not terminate the co-parcenary whether the property alienated is either the whole or only a part of his interest in the family property, and that notwithstanding the alienation, the alienor continues to be undivided with the other members of the family with rights of survivorship between him and the other members of the family in respect of the property of the family was laid down clearly by Bashyam Ayyangar, J., in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[2] though, it must be observed, in a later decision *Lakshmi Achi* v. *Narayanasami Naicker*[3], Ramesam, J., if I may say so with great respect, interpreted this proposition wrongly. This mistake was noticed by Venkataramana Rao, J., in *Ramasubbaraya* v. *Ganapathiraju*[4]. For the reason given by Venkataramana Rao, J., in that decision, I respectfully agree with his opinion that the view taken by Ramesam, J., in *Lakshmi Achi* v. *Narayanasami Naicker*[3], is not correct. Ever since the decision in *Ayyagiri Venkatramayya* v. *Ayyagiri Ramayya*[2] the preponderance of authority in this Court is in favour of the view taken by Bashyam Ayyangar, J., notwithstanding the expressions of opinion to the contrary by other learned Judges. *Manjayya Mudali* v. *Shanmuga Mudali*[5], *Maharaja of Bobbili* v. *Venkatramanjulu*[6], *Venkatrayudu* v. *Sivaramakrishnayya*[7], *Lakshmanan Chettiar* v. *Srinivasa Aiyangar*[8], *Suryanarayanamurthi* v. *Veeraraju*[9] and *Ramasubbaraya* v. *Ganapathiraju*[4] support this view. In my opinion, it is too late in the day to set the clock back and to hold that the alienation has the effect of dividing the status of the family.

The earlier branch of the argument of the learned advocate was directed to restrict and to curtail the rights of the alienee as far as possible and to prevent in effect the free exercise of the power of alienation by an undivided member of a Hindu joint family governed by Mitakshara Law. He now wants to go to the other extreme and asks us to hold that the alienation practically converts the ownership of the property into a tenancy-in-common. Judicial decisions in this State have evolved a power of alienation and a logical, and if I may say so with respect, equitable system, adjusting the equity of the alienee and the rights of the other co-parceners. The object, I should think, was to encourage the exercise of individual rights with a view to advance commerce and trade and also to enable the co-parcener to advance, by raising money, the interests of himself and his branch. The law has progressed in India from the corporate ownership of the village community into the joint

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1. (1936) 71 M.L.J. 558 : L.R. 63 I.A. 397 : I.L.R. (1937) Mad. 1 (P.C.).
2. (1902) I.L.R. 25 Mad. 690 at page 717 (F.B.).
3. (1929) 57 M.L.J. 746 : I.L.R. 53 Mad. 188.
4. (1940) 2 M.L.J. 1021 : I.L.R. (1940) Mad. 405.
5. (1913) 26 M.L.J. 576 : I.L.R. 38 Mad. 684.
6. (1914) 27 M.L.J. 409 : I.L.R. 39 Mad. 265.
7. (1934) 67 M.L.J. 486 : I.L.R. 58 Mad. 126.
8. (1936) 71 M.L.J. 707 : I.L.R. (1937) Mad. 203.
9. (1946) 1 M.L.J. 103 : I.L.R. (1946) Mad. 54.

family also of a corporate nature. The joint family was taken as a unit and the conception of joint ownership continued for a long time when there was not much of a progress in the direction of commerce and trade. It is common knowledge that India was purely an agricultural country for a long time and even now the major part of the population of the country make their living by agriculture. The transition from the ownership of a joint family as a unit to individual property has been one of gradual evolution under Mitakshara law by judicial decisions. The swing of the pendulum in some of the countries is to go back and to abolish altogether individual property and vest the ownership of every kind of property in the State. Whether individual ownership or State ownership of property is good for society and of the two which should survive is for the politicians to solve and for them to decide. It is not within the province of a judge to consider these problems and express his opinion. But in a society which is advancing, it is unwise to retard the progress by introducing brakes at every stage. To curtail, therefore, or to restrict by limitations the power of alienation is, in my opinion, inconsistent with the progress of society and the evolution of the right of individual property.

To resume the argument of the learned counsel for the respondent after this brief digression, it must also be stated that the insolvency of a co-parcener does not bring about a division of the status of the family. This question has been considered in this Court in some of the decisions. When a co-parcener is adjudicated insolvent, his property vests in the Official Receiver. The property of the insolvent for the purpose of section 28 of the Provincial Insolvency Act does not, however, include any property which is exempt by the Code of Civil Procedure, 1908 or by any other enactment for the time being in force from liability to attachment and sale in execution of the decree. The share of the insolvent in the family property in so far as it is attachable and saleable under section 60, Civil Procedure Code, will vest in the Official Receiver. It is wrong, therefore, to assume that the entire interest of the insolvent in the joint family property vests in the Official Receiver. *Venkatarayadu* v. *Sivaramakrishnayya*[1] considered the effect of insolvency on the joint family status and after an elaborate examination of the authorities, it was held that the insolvency would not sever the joint family status and the purchaser from the Official Receiver would not become a tenant-in-common from the date of his purchase. This opinion was based on the analogy of the effect of alienation by a co-parcener of his entire interest in the joint family property. If there was a surplus of the assets of the insolvent after the administration is completed, the question arose whether that surplus which reverts to the insolvent is to be treated as joint family property or as the separate property of the insolvent. Venkataramana Rao, J., sitting as a single judge, considered the question in *Lakshmanan Chettiar* v. *Srinivasa Ayyangar*[2] and held that the revesting of the surplus in the insolvent after the insolvency had the effect of altering the character of the property and that it would become the separate property of the insolvent. He, however, did not consider that the insolvency operated to bring about a division in status. The family status continued to be undivided even according to the learned Judge, notwithstanding the insolvency. In *Suryanarayanamurthy* v. *Veeraraju*[3], Wadsworth and Patanjali Sastri, JJ., pointed out that the view taken by Venkataramana Rao, J., in *Lakshmanan Chettiar* v. *Srinivasa Ayyangar*[2] was not correct and that the character of the property was not altered by reason of the insolvency. Of course, the learned Judges also affirmed the view that the insolvency does not affect the status of the family. This decision again followed in *Hanumantha Gowd* v. *Official Receiver, Bellary*[4], by Wadsworth and Rajamannar, JJ. (as he then was) in which the question that arose for consideration was whether if after the adjudication of a member as an insolvent, another member dies and there is an increase in the share to which the insolvent would be entitled whether the increased share vested in the Official Receiver as after-acquired property under section 28 (4) of the Provincial Insolvency Act. The

1. (1934) 67 M.L.J. 486 : I.L.R. 58 Mad. 126.
2. (1936) 71 M.L.J. 707 : I.L.R. (1937) Mad. 203.
3. (1946) 1 M.L.J. 103 : I.L.R. (1946) Mad. 54.
4. (1946) 1 M.L.J. 247 : I.L.R. (1947) Mad. 44.

learned Judges held that by reason of the insolvency, the joint family status was not disrupted and that any addition to the share of the insolvent by survivorship would be after-acquired property within the meaning of section 28 (4). The reason why the Official Receiver does not lose that which was vested in him is stated at page 46 to be that the

> "vesting amounts to an alienation which *crystallises the share* of the insolvent to which the alienee is entitled on the date of the adjudication."

This expression in this judgment is the basis and the foundation of the argument of learned counsel for the respondent that the insolvency has the effect of crystallising the share in the sense that the Official Receiver practically becomes a tenant-in-common in respect of that share with the other co-parceners. This argument, in my opinion, proceeds on a total misinterpretation of the expression used by the learned Judge, Wadsworth, J., in the context. The crystallisation of the share that is referred to by the learned Judge means only that the fractional interest of the co-parcener who is adjudicated insolvent as on the date of the adjudication vests in the Official Receiver, and the fraction of the interest which so vested in the Official Receiver is not altered by subsequent births and the benefit of the increase by subsequent deaths which accrues by survivorship to the insolvent vests in the Official Receiver as after-acquired property in the right of the insolvent. This is practically the principle with has been established in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[1] approved by the Full Bench in *Chinnu Pillai* v. *Kalimuthu*[2]. That principle is that the fraction of the share which vests in the alienee under an alienation is not altered by subsequent births or deaths and is once for all unalterably fixed. The crystallisation, therefore, in that sense has not the effect of defining the share of the insolvent in the joint family property so as to convert it into a tenancy-in-common and make it a defined share. If the foundation of the argument falls to the ground, the argument itself fails. Further as stated above, it is not the entire interests in the property that vests in the Official Receiver. Part of the property of the family which is not saleable and attachable under section 60, Civil Procedure Code, must necessarily remain with the joint family without any interest in such property vesting in the Official Receiver.

Assuming for the sake of argument that the insolvency has the effect of defining the share by a division of the joint right of the co-parcener in the sense in which it was used by the Privy Council in *Appovier* v. *Ramasubba Ayyan*[3] such a definition of a share has not the result of changing the status of the family so far as the insolvent is concerned. Strong reliance to support the view that it brings about that result was placed by learned counsel for the respondent on a passage in judgment of the Judicial Committee in *Venkatapathi Raju* v. *Venkatanarasimha Raju*[4] : –

> "A division of right or a severance of the joint status may result, not only from an agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate. If the document clearly shows a division of the right, its legal construction and effect cannot be controlled or altered by evidence of the subsequent conduct of the parties."

The point actually decided by the Judicial Committee in the case was that a renunciation by a member of the joint Hindu family governed by the Mitakshara law merely extinguishes the renouncing member's interest in the family estate but does not affect the status of the remaining members *quoad* the family property and that they continued to be co-parceners in the same manner, notwithstanding the renunciation. The passage relied on in my opinion, does not at all apply to a situation where the entire interest of a co-parcener is alienated or the interest of the co-parcener became vested in the Official Receiver by reason of the insolvency. The division of right can be undoubtedly brought about by agreement between the parties as stated in *Appovier* v. *Ramasubba Aiyan*[3]. It may also be brought about by a unilateral declaration of a member to become divided in status as laid down by

1. (1902) I.L.R. 25 Mad. 690 (F.B.).
2. (1908) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).
3. (1866) 11 M.I.A. 75.
4. (1936) 71 M.L.J. 558 : L.R. 63 I.A. 397 : I.L.R. (1937) Mad. 1 at pp. 12 and 13 (P.C.).

the Judicial Committee in *Girja Bai* v. *Sadashiv Dhundiraj*[1] without an actual partition of the properties. The view of the Judicial Committee as pointed out by Ameer Ali, J., in the judgment is based on Viramitrodaya, Vyavaharamayuka, Saraswathi-vilasa, passages from which were extracted at page 1046. The definition of partition given by Vignaneswara in Mitakshara as

"the adjustment of diverse rights regarding the whole by distributing them in particular portions of the aggregate"

is also referred to at page 1045. The act, therefore, contemplated in the passages in *Venkatapathi Raju* v. *Venkatanarasimharaju*[2] above extracted must be an act which amounts to an unilateral declaration expressed by a member of an intention to become separate from the family. It has been established that the declaration may be either express or implied from conduct. The 'transaction' referred to in the passage must be a transaction between the members of the family which may not be an express agreement between the parties to become divided in status and to divide the right but may be any document in which a division of the right is assumed or expressed. The passage in question does not, in my opinion, contemplate the result of bringing about a division of the right when there is not either a consensus of intention expressed by the members of even a unilateral declaration by a member of his intention. The essence of the division of a right, in my opinion, is the expression of intention which may be contained in an agreement between the parties or any document entered into by the parties or it may be a division by the expression of unilateral declaration. The alienation by itself or a compulsory alienation like the insolvency or an execution sale cannot, in my opinion, be treated in view of the authorities already considered in this Court as an expression of an intention to sever the status of the family.

Reference was made in the course of the argument to the definition of partition by Vignaneswara where the author defines that term as (Vibagonama Dravya-samudhaya Vishayanamaneka Swayamanam thathekathesshu Vyavasthapanam).

The translation given by Colebrooke for this passage is

"Partition (vibaga) is an adjustment of the ownership of many persons in the aggregate wealth by assigning particular portions of the aggregate to a several ownership."

This, in my opinion, undoubtedly refers to the actual division by metes and bounds by an agreement between the parties. "Ekathesa Vyavasthapanam" can be only by a voluntary act of the parties and not by a compulsory alienation. Even then it requires the restriction of the ownership of each member in the entirety of the property to particular portions of the aggregate so as to constitute several ownership. This has no reference even to a mere division of the right without division of the property. Undoubtedly as the Privy Council pointed out in *Girja Bai* v. *Sadashiv Dhundiraj*[1], there are texts of Viramitrodaya and others which recognise the division of the right without the division of the property by a unilateral declaration or by "buddhivisesha". The other passages to which reference was made in the course of the arguments from Jimuthavahana's Dayabagha, Smritichandrika page 12 and Viramitrodaya do not at all support the argument that without an intention to divide on the part of the member, a division in status, can be brought about merely because either his share is crystallised or his interest was alienated whether the alienation is voluntary or even if it be involuntary. It is needless to consider in detail the other texts which have been placed before us as we think that there is no foundation to support the argument of the learned counsel. I have therefore no hesitation in coming to the conclusion that the insolvency of a member does not change the status of the family. The family was not treated as divided in status notwithstanding the insolvency of the father in *Sat Narain's* case and the decree for partition provided for the discharge of joint family liabilities. (*Sat Narain* v. *Sri Kishen Das*[3].)

1. (1916) 31 M.L.J. 455 : L.R. 43 I.A. 151 : I.L.R. 43 Cal. 1031 (P.C.).
2. (1936) 71 M.L.J. 558 : L.R. 63 I.A. 397 : I.L.R. (1937) Mad. 1 (P.C.).
3. (1936) 71 M.L.J. 812 : L.R. 63 I.A. 38 : I.L.R. 17 Lah. 644 (P.C.).

It was strongly pressed before us that conversion of a member, it has been established, has the effect of severing the status of that member separating him from the family and that that analogy should be applied to the case of insolvency also. I do not think that the analogy holds good as the effect of conversion is to change the religion of the co-parcener and it would be impossible to allow him to continue to be a member of the family sharing the worship and the food and the other amenities of the members of the family. I do not think that by such an analogical reasoning the principle can be extended to the case of insolvency.

It only remains to state my conclusions in order to avoid any confusion.

(1) A co-parcener of a joint Hindu family governed by Mitakshara obtaining in the State is entitled to alienate his undivided share either in the whole of the property or in a certain specific item of the property or even the whole of a specific item. In all such cases the only right which the alienee acquires is to stand in the shoes of his vendor and to work out his rights by a suit for partition and in such a suit, if without prejudice to the rights of the other members of the family, it is possible to have the share alienated allotted to the alienor, it may be allotted to the alienee in the right of the alienor. The alienee has to bear the proportionate share of the common burden of the family proportionate to the value of the share alienated to him.

(2) Where an alienation is made by a father or manager of a joint Hindu family and if either the alienation is fully supported by necessity or supported by necessity except to a small extent, the alienation has to be upheld.

(3) If, however, the alienation made by the father or manager of a joint family is supported only by partial necessity, the alienee would be entitled in a suit for partition instituted either by him or by other coparceners, impugning the alienation to have the alienor's share allotted to him and also to have the binding portion of the consideration distributed equally having regard to the interest of the alienor and the value of the property alienated.

(4) If the non-alienating coparcener challenges the sale made by the father or manager of the joint family property on the ground that it is not binding on him but institutes a suit only to recover his share in the property alienated thereby admitting the right of the alienee to the other share in that property, and if it is found that the alienation is supported by partial necessity, the common burden discharged from and out of the consideration should be distributed proportionately in the same suit on the principle of *Vadivalam* v. *Natasam*[1].

(5) If the alienation whether made by a father or manager or by any other coparcener, though purporting to be for value, is in fact a device to make a gift and not a transfer for consideration, the alienation would not defeat the right of the other coparceners to take the property by survivorship in case of death of the alienor. A non-alienating coparcener is not otherwise entitled to dispute the adequacy or fairness of the consideration for the sale by a coparcener and his only right is to insist that the property alienated should bear the proportionate share of the common burden on the family.

(6) Neither the alienation of the entirety of the interest of a co-parcener nor an adjudication of a co-parcener as an insolvent would have the effect of disrupting the status of the family.

(7) The share or in other words the fraction of the share which the alienee acquires is unalterably fixed on the date of the alienation and is not subject to fluctuation either by subsequent births or deaths in the family and in all respects his rights must be determined and equities worked out as on the date of the alienation.

It follows that whether the general principle of the right of an alienee to work out his rights in a partition suit or whether the principle in *Vadivalam* v.

1. (1912) 23 M.L.J. 256: I.L.R. 37 Mad. 435.

Natasam[1] is applied to the facts of this case, the third defendant is entitled to have a condition imposed that the plaintiff should not recover possession of his half share of the property without payment of a half share of the binding consideration, *viz.*, Rs. 3,511. The decree, therefore, of the Courts below must be modified by adding that before the plaintiff recovers possession of the property he must deposit into Court a sum of Rs. 3,511 and the plaintiff would thereafter be entitled to recover possession of the property with mesne profits as from the date of deposit. The money so deposited shall be paid over to the third defendant. The appellant is entitled to his costs throughout.

Panchapagesa Sastri, J.—Where a sale of joint family properties is challenged by the non-alienating coparceners as not binding on their shares, they have been allowed to bring a suit for partition of the alienated items only and recover their shares therein leaving the share of the alienating coparcener in the possession of the alienee. This is an exception to the rule against partial partition. This right has been recognised by the Full Bench decision in *Ibuamsa Rowthan* v. *Thiruvenkatasami Naick*[2] as 'a long-established rule'. The judgment in that case rejected the argument that the recognition of this right of partial partition is logically inconsistent with and trenches upon the alienee's equity to have his rights worked out in a general partition suit so as to enable him to claim, if possible, an allotment of the whole of alienated items or as much of it as may be possible to the share of his alienor. Its real justification is its obvious convenience and simplicity of procedure and the undesirability of compelling the other co-parceners to bring a complicated suit for general partition involving other properties of the family as well. Its legal basis is rested upon the doctrine that it is open to the non-alienating co-parceners to affirm the transaction and to recognise it as valid to the extent of the share of the alienor. Such affirmance of the transaction and the recognition of the partial validity must necessarily postulate a legal fiction of a prior division, *quod* the alienated items, between the alienating coparcener and the others and the transfer of the share of the divided member of the alienee. A suit for partial partition brought by the non-alienating coparceners must therefore be deemed in law to contain these averments necessitated by the above legal fiction. The plaintiffs cannot be allowed to challenge the same, as the suit itself must be deemed to have been founded on the basis of such a fiction. They cannot be permitted to advance any arguments contrary to such implied averments, at any rate during the progress of such a suit. The alienee, if he is not satisfied with the share of the alienor which is left undisturbed in his hands, and, is anxious to claim an allotment of the whole of the items, or a greater portion of it, must work out his rights in his own suit for a general partition. Where, however, he does not bring such a suit the rights of all the parties have to be adjusted by the Court within the framework of the suit for partial partition brought by the non-alienating co-parcener. Even in such cases a portion of the consideration of the sale of joint family properties may be found to be binding on the family. What then is the rule to be adopted in adjusting the equities in cases of that kind? This was the only question raised before me in hearing this appeal while sitting singly and the main and important question argued before the Full Bench.

In my humble judgment the most equitable and eminently just rule will be to distribute the binding portion of the consideration proportionately over the whole of the property alienated and make the non-alienating coparceners liable for payment of their proportionate shares of such binding portion of the consideration as a condition precedent for the recovery of their proportionate shares in the alienated properties. The plaintiff has by his deliberate choice adopted the exceptional remedy of a suit for a partial partition of the alienated items alone. He cannot complain if within the framework of such a suit as brought by him the Courts proceed to adjust the equities of the alienee to as large an extent as possible. There is no sound reason or valid justification for relieving him of his obligation to bear

1. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
2. (1910) 20 M.L.J. 743 : I.L.R. 34 Mad. 269 (F.B.).

his proportionate share of the common liability or burden even in such a suit, just as he would have to share the same if the suit is to be one for general partition. The rights of parties should be adjusted in the same manner as if this suit was a suit for a general partition, the alienated properties alone being regarded as the whole of the joint family properties belonging to the family and available for division. This, I understand, to be the real principle underlying the decision in *Vadivalam* v. *Natasam*[1]. This rule has not only the merit of simplicity but works out the equity in as large a measure as the framework of the suit permits. The contrary view laid down in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] really ignores the equities in favour of the alienee. Moreover, it is obviously incomplete as it does not provide for a case where the portion of the consideration found to be binding exceeds the real value of even the alienor's share; nor is it logical in leaving the entirety of the alienor's share undisturbed in the hands of the alienee where the binding portion of the consideration is less than its value. The later decision in *Venkatapathi Naicker* v. *Pappiah Naicker*[3] removes the first of the anomalies pointed above and provides for the excess being made a charge on the shares of the non-alienating coparceners. Both the decisions, however, throw the entirety of the common burden exclusively and in the first instance on the alienor's share alone. The exoneration of the shares of the non-alienating coparceners from the burden of this common liability is not called for by any compelling principle of law or justice In my opinion, the decision in *Vadivalam* v. *Natasam*[1] is right and should be followed. This view of the law is in consonance with the progressive need of the times and really enhances the value of a coparcener's interest in his hands.

I agree that the decree of the Court below must be modified as per the judgment of my learned brother, Satyanarayana Rao, J.

In this view it is not necessary to deal with the other questions of law about which able and learned arguments were forcefully advanced by Mr. Venkatasubramanya Aiyar.

Viswanatha Sastry, J.—I do not rehearse the facts set out in the judgment of my learned brother. I wish at the outset to express my appreciation of the assistance given to us by counsel, particularly the learned counsel for the respondent, the merit of whose erudite and instructive argument is no way diminished because it has not succeeded. We were invited during the prolonged hearing of this appeal to examine many texts of Hindu Law and many more decided cases but I think that such an examination is of value only if it yields some general principle or test which may be of service in deciding other cases. To refer to all the texts and cases cited would be an endless and unprofitable task. Out of deference, however, to the respondent's argument which covered a wide field, I shall briefly sketch the background against which the case should, in my opinion, be viewed.

Unlike decided cases, the textual authority of the Mitakshara is both clear and logical. All the property of a joint Hindu family is held in collective ownership by all the co-parceners and none is the owner of a part. Family property is alienable only with the consent of all the co-parceners, at any rate, of all those who are in a position to consent. An alienation may be made by one member if the other co-parceners are incapable of giving assent as for instance, by reason of their minority and the alienation is for purposes designated by the texts as proper. In no other case is an alienation of family property allowed, the idea being that no individual member of the family has an interest of his own to convey. The family property is held in trust for the members then living and thereafter to be born. Mitakshara I-1-Pl. 28 to 30. An alienation in violation of the above rule must be treated as *non est* according to the Smritichandrika. The right of an individual member in family property can be ascertained and fixed by his exercising the right to

1. (1912) 23 M.L.J. 256: I.L.R. 37 Mad. 435.
2. (1899) I.L.R. 23 Mad. 89,
3. (1928) 55 M.L.J. 489: I.L.R. 51 Mad. 824.

partition and getting a separate allotment for himself. A partition or *vibhaga* is the adjustment of the ownership of many persons in the aggregate wealth by assigning particular portions to separate ownership. Mitakshara Chapter I-1-P1. 4. Though the respondent's effort was to keep us within the bounds of textual authority and incidentally within the grip of the joint family system, I consider it is permissible for us, consistently with precedents, to minimise the inconveniences of a personal law based on texts which have long outlived the epoch in which they were promulgated.

According to the early English lawyers and Judges until a partition took place, the co-parceners continued

"seized by one and the same title of the whole and every portion of the family property alike."

The English notion that joint tenants are seized of the land *per mie et per tout* was imported into the discussion of the rights of co-parceners in a Mitakshara joint family and alienees from them. (*Baluswami Iyer* v. *Lakshmana Iyer*[1].) The right of a co-parcener in family property springs from that fact of his birth in the family and ceases on his death. On the death of one co-parcener, the others take by the *jus accrescendi* that in which they had a common interest and a common possession during the lifetime of the deceased, *Katama Natchiar* v. *Rajah of Sivaganga*[2] and *Ramanna* v. *Jagannatha Rao*[3]. A co-parcener has not such an ascertained share in joint family property as is capable of being absolutely or indefeasibly alienated by him at his pleasure. The graphic description of the mode of enjoyment of joint family property given in 1866 by Lord Westbury in *Appovier* v. *Rama Subba Iyer*[4] is too familiar to require quotation. The members of the family have a right to be housed and maintained conformably to the means of the family and their respective needs and requirements. They cannot complain of inequality of enjoyment. A co-parcener has a right to enforce a partition and reduce to his exclusive ownership and possession that part of the family property which might fall to his share. At such a partition there must be a stock-taking of the whole of the existing assets and liabilities of the family; provision must be made for the discharge of common debts, encumbrances and other liabilities; and the rest of the family property should be divided among the coparceners. (*Sat Narain* v. *Sri Kishen Das*[5].)

The joint family system has however been invaded and rudely shaken by doctrines inspired by English legal conceptions and the demands of a progressive society. The Courts too have lent a helping hand to influences that have undermined the integrity of the joint family. The law relating to self-acquisitions as developed by Courts has responded to the desire of the members of the family to secure their own economic freedom and betterment by individual effort and exertion. The rigour of the Mitakshara rule has been relaxed. The emergence of "managership" of a joint family with incidental right to full possession and control of the family properties and the right to represent the family in suits and transactions affecting the family property, was not based on textual authority. It arose out of the ascription of a corporate character to the joint family and the consequent need for joint action of the members through an accredited representative. To this extent, the rights of individual co-parceners were subordinated to the conception of a corporate entity, represented by its manager. The recognition of wider powers in the manager of a trading family was in response to the needs of modern trade and commerce. The equal rights of co-parceners in family properties and their right to interdict alienations by their father were undermined by an appeal to the sanctity attached by Hindu Law to the obligation of a debt. The Courts allowed creditors of a father to attach and sell family property for the satisfaction of their debts not tainted by illegality or immorality. The further step was to recognise the father's power to effect a sale of family property so as to

1. (1921) 41 M.L.J. 129 : I.L.R. 44 Mad. 605, 626 (F.B.).
2. (1864) 9 M.I.A. 539, 611.
3. (1941) 2 M.L.J. 58 : L.R. 68 I.A. 75 : I.L.R. (1942) Mad. 886 (P.C.).
4. (1866) 11 M.I.A. 75, 89.
5. (1936) 71 M.L.J. 812 : L.R. 63 I.A. 38 : I.L.R. 17 Lah. 644 (P.C.).

bind his sons' interests for discharging his debts, the consent of the sons being presumed or implied. Gautama ruled that a father's debts incurred in the course of a business involving speculation need not be paid by the sons out of joint family properties but Courts do not now regard such debts as illegal or immoral. The next step was to enable a creditor to attach and sell the interest of a co-parcener not being the father. The further step was to uphold the right of the co-parcener himself to alienate his interest in joint family property for value. That the law has been progressively developed by Courts to suit changing conditions in different parts of the country will be evident from the fact that a voluntary sale by a co-parcener of his interest in joint family property does not convey any interest to the vendee under the Mitakshara law as administered in Bengal, Bihar and Uttar Pradesh while the opposite result has been arrived at in Madras and Bombay.

One convenient method of getting round textual authority prohibiting alienation of property was by saying that the prohibition was merely moral rather than legal, the distinction between the "vinculum juris and the vinculum pudoris" not being always kept in view by the texts. The alienation may be improper but not devoid of legal efficacy. *See* Sir W. Macnaughton's Hindu Law, page 6 cited with approval in *Balwant Singh* v. *Rani Kishori*[1]. The Mitakshara prohibution against alienation of joint family property was substantially abrogated by an appeal to equitable principles. English lawyers like Colebrooke, Ellis and Strange, who had to interpret and administer Hindu Law had a special solicitude for the purchasers for value in good faith and their views profoundly influenced the growth of Hindu Law in the first half of the last century. Sir Thomas Strange relying on Colebrooke's opinion observed :—

> "In favour of a *bona fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be done, out of the share of him, with whom he had dealt; and for this purpose, a Court would be warranted in enforcing a partition."

Strange's Hindu Law (1st Edition), Vol. I, page 179. Colebrooke previously had said :—

> "Equity would require redress to be awarded to the purchaser by enforcing a partition of the whole or sufficient portion of (family property) so as to make amends to the purchaser out of the vendor's share."

Strange's Hindu Law (1830), Volume II, page 349. This is the origin of the purchaser's equity, which powerfully reacted on the proprietary rights of co-parceners and their right to alienate their interest in joint family property. As early as *Suraj Bunsi Koer* v. *Sheo Persad Singh*[2], the Judicial Committee recognised the serious inroads that had been made into the Mitakshara joint family system and said :—

> "Since the decision, however, of the cases of *Virasvami Gramani* v. *Ayyasvami Gramani*[3] it has been settled law in the Presidency of Madras that one co-parcener may dispose of ancestral undivided estate even by contract and conveyance to the extent of his own share; and *a fortiori* that such share may be seized and sold in execution for his separate debt . . . . . There can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition."

In *Syed Tuffuzzool Hossein Khan* v. *Rughoonath Pershad*,[4] the Judicial Committee referred to a co-parcener's undivided interest as something "specific, existing and definite." In *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[5] and *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*,[6] Bhashyam Iyengar, J., held that a co-parcener had a "present vested interest" in joint family property transferable in whole or in part for value and that the transferee also took a present vested interest in the property. A further breach in the joint family system was made when the law of insolvency provided that the share of a co-parcener in joint family

1. (1899) L.R. 25 I.A. 54 : I.L.R. 20 All. 267 (P.C.).
2. (1880) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).
3. (1863) 1 M.H.C.R. 471.
4. (1871) 14 M.I.A. 40 at page 50.
5. (1902) I.L.R. 25 Mad. 690 (F.B.).
6. (1904) I.L.R. 27 Mad. 162 (F.B.).

property vested in the Official Receiver or Assignee of his adjudication. This was on the footing that it was property over which the insolvent had a power of disposal. As the law stands to-day, a co-parcener can claim at any given moment of time that he has a definite share in the family property which he can alienate for value without reference to the other co-parceners or which a Court can attach and sell for his personal debts. He has an interest in property which, though it may fluctuate in extent from time to time, is yet definite and ascertainable at any given moment, as for instance by a demand for partition or by an alienation, with this difference that an alienation *per se* does not affect a severance of the alienor from the joint family, *Narayana Sah* v. *Sankar Sah*[1], *Baluswami Iyer* v. *Lakshmana Iyer*[2]. The theory of the Mitakshara that an individual co-parcener has nothing like a share or specific interest in joint family property and that the alienation of such a property by a co-parcener without the consent of the others is void and of no effect whatever has been substantially abrogated by the decisions of Courts. What Jimutavahana did for Bengal in the 13th century was partially achieved by the Courts in Madras and Bombay in the 19th century. Nilakanta, though a pronounced follower of Vignaneswara, practically accepted the Dayabhaga view of the nature and extent of a co-parcener's right in joint family property. Indeed Vignaneswara himself recognised that property had its basis only in popular recognition.

What are the rights of an alienee of joint family property from a co-parcener and how are they to be worked out? Have the other co-parceners any and if so, what rights against the alienee and has the alienee any rights as against them? In the ensuing discussion, it is assumed that the alienation is for value but not for a purpose binding on the family. The texts of Hindu Law do not throw any light on these questions for they do not contemplate an alienation of joint family property by a co-parcener otherwise than for family necessity or benefit. Judge-made law has been hesitant with a gradual advance and an occasional set-back. The working out of the alienee's equity has caused not a little embarrassment in the logic of the law, which has to be gathered from decisions in which the principle has been progressively but not always consistently formulated. The touching refrain of the respondent's argument was :—

"Over-rule me if you please, but at least say something logical and consistent with the Mitakshara doctrine."

Bluntly I say it is not possible to find a logical solution of an illogical problem. As early as *Gurulingappa* v. *Nandapa*[3] Farran, C.J., had stated :—

"The position of the purchaser of the interests of a Hindu co-parcener in part or the whole of a joint estate is very anomalous. It is impossible to work out his rights on an exact logical basis. As it is an equity, it must be worked out on equitable principles."

The decisions on this topic are so many and so various that it will be impossible to ignore or reconcile all of them. The legal theory is that an alienee steps into the shoes of the alienating co-parceners; that he can have no higher rights than the alienor, that he must take the interest conveyed subject to the same limitations and conditions as the alienor, and that except through and in the right of the alienor, he cannot have any claim against the joint family. The stream can rise no higher than its source. This is good logic but law and logic soon parted company. The offspring became more powerful than its parent and the alienee was held entitled to enforce his rights in a manner not open to his alienor. A co-parcener's right to partition dies with him. His alienee for value or a purchaser of his interest at a court sale after his death pursuant to a prior attachment, could work out his rights by a partition against the surviving co-parceners even after the death of the vendor or judgment-debtor as the case may be. A contract for valuable consideration entered into by a co-parcener for the sale of his interest in joint family

1. (1929) 57 M.L.J. 685 : I.L.R. 53 Mad. 626 (F.B.). 1 at 14 (F.B.).
2. (1921) 41 M.L.J. 129 : I.L.R. 44 Mad. 605.
3. (1896) I.L.R. 21 Bom. 797 at 805.

property has been held to be specifically enforceable against the surviving co-parceners after his death. *Bhagwan Bhau* v. *Krishnaji*[1] and *Ramappa* v. *Yellappa*[2]. It is not therefore quite accurate to say as Bakewell, J., did in *Manjaya* v. *Shanmugam*[3] that the right of an alienee from a co-parcener is a mere right *in personam*. The alienating co-parcener is entitled to a partition *rebus sic standibus* as on the date of suit. The alienee's right, however, is to the share to which the alienor was entitled on the date of alienation according to *Chinnu Pillai* v. *Kalimuthu Chetti*[4]. An alienor's share is liable to diminution by a decrease of the family assets as well as by an increase in the number of co-parceners but the alienee's right has been held not to be affected by these changes. In *Brij Narain* v. *Mangala Prasad*[5], Lord Dunedin after observing that this branch of Hindu Law was "illogical" and "anomalous" gave the following caution :—

> "In such a matter as the present, it is above all things necessary *stare decisis*, not to unsettle what has been settled by a long course of decisions."

The respondent's invitation to us was to follow Vignaneswara wherever he led us ignoring decisions which have held the field for many years.

When a co-parcener alienates an item of family property, the bargain between the parties determines the interest intended to be conveyed to the vendee. In the case of a Court sale of the interest of a co-parcener, the purchaser obtains what was intended to be sold. What the alienee gets is the totality of what he bargained for and not a mere fractional share. The alienee, however, cannot trench upon the rights of the non-alienating co-parceners. In accordance with the maxim *sic utere fuo ut alienum non laedas* his rights must be enjoyed in such a way as not to interfere with the rights of others. The right of the alienee though fixed as between himself and the alienor and in that sense unchanging, has to be enclosed wholly or partially within the circumference of the alienor's right, that is to say, within the share which on a general partition would have been allotted to him. The respondent's advocate relied on the following passage in page 489 of Mayne's Hindu Law (11th Edition) :—

> "The right to get properties which fell to an alienor at a partition is the primary and indeed the only right which the alienee has, though the Court may at partition allot to him the properties which he purchased at a Court sale or at a private sale if it could be conveniently done."

It is argued that all that an alienee gets is a right to sue for partition standing in the shoes of the alienor and no other right, legal or equitable, as against family properties or the non-alienating co-parceners. It is not correct to regard an alienee as a transferee of a mere right to sue. Such a transfer would indeed be opposed to law. There is a transfer of property to the alienee with an incidental right of suit, if necessary, for perfecting his title. It may be granted that an alienation *per se* does not convey an unimpeachable or indefeasible title to the alienee. He gets a right, or an equity if you like, to stand in the vendor's shoes and work out his rights at a partition of the family estate. At such a partition, an alienee has the right to ask that *ceteris paribus* the share of the alienor should be so made up as to embrace wholly or so far as is possible, the property purchased by him. The Court is bound to grant such a relief to the alienee and if it can be done without injustice to the other co-parceners, it will so marshall the properties as to allot the property alienated or as much thereof as possible, to the share of the alienor. This right of the alienee can be worked out in any suit to which he is a party and which is of sufficient amplitude to allow a general stock-taking of the family assets as a whole and an adjustment of the rights of the co-parceners. It is not necessary for an alienee to sue as a plaintiff himself, *Ramaswami Aiyar* v. *Venkatarama Aiyar*[6] and *Krishnamurthi* v. *Nataraja*[7].

The preponderance of opinion in this Court has been that an alienee from a co-parcener does not become a tenant-in-common with the other co-parceners and

1. (1920) I.L.R. 44 Bom. 967.
2. (1927) I.L.R. 52 Bom. 307.
3. (1913) 26 M.L.J. 576 : I.L.R. 38 Mad. 684.
4. (1913) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
5. (1923) 46 M.L.J. 23 : L.R. 51 I.A. 129 : I.L.R. 46 All. 95 (P.C.).
6. (1923) 44 M.L.J. 208 : I.L.R. 46 Mad. 815.
7. (1948) 1 M.L.J. 430, 434.

is not entitled to joint possession with or get mesne profits from them. *See* paragraph 389 of Mayne's Hindu Law (11th edition). The view of the learned editor of Mayne in paragraph 391 is that section 44 of the Transfer of Property Act as amended in 1929 confers on an alienee from a co-parcener even these rights. By reason of the omission of the word "Hindu" in section 2 of the Act as amended section 44 now applies to Hindus as well. The section would apply to an alienee from a sharer in a Dayabhaga family whose members hold the common property in quasi severalty, each member being entitled to a defined share which he could dispose of as he likes. In the face of the saving words

> "subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred,"

it may be difficult to construe section 44 of the Transfer of Property Act as abrogating the decisions of this Court denying joint possession and a right to an account of profits to an alienee from a co-parcener. It does not, however, follow that an alienee from a co-parcener has no right in or to any property but only a personal remedy against the alienor. Even when the alienee does not get an allotment of the property alienated to him at a general partition, he would be entitled to the property allotted to the vendor for his share in substitution for the property alienated to him. (*Issaku* v. *Seetharama Raju*[1].) What an alienee gets is therefore a right in property carrying with it an equitable right to avail himself of the rule of substituted security. The right to get compensation or substituted property in case the property sold is lost for want of title in the vendor was recognised by the early texts.

I have said that the rights of the alienee are not co-extensive with these of the alienor. On the principle that he who seeks equity must do equity, it has been held that an alienee could, in no event, get more than what he bargained and paid for. If he purchases, say, the share of one of four undivided brothers in a property and at the time of the partition, the existing co-parceners are only two the alienee cannot claim a half share because his vendor would be entitled to such share. If however, there is an increase in the number of co-parceners, say, to six, the share of the alienee would be 1/6 according to *Rangaswami* v. *Krishnayyan*[2]. The reason was thus stated :—

> "In the case before us, the delay in suing for partition is imputable to the purchaser and as new co-parceners have meanwhile come into existence, the share to be awarded to him must diminish *pro tanto* on the simple ground that what he could lawfully purchase was an uncertain interest to be computed into a definite share with reference to the co-parcenary at the time of partition."

Good logic as far as it goes. But the necessity felt by Courts to promote certainty of title to property and to protect the interests of purchasers for value, forced the law into a procrustean bed where it has been lying uneasily for a long time. In *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[3], Bashyam Ayyangar, J., observed obiter that *Rangaswami* v. *Krishnayyan*[2] was wrongly decided. So great was the hold of that eminent Judge on the legal minds of his generation that his dissent soon became the unanimously accepted law of the Court in *Chinnu Pillai* v. *Kalimuthu Chetty*[4]. This case decided that an alienee of the interest of a co-parcener was entitled to enforce his claim against the share to which the vendor was entitled at the time of the alienation. Perhaps Bashyam Ayyangar, J., in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[3], unduly emphasised some expressions occurring in the judgments of the Judicial Committee in *Deendayal* v. *Jugdeep Narain*[5] and *Suraj Bansi Koer* v. *Sheo Prasad Singh*[6] and built up a theory of which their Lordships of the Judicial Committee were not the authors. The question is not whether the deductions of the learned Judge were justified in 1902 but whether his conclusions have not become the law of this Court accepted and acted upon as such for nearly half a century.

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1. (1947) 2 M.L.J. 166, 175, 176: I.L.R. (1948) Mad. 454 (F.B.).
2. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
3. (1902) I.L.R. 25 Mad. 690 (F.B.).
4. (1913) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
5. (1877) L.R. 4 I.A. 249 : I.L.R. 3 Cal. 198 (P.C.).
6. (1880) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).

The actual decision of the Full Bench in the *Ayyagiri case*[1] was that the death of the alienating co-parcener before a partition did not result in an extinction of the interest of the alienee by the operation of the law of survivorship. But Bashyam Iyengar, J., covered a much wider ground. Similarly the actual decision in *Chinnu Pillai* v. *Kalimuthu Chetty*[2] was that a mortgage executed by a co-parcener would operate on his share of joint family property as it stood at the date of the mortgage and that the security would remain undiminished in spite of a subsequent increase in the number of co-parceners. But the learned Judges went on to affirm the views of Bhashyam Iyengar, J., in the *Ayyagiri case*[1], in their entirety. The result, though anomalous and illogical, was that an alienee from a co-parcener supposed in theory to stand in the shoes of the alienor having no right of his own except through his alienor as against the family became a sharer in joint family property with a fixed and independent right of his own enforceable against the other members of the family. In *Sithapathiar* v. *Sivanarayana*[3], Jackson, J., sitting with Mockett, J., sought to effect a reconciliation between the Mitakshara doctrine refusing absolutely to recognise an alienation of joint family property by a co-parcener without family necessity and the rule of equity recognising the rights of purchasers for value. The learned Judges held that though the fractional share of an alienee from a co-parcener was fixed as on the date of alienation the properties in which the alienee was entitled to share were those existing at the time of the partition.

If the position of the alienee *vis-a-vis* the non-alienating co-parceners has to be fixed as on the date of the alienation and his rights worked out as if there had been a partition on that date, the family hotchpot would have to be filled up retrospectively, it may be, years after the alienation. If there were a number of alienations in successive years by the same or different co-parceners, each one of the alienees can claim to have a separate hotchpot hooked to the date of his alienation, though at the date of the actual partition the existing hotchpot might be merely empty. These difficulties which were real enough did not appeal to Leach, C.J. and Horwill, J., who, in *Dharmarao* v. *Bapanayya*[4] assembled an imposing array of decisions in which *Chinnu Pillai* v. *Kalimuthu Chetty*[2] had been referred to and apparently followed and silenced the criticism of Jackson, J., without an independent consideration of the problem of the alienee's equity. The reasoning of Krishnan and Curgenven, JJ., in *Venku Reddi* v. *Venku Reddi*[5] would seem to support the view of Jackson, J., that partition quantifies the fractional share of the alienee from a co-parcener and that the alienation is subject to the liabilities of the joint family. The learned Judges who decided *Dharmarao* v. *Bapanayya*[4] did not, I humbly venture to think, realise the injustice done to the non-alienating co-parceners by their decision. An alienee from one of the co-parceners was allowed at a partition to retain an one-third share of the whole family estate, while the non-alienating co-parcener got one-ninth of the estate (or perhaps a little more) as the result of the birth of other co-parceners before partition. This was the consequence of fixing the alienee's rights on the basis of *Chinnu Pillai* v. *Kalimuthu Chetty*[2]. If that were the law, the alienating co-parcener has the best of both worlds. He enjoys the advantages of a divided status by realising the value of his share and of the membership of a joint family with its attendant benefits. Equity is not an one-way traffic. In the name of equity it is not permissible to sacrifice the interests of non-alienating co-parceners to satisfy the claims of an alienee from one co-parcener who knows that he is purchasing something which is subject to the rights of the other co-parceners and the liabilities of the joint family. It is one thing to say that the fractional share of the alienee is fixed as on the date of the alienation and it is a different thing to say that the fraction must be related to the family estate as it stood at the date of alienation and not at the date of partition. If the matter were *res integra* the inclination of my

1. (1902) I.L.R. 25 Mad. 690 (F.B.).
2. (1913) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
3. (1932) 64 M.L.J. 66 : I.L.R. 56 Mad. 534.
4. (1941) 1 M.L.J. 15.
5. (1926) 52 M.L.J. 387 : I.L.R. 50 Mad. 535 (F.B.).

mind would be to agree with the reasoning of Jackson, J. The majority of my learned brethren, however, are of the opinion that it is too late in the day to question the authority of *Chinnu Pillai* v. *Kalimuthu Chetty*[1] in the sense in which it was understood in *Dharmarao* v. *Bapanayya*[2] and I do not wish to mar this pleasing unanimity by giving expression to views considered to be heretical. It is a case of *stare decisis*. I realise that in a branch of law affecting titles to property it is more important that the applicable rule of law be settled than that it be refashioned on absolutely logical lines. The respondent's Advocate hopes that the ghost of *Rangaswami* v. *Krishnaien*[3] which was buried forty years ago may walk again, nay, he anticipates a flesh and blood resurrection. All that I say is that such miracles, if they happen, will reduce transactions affecting property to a mere gamble.

An alienation of family property by a co-parcener be he the manager or father, can be set aside *in toto* at the instance of the other co-parceners if the alienation is not for family necessity or for discharging untainted antecedent debts. Even where the necessity for a sale is partial, that is to say, where the consideration raised or applied for meeting necessary purposes is less than the price, the sale can be set aside as a whole as not justified. *Krishna Das* v. *Nathuram*[4], *Niamat Rai* v. *Din Dayal*[5] and *Gauri Shankar* v. *Jiwan Singh*[6]. The property is recovered for the family and if it is found that part of the consideration paid by the alienee has been applied in discharge of debts or liabilities binding on the family, justice and equity require that the family should refund that portion of the consideration to the alienee. *See* sections 64 and 65 of the Contract Act and section 41 of the Specific Relief Act. Otherwise, the Court would be helping the family to enrich itself unjustly at the expense of the alienee. Even if the property is recovered by the family, it is open to the alienee to sue for partition of the family estate and for allotment of the alienated property to him in the right of his alienor and as part of his alienor's share of the family properties. He can even set up this right as a defence to a suit by the non-alienating co-parceners for recovery of their shares of the alienated property, if the suit is comprehensive enough to permit a stock-taking of the entire family estate. *Ramaswami Aiyar* v. *Venkataramana Aiyar*[7], *Krishnamurthi* v. *Nataraja*[8] and *Dharma Rao* v. *Bapanayya*[2].

An alienee's suit to work out his equity must be one for partition of the entire family property; and not for partition of any specific item or any specific interest. This is because the alienee has no connection with the joint family and can seek relief only in the right of the alienating co-parcener. A co-parcener suing for partition must sue for partition of the entire divisible family estate. Ordinarily a suit for partial partition does not lie among co-parceners. An alienation by a co-parcener of his interest in family property does not put an end to the co-parcenery or effect a severance. *See* Mayne's Hindu Law (11th Edition), Paragraph 389, page 490. It has been laid down in many decisions of this Court starting from *Venkatachalla* v. *Chinnayya*[9], that it is open to co-parceners objecting to an alienation by the father or manager to bring a suit for their share of the property alienated. *Iburamasa Rowthan* v. *Thiruvenkatasami Naick*[10]. This kind of suit is different in its scope and effect from a suit for partition so-called. For instance, the inference of an unequivocal intention to separate from the family and become divided in status which a suit for partition gives rise to, does not follow in a suit for recovery of a co-parcener's share of alienated property. *Ramasubbaraya* v. *Ganapathiraju*[11]. The dispute in the latter case is confined to the property alienated and is between the alienee on the one hand and the non-alienating co-parceners on the other. The co-parceners may wish to remain undivided and at the same time may be unwilling to allow

1. (1913) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
2. (1941) 1 M.L.J. 15.
3. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
4. (1926) 52 M.L.J. 720 : L.R. 54 I.A. 79 : I.L.R. 49 All. 149 (P.C.).
5. (1927) I.L.R. 8 Lah. 597 (P.C.).
6. (1927) 53 M.L.J. 786 (P.C.).
7. (1923) 45 M.L.J. 203 : I.L.R. 46 Mad. 815.
8. (1948) 1 M.L.J. 430, 434.
9. (1870) 5 M.H.C.R. 166.
10. (1910) 20 M.L.J. 743 : I.L.R. 34 Mad. 269, 272, 275 (F.B.).
11. (1940) 2 M.L.J. 1021 : I.L.R. (1940) Mad. 405, 410, 412.

the family property to be in the possession of a stranger claiming under a title which is not valid as against the family. The non-alienating co-parceners may, in effect, say to the alienee :—

"Though we have a right to recover the entire property alienated still as you have paid the vendor the price of the property we consent to your retaining his share. Give us our shares of the property. We agree to have a partition as if this were the only property to be divided."

The suit is in effect one for a partition of the alienated property alone and the decisions allow such a suit. The jural basis of this rule has been clearly and concisely stated in the judgment of my learned brother Panchapagesa Sastri, J., and I respectfully agree with him. The question is whether in such a suit the alienee has an equity to compel the plaintiffs to refund a part of the binding consideration proportionate to the share of the plaintiffs in the alienated property.

The decisions of this Court are conflicting. The appellant relies on the decision in *Vadivalam* v. *Natasam*[1], which though not noticed in the 10th and 11th editions of Mayne's Hindu Law, has nevertheless been accepted and acted upon in subsequent decisions of this and the other High Courts. This decision dissents from *Marappa Gaundan* v. *Rangaswami Gaundan*[2], which is relied upon by the respondent. The decision in *Venkatapathi* v. *Pappiah Nayakar*[3] follows the earlier decision and lays down three propositions which will be noticed presently. All the three decisions profess to deal with the mode in which an alienee's equity has to be worked out.

The respondent's learned Advocate took high ground and maintained that so far as joint family was concerned, an alienee from a co-parcener has no legal existence and he must work out his rights only through his alienor and that in a suit for a general partition. The alienor and *a fortiori* his alienee can only sue for a partition of the entire estate, partial partition not being allowed to them by law. It is only in such a suit that the alienee's equity can at all be enforced and the alienated property or as much of it as possible allotted to the share of his alienor. In a suit by non-alienating co-parceners for recovery of their share of the alienated property, without any intention to become divided from the alienor, the alienee's equity does not come into the picture at all. Even if it be assumed that he has any claim or equity against the joint family when a suit for recovery of the property alienated is brought, it must be regarded as satisfied by the value of the vendor's interest which the alienee is allowed to retain. *Marappa Gaundan* v. *Rangaswami Gaundan*[2]. The share of the property which an alienee is allowed to keep is joint family property and an alienee who is allowed to keep it cannot, under any circumstance, claim further equity against the family. So ran the argument.

With due respect to the learned Judges who decided *Marappa Gaundan* v. *Rangaswami Gaundan*[2], I fail to understand how a vendee from a co-parcener can be said to be a "volunteer". A person who purchases from one who has a right to sell his interest, whatever it is and pays value for it is in no sense a "volunteer". The learned Judges further ruled

"that if the vendee wishes to stand by a sale which is valid only partially, such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for return of the price paid, on the ground that the consideration for the payment failed".

This is with all respect begging the question. If the non-alienating co-parceners exercise their right of interdiction and sue for recovery of the entire property alienated, they can, as already stated, be required to pay the alienee the whole of the consideration found to be binding on the family. If they sue for a general partition, the alienee can work out his equity and might get an allotment of the entire alienated property for himself in the right of his alienor. If they seek recovery of their share of the property, they treat the alienation as valid to the extent of the alienor's share and seek a partition, confined to the alienated property and as against the alienee. It has

1. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
2. (1899) I.L.R. 23 Mad. 89.
3. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad 824.

been held in some decisions that the non-alienating co-parceners can recover their shares of the alienated property as their own separate property. *Chinna Sanyasi* v. *Surya Razu*[1] and *Kadegan* v. *Periya Munuswami*[2]. There are however difficulties in the way of accepting this position. The recovery by the non-alienating co-parceners of their shares of the property alienated would not prevent the alienee from bringing a suit for general partition and asking that the entire property should be allotted to him in the right of his alienor. If so, the property recovered retains its character as joint family property. (*Gurlingapa* v. *Nandapa*[3], *Kandaswami* v. *Velayudha*[4] and *Ramasubbaraya* v. *Ganapatiraju*[5].) An alienee from a co-parcener does not as already stated become a tenant-in-common with the other co-parceners. At the same time, a right of action has been conceded to the non-alienating co-parceners to recover only their share of the alienated property in decisions too numerous to be now upset. The position is no doubt illogical but a Court need not throw up its hands in despair and leave the alienee helpless. If on account of the limited scope of the suit instituted by the non-alienating co-parceners and by reason of it comprising only the alienated property to the exclusion of other family properties, an alienee is unable to have his equity worked out fully, there is no reason why his equity should not be reognised to the limited extent to which the suit permits. There is no reason why the non-alienating co-parceners who recover their shares, should escape liability for a proportionate part of the common burden which the alienee has discharged. They cannot seek the advantages of a partition confined to the alienated property without submitting to an apportionment of a common liability discharged by the alienee. If the alienee receives or recovers the binding part of the consideration from the non-alienating co-parceners, it may be a *pro tanto* satisfaction of his claim against joint family and he cannot thereafter sue for a partition and allotment of the entire properties alienated to him. The learned Judges in *Marappa Gaundan* v. *Rangaswami Gaundan*[6] claimed that their decision would

> "tend to act as a check on a disposition on the part of speculative persons to enter with some co-parceners into transactions calculated to affect the rights of other co-parceners who are not parties thereto."

It may be argued that their view seriously impairs the commercial value of the proprietary rights of co-parceners by tying them up to the joint family too closely and by seriously jeopardising the rights of alienees from them. The remedy by way of damages or otherwise against the alienor pointed out by the learned Judges may not always be effective or fruitful.

Reference may here be made to *Rottala Ranganathan Chetty* v. *Pulicat Ramasami Chetty*[7] where this Court held that it was not permissible for a co-parcener to evade the prohibition of Hindu Law against gifts of joint family property by professing to make an ostensible sale when the price was wholly and obviously inadequate. The Court ruled that in such a case

> "the transaction could be upheld against the family to the extent of the alienor's interest in the joint family properties only to the extent of the value received."

The alienor's interest was treated as having been sold in part and gifted as to the rest.

This decision was followed in *Venkatapathi* v. *Pappiah Nayakar*[8] and the Court enunciated three propositions of which the first was as follows :—

> "Where the whole of the consideration for a sale even after being allotted to the alienor's share only, is grossly inadequate, the whole transaction may be set aside making the consideration proved a charge on the family property."

When is the consideration "grossly inadequate" when it is merely "inadequate" and when it is low but not "inadequate" are questions which do not admit of an easy answer as the decision itself shows. The quantum of the consideration for a sale is a matter between the vendor and the vendee. This rule is, to some extent, displaced in the case of a proposed sale of joint family property for, the Hindu

1. (1882) I.L.R. 5 Mad. 196.
2. (1903) 13 M.L.J. 477.
3. (1896) I.L.R. 21 Bom. 797.
4. (1926) 51 M.L.J. 99 : I.L.R. 50 Mad. 320.
5. (1940) 2 M.L.J. 1021 : I.L.R. (1940) Mad. 824.
405, 410, 412.
6. (1899) I.L.R. 23 Mad. 89.
7. (1903) I.L.R. 27 Mad. 162.
8. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad.

law prohibits a gift by a co-parcener under the guise of a sale. I confess to considerable difficulty in understanding the precise sense in which the learned Judges in *Venkatapathi* v. *Pappiah Nayakar*[1] use the expression "consideration" occurring in each of the three propositions enunciated by them. It is clear however that they are not using the expression in the same sense throughout. When they refer in the passage above cited to the whole of the consideration for a sale, I take it that they refer to the price paid by the vendee. When they refer to the "consideration proved" being made a charge on the family property they must refer, I think, to the consideration paid by the vendee and proved to be binding on the joint family. If so, the first proposition is a mere re-statement of *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[2]. When the non-alienating co-parceners sue for recovery of only their share of the properties sold they in effect admit that *quoad* the share of the alienor the sale is supported by adequate consideration and is not gift. The second proposition runs thus :—

> "where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share but is less than the value of such share, the transaction may be upheld as a sale of the alienor's share only and the other members who question the transaction are entitled to recover their shares of the property without being subject to any other equity. In such a case if the members are divided and the alienor leaves other heirs than the members who question the transaction, he or his heirs may have right to contribution."

Here the learned Judges use the word "consideration" as meaning the binding part of the consideration, for only if it is so understood does the reference to an "equity" become intelligible. The reference to a right of contribution in the second sentence of the above extract also confirms this view. In so stating the rule the learned Judges followed the decision in *Marappa Gaundan* v. *Rangaswami Gaundan*[3]. I am unable, with great respect, to accept the second proposition as a correct statement of the law. Why should the alienor's share in the hands of the alienee be entirely appropriated to the satisfaction of family debts and the non-alienating co-parcener's share escape liability? Surely the alienor is not a trustee for sale of his interest in joint family property and for the application of the proceeds for the discharge of family debts, thereby relieving the other co-parceners of their share of the burden. If the non-alienating co-parceners, instead of seeking a general partition and the adjustment of all rights and liabilities and equities between them and the alienor sue for recovery only of their shares of the alienated property, why should they get their shares free of any obligation to pay their proportion of the family debts discharged by the alienee. If they want a piece-meal partition taking advantage of an exceptional procedure sanctioned by decisions, why should they not be made to submit to a piece-meal adjustment of equities, when they recover their shares of the alienated property? By suing for a partition and recovery only of their shares of the alienated property, they affirm the alienation to the extent of the alienor's share as a proper and valid transaction and invite an adjustment of the equities arising in favour of the alienee from the partial setting aside of the alienation. The third proposition was in these terms :—

> "Where the consideration proved exceeds the value of the alienor's share the transaction may be upheld as a sale of the alienor's share only and for the excess, a charge may be given over the shares of the other members."

Here again, the word "consideration" must be taken to be used in the sense of binding consideration. This is an extension of the principle of *Marappa Gaundan* v. *Rangaswami Gaundan*[3]. Here again, the value of the share of the alienor is wholly appropriated to the binding portion of the consideration and to the extent the latter exceeds the former, a charge is allowed on the shares of the other members. It is not explained why there should be a piece-meal adjustment of equity in this case in contravention of the rule laid down in *Marappa Gaundan* v. *Rangaswami Gaundan*[3], but not in the case covered by the second proposition. Unless it is assumed, I see no reason in law or justice for so doing, that the alienating co-parcener's interest alone is liable for the payment of family debts and that an alienee who purchases

1. (1928) 55 M.L.J. 489: I.L.R. 51 Mad. 824.
2. (1903) I.L.R. 27 Mad. 162.
3. (1899) I.L.R. 23 Mad. 89.

that interest can therefore have no higher rights it is not possible in my opinion to support the second and third propositions in *Venkatapathi* v. *Pappiah Nayakar*[1]. No principle of justice or equity entitles the non-alienating co-parceners to throw the entire burden of the family debt on an alienee from a co-parcener and secure an immunity for themselves at his expense. The same principles must govern private sales and sales *in invitum*. If there is a court-sale of a co-parcener's interest there is no warrant for dissecting the sale in order to find how much of it is a gift and how much of it is a sale.

The decision in *Vadivalam* v. *Natasam*[2] presents, on the whole, not only a simple and workable rule but also a just and equitable solution of the problem of the alienee's equity. This decision besides being that of two distinguished Hindu Judges of this Court familiar with Hindu Law and the needs and conditions of modern joint family life has been uniformly followed. The learned Judges held that where an alienation of family property by a co-parcener is only partially justified by family necessity and the non-alienating co-parceners sue for recovery of their share of the property, they must bear their share of the family debts and liabilities discharged by or out of the consideration paid by the alienee.

"According to accepted equitable principles, in the absence of anything appearing to the contrary the consideration for the sale must be distributed over the whole property sold in proportion to the value of each part (page 437). . . . . . It cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases. It is equally clear that as between the vendor and the vendee in the absence of any contract to the contrary the consideration for a sale will be apportioned between all the items of the property sold in cases of dispute (page 438)."

This passage came in for strong criticism at the hands of the respondent's advocate who maintained that a co-parcener has no share in any property of the family according to *Appoovier* v. *Ramasubba Iyer*[3]; that an alienee from a co-parcener merely got an uncertain fluctuating and contingent interest described vaguely as the alienee's "equity" as opposed to a present legal vested interest; and that his only right was to sue for a partition of the family estate and work out his rights, such as they are, in that suit. He argued that the basic assumption of the learned Judges in the above passage was untenable. Earlier in this judgment I have endeavoured to show that the share of co-parcener in joint family property is predicable with sufficient definiteness at any given point of time and is also transferable for value. The alienee acquires a right to property and not merely a right of action. In *Suraj Bansi Koer* v. *Sheo Prasad Singh*[4] the Judicial Committee categorically asserted that,

"a co-parcener may dispose of ancestral undivided estate even by contract and conveyance to the extent of his own share".

When the learned Judges observed that a co-parcener could alienate his share for any consideration he pleased they were, in my opinion, primarily thinking of the nature of the consideration, as for instance, his own personal needs as distinguished from family necessity. There was no question of inadequacy of consideration for the sale in that case. As regards the vendors' own share the Court must hold him to his sale without being concerned with the merits of his bargain. When the non-alienating co-parceners sue only for recovery of their share of the alienated property *ex concessi* they treat the alienation as valid and proper *quoad* the share of the vendor and no question of adequacy of consideration would arise. If a co-parcener alienates his interest for a cheap price it is his own affair. The alienee cannot escape liability for his just share of binding family debts existing at the date of alienation (*Venku Reddi* v. *Venku Reddi*[5]) and there is no prejudice to the other co-parceners. We may leave out of account cases where the consideration for the sale is so illusory as to make the transaction a virtual gift of the alienor's

1. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.
2. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
3. (1866) 11 M.I.A. 75.
4. (1880) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).
5. (1926) 52 M.L.J. 387 : I.L.R. 50 Mad. 535 (F.B.).

interest. In all other cases the consideration for the sale, the binding as well as the non-binding part must be distributed over the whole property sold in proportion to the share of the alienor and the non-alienating co-parceners when the latter sue for recovery of their shares of the property sold.

It is said that the learned Judges who decided *Vadivalam* v. *Natasam*[1], were influenced by a view of the law which has been held to be incorrect in this Court. In joint family property, the Mitakshara recognised only a common ownership in all the co-parceners while the Dayabaga recognised an ownership in severalty. Deviating from the main streams there was a cross-current of decisions in Madras to the effect that an alienee from a co-parcener became a tenant-in-common with the non-alienating co-parceners *quoad* the property alienated. It started feebly in *Venkatachalla* v. *Chinnayya*[2], gathered momentum when Bashyam Ayyangar, J., joined it in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[3] and swelled in volume with the adherence of Krishnaswami Ayyar, J., in *Chinnu Pillai* v. *Kalimuthu Chetty*[4], Benson and Miller, JJ., in *Srinivasa Sundara Thathachariar* v. *Krishnaswami Ayyangar*[5] and Benson and Sundara Ayyar, JJ., in *Subba Row* v. *Anantanarayana Aiyar*[6]. Sadasiva Ayyar, J., also was to mingle with this cross-current in *Soundararajan* v. *Arunachalam Chetty*[7]. When the Full Bench granted a decree for specific performance of a contract for sale of the share of a co-parcener in a specific item of joint family property, it practically acted upon this view. Indeed Kumaraswami Sastri, J., went even to the length of observing that a co-parcener has a share in each item of the joint family property. (*Baluswami Iyer* v. *Lakshmana Iyer*[8]). The position of the members of a Mitakshara joint family had been assimilated to some extent to that of English co-parceners or joint tenants by the decisions of the Judicial Committee. (*Bahu Rani* v. *Rajendra Bakhsh*[9] and *Jogeswar Narain* v. *Ramchandar Dutt*[10]). According to the English Law, a conveyance or an agreement to convey his interest by one of the joint tenants operates as severance. A mere attachment of the share of the co-parcener in execution of a decree for his personal debts prevents the operation of survivorship. So also an alienation for value in Madras and Bombay. In *Deendayal* v. *Jagdeep Narain*[11], the Judicial Committee applied the analogy of the purchase of a partner's interest in execution of a decree against him to the case of a purchase of a co-parcener's interest. Once it is accepted that the interest or share of the alienee is to be fixed with reference to the position of the vendor *vis-a-vis* the other co-parceners as on the date of alienation unaffected by fluctuations due to subsequent births and deaths and increase or decrease in the family assets, the view of the learned Judges of this Court in the cases above cited cannot be said to be unreasonable. The preponderance of authority in this Court, however, is against the view that an alienee from a co-parcener is in the position of a tenant-in-common with the other co-parceners. *See* Mayne's Hindu Law (11th Edition), pages 488-491. In this corner of Hindu Law one is frequently obliged to seek refuge in the well-known shelter provided by Lord Halsbury and say that the law is not logical. There is however nothing in the judgment in *Vadivalam* v. *Natasam*[1] to suggest the learned Judges rested their decision on the dissentient view of the minority regarding the position and rights of an alienee from a co-parcener. There the non-alienating co-parcener claimed a partition of only his share of the alienated property. The limited equity recognised in *Vadivalam* v. *Natasam*[1] should, in justice, be available to the alienee if, owing to the restricted nature of the suit for partition by the non-alienating co-parceners, it is not possible to have a stock-taking of the family assets and liabilities and the

1. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 485.
2. (1870) 5 M.H.C.R. 166.
3. (1902) I.L.R. 25 Mad. 690 (F.B.).
4. (1913) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
5. (1912) 15 I.C. 354.
6. (1912) 23 M.L.J. 64 (70).
7. (1915) I.L.R. 39 Mad. 159 (F.B.).
8. (1921) 41 M.L.J. 129 : I.L.R. 44 Mad. 605 (F.B.).
9. (1933) 64 M.L.J. 555 : L.R. 60 I.A. 95 I.L.R. 8 Luck. 121 (P.C.).
10. (1896) L.R. 23 I.A. 37 : I.L.R. 23 Cal. 670 (P.C.).
11. (1877) L.R. 4 I.A. 247 : I.L.R. 3 Cal. 198 (P.C.).

allotment of the entire property to the alienee in the right of his alienor. If a suit by the non-alienating co-parceners to set aside an alienation is of sufficient amplitude to admit of a consideration of the rights of the co-parceners in the entire joint family estate, the Court will do complete justice to the alienee and allow him to retain the entirety of the alienated property or as much of it as possible consistently with the rights of the other co-parceners. (*Ramaswami* v. *Venkatarama*[1], *Krishnamurthi* v. *Nataraja*[2] and *Dharma Rao* v. *Bapanayya*[3]).

Reference was made to the well-known established rule that a Court has no power to make a new bargain between the parties to a sale by splitting the land sold into parcels, evaluating them separately, assigning one of the parcels to the purchaser and directing a refund a part of the price proportionate to the share in the property sought to be recovered. (*Nagappa Chettiar* v. *Brahadambal Ammani*[4].) In my opinion, this contention has no force for this is not a case where as between the vendor and the vendee a different contract with terms differing from the sale deed executed by the one to the other, is sought to be enforced. This is a case where third persons having an interest in the property sold seek to have the sale set aside to the extent of their interest in the property and ask for a partition only of their share in the property. In such a case the Court can grant relief to the plaintiffs on condition of their restoring the benefit received by them out of the consideration paid by the vendee. In innumerable cases where the Court has set aside a father's, manager's, guardian's, trustee's or widow's sale in excess of the powers of the alienor, it has granted equitable relief to the plaintiff on condition of a refund of that part of the consideration which is found to be binding on the estate.

The principle of section 15 of the Specific Relief Act as applied in *Baluswami Aiyar* v. *Lakshmana Aiyar*[5] to a suit for specific performance of a contract for sale entered into by the manager of a joint Hindu family without legal necessity was next referred to. This Court held that the vendee was not entitled to specific performance of the contract as a whole but only to a conveyance of the share his vendor had at the time of the contract, on payment of the entire consideration. On this analogy it was suggested that an alienee of joint family property must rest content with his vendor's share and has no further claim to a refund of a part of the consideration. Here a title which has already passed under the sale deed duly executed and registered is sought to be displaced in part by third person who were not parties to the contract of sale. This is not a case where a contract of sale is sought to be enforced by the vendee against a vendor with imperfect title. Principles of equity which prevent unjust enrichment of one party at the expense of another and compel restitution of or compensation for a benefit not intended to be gratuitously conferred are here invoked.

I am in respectful agreement with the decision in *Vadivalam* v. *Natasam*[6] which was referred to with apparent approval by the Judicial Committee in *Masit Ullah* v. *Damodar Prasad*[7]. In *Srinivasa Aiyangar* v. *Kuppuswami*[8], Wallis, C.J., referred to the well-known equity of an alienee from a co-parcener to a refund from the non-alienating co-parceners of a proportionate part of the consideration paid by the alienee and applied in discharge of binding family debts, as a condition of the sale in his favour being set aside at the instance of the other co-parceners. The other decisions of this Court in which the same principle has been accepted are *Adinarayana Reddi* v. *Subbarayulu Reddi*[9], *Sitharam Naidu* v. *Balakrishna Naidu*[10] and *Subbayya Mudaliar* v. *Thulasi Mudaliar*[11]. If this conclusion deals a blow at the tottering joint family structure there will not be many to shed a tear over the result. I shall now advert to another branch of the argument of the learned counsel for

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1. (1923) 45 M.L.J. 203 : I.L.R. 46 Mad. 815.
2. (1948) 1 M.L.J. 430, 435.
3. (1941) 1 M.L.J. 15.
4. (1935) 68 M.L.J. 452 : L.R. 62 I.A. 70 : I.L.R. 58 Mad. 350 (P.C.).
5. (1921) 41 M.L.J. 129 : I.L.R. 44 Mad. 605 (F.B.).
6. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
7. (1926) 51 M.L.J. 792 : L.R. 53 I.A. 204 : I.L.R. 48 All. 518, 522 (P.C.).
8. (1920) I.L.R. 44 Mad. 801, 802, 803.
9. A.I.R. 1927 Mad. 1116 (2).
10. (1913) 26 M.L.J. 604.
11. (1914) M.W.N. 16.

the respondent which to a large extent, contradicts his submissions on the main part of the case directed to demolishing the authority of *Vadivalam* v. *Natasam*[1]. The suit as framed in one for a general partition by a son against his father impleading also the alienees from the latter and in my opinion, the rights of the alienees to any equities they may have can be satisfactorily worked out in this suit. It is said however, that here is a fatal objection to this course, by reason of the adjudication of the father as an insolvent and the administration of his estate by the Official Receiver. The adjudication coupled with the administration of the estate in insolvency effected a division between the insolvent debtor and his son and therefore, the suit cannot be viewed as one for a partition of joint family estate but only as a simple suit for recovery by the son of his half-share of an item of joint family property improperly alienated by his father. As the alienee stands in the shoes of the alienor and uses the alienor's right to claim a partition as a lever against the other co-parceners if the alienor has lost his right to a partition, the alienee cannot enforce his equity against the other co-parceners by a claim for partition. The equity of the alienee is an *inter partes* equity as between the alienor and the alienee and not against the joint family. The liquidation of the alienor's right in the joint family property, by the administration in insolvency put an end to the alienee's equity which was thereafter available only against the Receiver in insolvency. As a debt or liability of the alienor it has been wiped off by his adjudication in insolvency and his subsequent discharge. This was how the argument was presented to us. In my opinion, it cannot be accepted. The alienee has a legal right against his vendor to the property alienated and an equitable right against the non-alienating co-parceners to have the alienated property allotted to him in the right, of his vendor. Neither the death nor the subsequent insolvency of the alienor affects the vendee's right as against the members of the family and he can work out his right of a partition of the family estate. The insolvency has no effect on the rights of the alienee whose title accrued prior to the filing of the petition for adjudication. The alienee has a right of his own, the extent of the right being determined with reference to the interest of the vendor in the joint family property as it stood on the date of the alienation. As already pointed out the alienee can assert his right as a defence to a suit for partition, if the suit is comprehensive enough to allow a general stock-taking of the family assets.

Another phase of the argument was that the adjudication of the father effected a crystallisation of his interest in joint family property and the Receiver in whom that interest vested took the place of the father. The vesting of the entire share of the father in the Receiver and the administration of that interest by him effected a severance between the father and son and thereafter there could be no suit for a partition of the joint family estate by the son against the father. According to the Mitakshara "*Ekadesavyavasthapana*" or the establishment of the sole right of one person in displacement of the right of all in the "*Dravya Samudaya*" or aggregate wealth constitutes partition. But the partition contemplated by Vignaneswara is obviously a division by metes and bounds as the result of a consensus among coparceners or in the exercise of the father's power of effecting a partition. Moreover the intention to become divided must be present and manifested, separate allotments being evidentiary of that intention. According to Vignaneswara partition created a title in each of the erstwhile co-parceners by its own effect and operation while Jimuthavahana asserted that partition was merely the external manifestation of a pre-existing right in the sharers. I have already stated that Nilakanta though in the main a follower of the Mitakshara school, differed from Vignaneswara as regards the conception of the interest of a co-parcener in joint family property and was inclined to accept the theory of Jimuthavahana *see* Mayukha Daya Nirnaya, section 1, pl. 6, Setlur's translation page 63. This was the basis of the distinction drawn by English lawyers between the joint tenancy of the Mitakshara family and the quasi severalty of the Dayabhaga family. According to the later writers of

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1. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.

the Mitakshara school, a severance in status resulted from a unilateral declaration of his intention to become divided on the part of a co-parcener. The textual authority is reviewed in *Kathesumma* v. *Beechu*[1]. The respondent's advocate states that the "*Ekadesavyavasthapana*" of the Mitakshara which is the essence of a division is brought about by the adjudication of a co-parcener as an insolvent and the administration of his estate by the Receiver. He maintains that a division in status can be brought about not only by the intention or volition of a co-parcener or, by an agreement between the co-parceners concerned but also by the operation of external factors. Reference was made to the following passage in the judgment of the Judicial Committee in *Venkatapathiraju* v. *Venkatanarasimharaju*[2].

"A division of right or severance of the joint status may result, not only from an agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate".

In my opinion, the "act or transaction" in this passage has reference to an act or transaction of the parties, such as the expression of an intention to become divided, the institution of a suit for partition, the execution of a document with the necessary recitals, etc. It has no reference to an attachment or a Court sale of a co-parcener's interest or his adjudication in insolvency. This is made clear by the context in which the expression occurs.

It is urged that on an adjudication there is a fixation of the interest of the insolvent and the vesting of that interest in the Official Receiver and thereby a severance is effected between the insolvent and his co-parceners. If the insolvent dies, his share already vested in the Receiver does not pass by survivorship to the other co-parceners, but continued to vest in the Receiver. In *Narayana Sah* v. *Sankar Sah*[3], Wallace, J., observed that on the insolvency of a co-parcener, his entire estate or interest vested in the Receiver and was "thus lost to the family". In *Lakshmanan* v. *Srinivasa*[4], Venkataramana Rao, J., sitting as a single Judge held that the surplus proceeds of the share of an insolvent which had vested in the Official Assignee would on an annulment of adjudication consequent on a payment of the insolvent's debts in full revert to him or his heirs as separate property though *the insolvent was a member of a joint family* at the time of his adjudication. The learned Judge said :—

"If the effect of the insolvency is to divest the share of the insolvent of its character as joint amily property, it cannot regain that character as joint family property when it comes back to the insolvent on annulment."

Apart from the fact that this view has been overruled in two later decisions of division benches in *Suryanarayanamurthi* v. *Veeraraju*[5] and *Hanumantha Gowd* v. *The Official Receiver, Bellary*[6]. I am unable to agree with the reasoning. The vesting in the Receiver on an adjudication is only for the limited purpose of satisfying the creditors of the insolvent. There is no question of an intention on the part of the co-parceners to become divided, and the joint status of the insolvent is not affected. The law merely places the share of the insolvent co-parcener in the hands of the Receiver for the purpose of administration and payment of his creditors. An attachment of the right, title and interest of a co-parcener in joint family property does not effect a severance between him and the other members of the family nor does an involuntary or private sale of his entire interest have that effect. *See* Mayne's Hindu Law (11th edition), paragraph 389 and the cases cited in the footnote. An adjudication in an insolvency has no more drastic effect. The view of Ramesam, J., in *Lakshmi Achi* v. *Narayanasami Naicker*[7], that a member becomes divided if he alienates his entire interest does not, it appears to me, proceed on a proper under-

1. (1949) 2 M.L.J. 268.
2. (1936) 71 M.L.J. 558 : L.R. 63 I.A. 397 : I.L.R. (1937) Mad. 1 (P.C.).
3. (1929) 57 M.L.J. 685 : I.L.R. 53 Mad. 1, 14 (F.B.).
4. (1936) 71 M.L.J. 707 : I.L.R. (1937) Mad. 203.
5. (1946) 1 M.L.J. 103 : I.L.R. (1946) Mad. 54, 59.
6. (1946) 1 M.L.J. 247 : I.L.R. (1947) Mad. 44.
7. (1929) 57 M.L.J. 746 : I.L.R. 53 Mad. 188, 195.

standing of the observations of Bashyam Ayyangar, J., in *Ayyagiri Venkataramayya* v. *Ayyagari Ramayya*[1]. This was pointed out by the learned Judges in *Ramasubbaraya* v. *Ganapathiraju*[2]. Even according to Venkataramana Rao, J., in *Lakshmanan* v. *Srinivasa*[3] neither an adjudication of a coparcener nor an alienation of his entire interest in joint family property brings about a soverance between him and the other co-parceners. This was also the view taken in the two decisions above referred to, in which the view of the learned Judge was dissented from. With great respect however to the learned Judges who decided *Hanumantha Gowd* v. *The Official Receiver, Bellary*[4], I venture to doubt whether on the death of a co-parcener there is any "devolution" of "interest" on the insolvent within the meaning of section 28 (4) of the Provincial Insolvency Act. The dying co-parcener merely drops out or fades away and nobody steps into his place. The claims of the other co-parceners spring from the mere fact of their birth, and not from their taking the place of any particular individual. The dying co-parcener leaves no interest behind him and there is nothing to pass by devolution to his heirs or other person. It is on this ground that the widow of an undivided co-parcener is excluded from succession to his share in the Mitakshara School. It is further reason that co-parceners taking the whole estate by survivorship are not held liable for the personal debts and obligations of their deceased co-parcener. The result of this decision would be to give the Receiver the benefit of an increase in the share of the insolvent by reason of the death of a co-parcener subsequent to the adjudication while the Receiver is not affected by any debts incurred after that date by the joint family. This however does not affect the other principle underlying the decision that the adjudication of a co-parcener does not work a severance between him and the other members of the family.

On the adjudication of the father in a Mitakshara family, his power to sell his sons' interest for antecedent debts not tainted by illegality or immorality, vests in the Official Assignee under section 52 (2) of the Presidency Towns Insolvency Act. It was so held by the Judicial Committee in *Sat Narain* v. *Srikishen Das*[5]. Decisions of this Court held that the law was the same under section 28 of the Provincial Insolvency Act. *Sankaranarayana* v. *Rajamani*[6] and *Seetharama Chettiar* v. *Official Receiver, Tanjore*[7]. Though this line of authority was reversed by *Ramasastrulu* v. *Balakrishna Rao*[8] and *Virupaksha Reddi* v. *Siva Reddi*[9], it has been restored with retrospective effect by the enactment of section 28-A of the Provincial Insolvency Act in 1948, *Official Receiver of Ramnad* v. *Devarayan*[10]. But during all this time nobody ever suggested that the adjudication of a father effected a severance in status between him and his sons and for that reason his power to sell his sons' interest for his own untainted debts was at an end and could not thereafter vest in the Official Receiver. Realising this difficulty, the respondent's advocate stated that a severance took place only when the estate of the insolvent had been administered by the Receiver. What about a case where the insolvent has no assets and there is no question of any administration of his estate by the Official Receiver. There may be a joint family consisting of persons who are joint in food and worship without having or holding any property. *Janakiram* v. *Nagamony*[11]. In such a case it must be conceded that the adjudication of one of the members does not work a severance, for there is no property to vest in the Receiver and the object of the insolvency is merely to enable the debtor to start a new life unhampered by debts. Again what is to happen during the time the administration of the estate is in progress and the properties are being sold one by one? Is the division to be postponed to the closure of the insolvency proceedings or is it to be said *quoad*

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1. (1902) I.L.R. 25 Mad. 690 (F.B.).
2. (1940) 2 M.L.J. 1021 : I.L.R. (1940) Mad. 405, 410, 412.
3. (1936) 71 M.L.J. 707 : I.L.R. (1937) Mad. 203.
4. (1946) 1 M.L.J. 247 : I.L.R. (1947) Mad. 44.
5. (1936) 71 M.L.J. 812 : L. R. 63 I.A. 38 : I.L.R. 17 Lah. 644 (P.C.).
6. (1923) 46 M.L.J. 314 : I.L.R. 47 Mad. 462.
7. (1926) 51 M.L.J. 269 : I.L.R. 49 Mad. 849.
8. (1942) 2 M.L.J. 457: I.L.R. (1943) Mad. 83 (F.B.).
9. (1943) 2 M.L.J. 87 : I.L.R. (1944) Mad. 212.
10. (1948) 2 M.L.J. 415.
11. (1925) 50 M.L.J. 413 : I.L.R. 49 Mad. 98, 115-6.

the item sold by the Receiver there is a division? Again even if the administration is complete what is to happen to properties that are exempt by statute from vesting in the Receiver or to trust properties in which the family of the insolvent has a right to trusteeship. It is well settled that the devolution of trusteeship held by a family depends upon the status of the members of the family at the time when the succession opens. *Thandavaroya* v. *Shanmugha*[1] and *Ramanathan Chetty* v. *Murugappa Chetty*[2]. There cannot be an administration by the Receiver in respect of these properties and it cannot be contended that the insolvent becomes divided even with reference to them. It follows from these considerations that neither the adjudication nor the administration of the insolvent's estate by the Receiver affects a severance between the insolvent and his co-parceners. Under the Hindu Law, the intention to become divided is essential to create a severance. There is no warrant either in the texts or in the decisions or in common-sense for saying that a man becomes divided against his own wishes and the wishes of his co-parceners if he happens to be adjudicated an insolvent.

The respondent's learned advocate called in aid the anology of the conversion of a co-parcener to another faith and the decisions which have held that a conversion effects a severance. The distance between a conversion and an adjudication of a co-parcener as an insolvent can be measured only in miles. An insolvent co-parcener does not cease to be a member of the family and may often continue joint in food and worship with the other co-parceners either by choice or by necessity. A convert is regarded as dead and even obsequial rites are directed to be performed for him by the texts of Hindu Law. Act XXI of 1850 removes the disqualication arising from apostacy and relieves against the forfeiture of the convert's interest in joint family property. In *Abraham* v. *Abraham*[3] Lord Kingsdown observed that conversion dissolved the family tie and severed the convert from the family and compared the situation arising from a conversion to that of a severance by partition. In their attempt to work out the result of Act XXI of 1850 and fit it into the framework of the joint Hindu family system of holding property, the Courts assimilated the effect of a conversion to a partition. The ancient law-givers, however, never countenanced such a theory. In my opinion, the analogy of a conversion is an unsafe basis for the argument that in Hndu Law a severance in status might be brought about even against the wishes of the co-parceners or without the volition or intention of a co-parcener to become divided.

For these reasons, it must be held that the suit for partition was maintainable by the son against the father notwithstanding the latter's adjudication in insolvency.

I agree with the conclusion of my learned brother Satyanarayana Rao, J., as regards the decree to be passed in this appeal.

Raghava Rao, J.—The question in this case is whether the decrees of the courts below are correct which granted the plaintiff his half share of certain property alienated by his father the first defendant to the third for Rs. 13,400 although, in fact, worth Rs. 16,400 without imposing a condition on the plaintiff that he should before getting his half of the property pay one-half of the sum of Rs. 7,022 representing that portion of the consideration of Rs. 13,400 paid which was binding on the joint family of the plaintiff and the first defendant. The Courts below granted the decree without imposing such a condition in the view that they took that the case fell within rule 2 of the three rules laid down by a Bench of this Court (Kumaraswami Sastri and Ramesam, JJ.) in *Venkatapathi* v. *Pappiah*[4] for working out the equities between the alienee from a co-parcener on the one hand and the non-alienating co-parcener or co-parceners on the other in a suit by the latter for setting aside the alienation found to be only partially supported by consideration binding on the joint family. The decree is assailed in this Court on the ground

1. (1908) 19 M.L.J. 59 : I.L.R. 32 Mad. 167.
2. (1903) 13 M.L.J. 341 : I.L.R. 27 Mad. 192, 200.
3. (1863) 9 M.I.A. 195, 237 (P.C.).
4. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.

that it is opposed to *Vadivalam* v. *Natasam*[1], which, in the submission of the learned counsel for the appellant (third defendant) enunciates the correct law. It is not disputed that, if that is so, this appeal must prevail; but what is contended for the respondent is, *firstly*, that an earlier decision of a Bench of this Court (Subramania Aiyar and Boddam, JJ.) in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] lays down the correct law and ought not to have been dissented from in *Vadivalam* v. *Natasam*[1] inasmuch as the grounds of dissent are opposed to fundamental principles of Hindu law and cannot be countenanced, and, *secondly*, that no equity can be claimed by the third defendant who has had and is to have the share of the first defendant actually worth Rs. 8,200 when the binding portion of the consideration for the sale of the whole of the property is only Rs. 7,022 and that this case is governed, as rightly held by the Courts below, by rule 2 of the rules laid down in *Venkatapathi* v. *Pappiah*[3]. The first of these lines of argument for the respondent is of wider ambit than the second and entails that the suit should be decreed in accordance with the decision in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] without any consideration of equities in favour of the appellant while the second assumes that such equities can be considered but to no good purpose for the appellant inasmuch as no equity can be held to arise on the facts of this case which attract the second of the rules in *Venkatapathi* v. *Pappiah*[3].

Before dealing with the arguments advanced before us with reference to the three reported decisions, I shall clear the ground by making a few preliminary observations.

In the course of a highly learned and strenuous argument, on his own side occupying practically three days out of nearly five of the total hearing, Mr. Venkatasubramania Aiyar dwelt at considerable length against a whole current of more or less settled authority of this Court on the effect of adjudication and administration in insolvency as bringing about a division in status between the person adjudged insolvent and other members of his family, a question which, in my opinion, does not fall to be considered at all in view of the basis of his client's plaint which, on the contrary, avers jointness continuing even after the adjudication down to the date of the suit. No cause can be decided except *secundum allegata et probata* and the question cannot therefore be entertained. Why Mr. Venkatasubramania Aiyar dwelt on the question at all, it was not easy for me to see either for a long time but, as he explained the position in answer to a question from me at a later stage of the hearing, it was because, if his first line of argument that there were no equities to be worked out for the alienee except in a suit for general partition were to be repelled on the ground that in the present case we have a suit for such a partition,— it being immaterial whether in such suit the alienee is defendant or plaintiff—no such suit bringing about a partition in status for the first time between the alienor and his co-parceners could be postulated here, because long long ago there had already been a division in the sense of fixation or crystallisation of the first defendant's share effected by his adjudication in insolvency. With such fixation or crystallisation, it was contended by the learned counsel that the appellant even if he had any equities was to have worked them out from the standpoint of their ultimate destination by looking up to the Official Receiver in whom the insolvent's share had become vested and proceeding against him. The contention, however, overlooked that the equities claimable by the alienee as standing in the shoes of the alienor had become vested in him by an alienation prior to the insolvency and would have to be worked out as against the other co-parceners and not against the alienor himself or the Official Receiver as representing his estate in insolvency. The contention also overlooked that now that the insolvency is at an end, there can be no objection, even on the assumption that insolvency means division and that the

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1. (1912) 23 M.L.J. 256: I.L.R. 37 Mad. 435.
2. (1899) I.L.R. 23 Mad. 89.
3. (1928) 55 M.L.J. 489: I.L.R. 51 Mad. 824.

present suit is for general partition as between tenants-in-common subject to what has taken place in insolvency, to the working out of equities as between the plaintiff and the third defendant in respect of the abovementioned item.

Again, there were repeated asseverations of anxiety before us from the learned counsel for the respondent during the argument to re-open the Full Bench ruling in *Chinnu Pillai* v. *Kalimuthu Chetti*[1] and rehabilitate the earlier Full Bench ruling, that is, the one in *Rangaswami* v. *Krishnayyan*[2]. Counsel went so far as to maintain that this Full Bench of five Judges had been constituted only because in the opinion of the three Judges who at an earlier stage heard this second appeal, any conflict between *Chinnu Pillai* v. *Kalimuthu Chetti*[1] and *Rangaswami* v. *Krishnayyan*[2] would have to be resolved for the disposal of this second appeal. Whether indeed the conflict between the two Full Bench decisions is one which is ever required to be resolved in view of the weight of subsequent authority in this Court applying and approving the later Full Bench decision in disregard of the earlier, which has been adverted to by a Division Bench of this Court (Leach, C.J. and Horwill, J.) in *Dharmarao* v. *Bapanayya*[3] is another matter with which I shall deal later in this judgment. The point remains that counsel was not able to make it clear how the conflict arises for a resolution in the circumstances of the present case in which no question of a diminished share for the alienee depending on subsequent births in the family arises for consideration. All that counsel could and did persist in saying was that *Chinnu Pillai* v. *Kalimuthu Chetti*[1] is a much misunderstood case in the sense that while it has only laid down that in Hindu law the alienee of the interest of a co-parcener is entitled to enforce his claim against the share to which the alienor was entitled at the time of the alienation regardless of subsequent births and deaths in the family, the decision has been however understood in later cases of this Court as authority for the position that a fractional interest in any particular item alienated stands conveyed to the alienee—a position which counsel contended would be opposed to the fundamental conception of Hindu law established by a long course of decisions, some of them of the highest authority extending over a period of well-nigh three-quarters of a century, that where a co-parcener alienates, whether his undivided share in the whole of the family property or his undivided share in certain specific family property or the whole of a specific item of the family property, in none of these cases does the alienee acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession but only an equity to stand in his vendor's shoes and to work out his rights by means of a partition. Till the equity materialises in such working out of rights by the allotment of certain specified property or properties, there can be no question, says learned counsel, of mesne profits as from the date of alienation; there is every possibility of the right to the specific item alienated in whole or in part being defeated by a subsequent partition in the family and superseded by a right to the other item or items allotted to the alienor's share at such partition or at the partition to be effected by Court in the alienee's or non-alienating co-parcener's suit for general partition, where the allotment to the alienor of the precise item alienated is found impossible; and there is every possibility of the alienee being evicted from the property alienated in a suit at the instance of the non-alienating co-parcener or co-parceners. I, for one, am prepared to proceed with the decision of this appeal on the footing that the case in *Chinnu Pillai* v. *Kalimuthu Chetty*[1] has been misunderstood in some later cases as contended by learned counsel; and that it should be understood in the manner indicated by him. As, in my opinion, rightly put in paragraph 393 at page 494 of Mayne's Hindu Law and Usage, 11th Edition, while the quantum of interest which according to the number of members of the family an alienee of a co-parcener's interest acquires by alienation is to be ascertained as on the date of the alienation, the properties of the family in which he has to get his share are as usual ascertained as on the date of the suit for partition. That

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1. (1910) 21 M.L.J. 246 : I.L.R. 35 Mad. 47.
2. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408.
3. (1941) 1 M.L.J. 15.

position is borne out by the decisions in *Venkureddi* v. *Venkureddi*[1] and *Sathapathiar* v. *Sivanarayana Pillai*[2] and cannot be and has not been disputed for the appellant either. Judging the matter from this standpoint, it makes to my mind, very little difference for the decision of this case whether *Rangaswami* v. *Krishnayyan*[3] or *Chinnu Pillai* v. *Kalimuthu Chetti*[4] declares the correct law, as it is not suggested that there has been any addition to the members of the family since the date of the first defendant's alienation. Nor is it suggested that in addition to the debt representing the binding portion of the consideration for the sale in favour of the appellant, there has been any other binding debt incurred by the first defendant since the date of the sale or that there has been any alteration of the assets and liabilities of the family notwitnstanding the first defendant's adjudication in insolvency and the administration of his estate in insolvency such as would introduoe any complication into the situation relating to the partition of the only particular item still remaining as claimed by the plaintiff. This claim of partition has to be upheld in accordance with the decision in *Sathapathiar* v. *Sivanarayana Pillai*[2] and the only question is how the equities have to be worked out in view of the partial necessity for the alienation in question which has been found by the Courts below in the present case.

It may not be out of place at this juncture to say a few words about the way in which the conflict between *Rangaswami* v. *Krishnayyan*[3] and *Chinnu Pillai* v. *Kalimuthu Chetty*[4] is dealt with in *Sathapathiar* v. *Sivanarayana Pillai*[2]. In that case the facts were as follows: the defendant was an alienee from a brother in a Hindu joint family and by virtue of the alienation the defendant got into possession of certain parcel of land. The rest of the joint family property became later dissipated and then the plaintiff, the other brother, sued for partition of that parcel. It was on those facts held by Devadoss, J., in second appeal that the plaintiff was to be non-suited because the defendant was entitled to claim the whole item for himself, as a matter of equity available to him on the date of alienation with reference to the state of family assets and liabilities then existing which was such that it would have allowed of the allotment of the whole item to the alienor's share had there been a partition then and there instead of years afterwards during which the rest of the family properties had become dissipated. This decision was reversed in Letters Patent Appeal.

It is true that in that case the conflict did not directly arise for determination as even assuming *Chinnu Pillai* v. *Kalimuthu Chetti*[4] and not *Rangaswami* v. *Krishnayyan*[3] to be correct as laying down that the share of the alienating co-parcener in the family property alienated by him ceased to fluctuate from the date of the alienation, the learned Judges there (Jackson and Mockett, JJ.) held that there was no justification for concluding that the hotchpot to be taken note of for working out the right of the alienee in a suit for partition, whether filed by him or against him later on, should be hooked to the date of the alienation and not had regard to as with reference to the date of such suit. The opinion of the learned Judges, although obiter, with reference to conflict in question reveals, if I may say so with respect, an incisive analysis by Jackson, J., of the entire case-law bearing on the point. The learned Judge in his analysis subjects to a very searching criticism Bashyam Aiyangar's opinion in the Full Bench case in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[5] on which the later Full Bench ruling in *Chinnu Pillai* v. *Kalimuthu Chetti*[4] is founded and points out how the repudiation of the much earlier Full Bench ruling in *Rangaswami* v. *Krishnayyan*[3] by the later Full Bench ruling in *Chinnu Pillai* v. *Kalimuthu Chettu*[4] is really unfounded. His Lordship points out the errors and infirmities of Bashyam Aiyangar's reasoning in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[5] and proceeds to show how from the Full Bench ruling in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[5] that the death of the alienating co-parcener does not

1. (1926) 52 M.L.J. 387: I.L.R. 50 Mad. 535 (F.B.).
2. (1932) 64 M.L.J. 66: I.L.R. 56 Mad. 534.
3. (1891) 1 M.L.J. 603: I.L.R. 14 Mad. 408.
4. (1910) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).
5. (1902) I.L.R. 25 Mad. 690 (F.B).

create any right of survivorship to the other co-parceners so as to preclude a suit for partition by the alienee after the death of the alienor, it had come to be regarded almost as a necessary corollary by White, C.J., in the Full Bench case in *Chinnu Pillai* v. *Kalimuthu Chetti*[1] that the quantum of interest which vests in the alienee is not affected by subsequent changes in the number of co-parceners. Says the learned Judge :

> " This is good logic ; but it is equally good logic to say that if the alienor only sells what he has got and no more, it follows as a necessary corollary that the interest of the alienee fluctuates. We start with the principle ' only that passed which the alienor had '. We recognise an arbitrary exception that death does not diminish the alienee's right, then we make the exception itself the principle, and turning round at that point, conclude that something passed which the alienor had not got. A vicious circle. Either view is rational, but it is impossible to pick out one of them as exclusively based either on law, or on logic."

His Lordship concludes the entire discussion with remarks to be found at page 544 of the report in these terms :

> " In my opinion the most equitable and logical view of this vexed question is that the alienor cannot part with more than he has got ; that is a basic principle which I can understand and I should have been quite prepared to hold that as the right of the alienor becomes extinct upon his death, the right of the alienee becomes extinct also. However, the contrary opinion is founded upon a long series of cases and I agree with the Full Bench in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[2], that even at that date it was too late to think of upsetting it. So the contingency of death stands as an arbitrary exception to the rule that the right is fluctuating.
>
> But I see no reason to import other exceptions, and prefer the decision of the four Judges in *Rangaswami* v. *Krishnayyan*[3] to the decision of the four Judges in *Chinnu Pillai* v. *Kalimuthu Chetti*[1]. The former decision is logical, and quite equitable, for the alienee has only himself to thank if by delaying his right to compel partition he finds his security diminished.
>
> Holding this view I find no basis for the proposition that when he does compel partition the alienee's right to the property must be worked out as from the date of the alienation . . . . ."

Whether the view thus expressed in *Sathapathiar* v. *Sivanarayana Pillai*[4] is or is not correct is a matter which may arise for determination only in another case and not, for the reasons which I shall indicate *infra*, in the present case. We have not heard any argument on this question and I do not propose to express my own opinion on it. An argument has been found unnecessary by this Bench in the circumstances of this case as will appear from a later part of this judgment ; but, it cannot, in my opinion, be maintained that if the question arose for determination in another case this Court could avoid a decision on it in the way in which Leach, C.J. and Horwill, J., made short-circuit in the case in *Dharmarao* v. *Bapannayya*[5]. There are two Full Bench decisions of equal strength in the law reports. *Rangaswami* v. *Krishnayyan*[3] and *Chinnu Pillai* v. *Kalimuthu Chetti*[1] which, undoubtedly, conflict with each other. Had the later decision been that of five Judges and not that of four as it eventually happened to be, on account of the dropping out of one of the five Judges who had been constituted into a Full Bench in that case, the matter would, of course, have been different. With two such conflicting decisions in the law reports the question is whether the conflict has not got to be resolved in a case in which it arises for resolution. The learned Judge in the case in *Dharma Rao* of *Bapanayya*[5] avoided a reference of the conflict for determination to a Full Bench of sufficient strength to overrule *Rangaswami* v. *Krishnayyan*[3] on the basis of their reasoning to be found expressed at page 18 of the report in these terms by Leach, C.J., who delivered the judgment of the Court :

> " It is said by the learned Counsel for the appellant im this case that as there are here two Full Bench decisions, each by a Court composed of four Judges, he is entitled to rely on the earlier decision, but this argument cannot be accepted because as I have already indicated this Court has held

1. (1910) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
2. (1902) I.L.R. 25 Mad. 690 (F.B.).
3. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408.
4. (1932) 64 M.L.J. 66 : I.L.R. 56 Mad. 534.
5. (1941) 1 M.L.J. 15.

that the later decision settled the law, so far as this Province is concerned. In *Balusami Aiyar* v. *Lakshmana Aiyar*[1] the question was considered by Wallis, C.J. and Oldfield and Kumaraswami Sastri, JJ. The leading judgment was delivered by Kumaraswami Sastri, J. and in it the learned Chief Justice and Oldfield, J. concurred. After referring to *Rangaswami* v. *Krishnayyan*[2] and *Chinnu Pillai* v. *Kalimuthu Chetti*[3], Kumaraswami Sastri, J. said:

'It may therefore be taken as settled that there is no fluctuation in the share to which the alienee is entitled and that his share will be the share of the vendor at the date of the alienation, subject of course to the equities in favour of the other members of the family against the transferor'.

"Other cases in which the same view has been taken are *Sivagnanam Servaigar* v. *Ramaswami Chettiar*[4], *Ganesh Rao* v. *Tulja Ram Rao*[5], *Seetaram Naidu* v. *Balakrishna Naidu*[6], *Doraiswami Sirumadan* v. *Nandisami Saluvan*[7], *Soundararajan* v. *Saravana Pillai*[8], *Subba Goundan* v. *Krishnamachari*[9], *Ramaswami Aiyar* v. *Venkatarama Aiyar*[10] and *Vasireddi Balachandrasekhara Varaprasad Bahadur* v. *Mallela Lakshminarasimham*[11].

The only dissentient note was struck in *Sathapathiar* v. *Sivanarayana Pillai*[12] which was decided by Jackson and Mockett, JJ. The decision given was in accord with *Chinnu Pillai* v. *Kalimuthu Chetty*[3], Jackson, J., in the course of his judgment in which Mockett, J. concurred, indicated a strong preference for the decision in *Rangaswami* v. *Krishnayyan*[2]. Inasmuch as *Chinnu Pillai* v. *Kalimuthu Chetti*[3] had in numerous judgments extending over a period of twenty years been accepted as settling the law, it is with great respect, difficult to understand the need for this further discussion. In view of what has gone before *Chinnu Pillai* v. *Kalimuthu Chetti*[3] must be followed and therefore the appellant's main contention must be rejected".

I am not satisfied with all respect to the learned Chief Justice that this mode of treatment of the conflict between *Rangaswami* v. *Krishnayyan*[2] and *Chinnu Pillai* v. *Kalimuthu Chetti*[3] is correct. The fact that a Full Bench decision of four judges has not been accepted by another Full Bench of four judges does not certainly show that the former has ceased to be, and that the latter has, in its place, become, binding authority on the point. Nor does the mere fact that later Divisional Benches have accepted the latter Full Bench ruling and refused to consider themselves bound by the earlier Full Bench ruling make any difference to the continuing existence of the conflict between the two Full Bench decisions unless one of them is upheld and the other overruled formally and in an appropriate manner. It may be that the latter Divisional Benches accepted the ruling in *Chinnu Pillai* v. *Kalimuthu Chetti*[3] as settling the law under the impression that it was a ruling of five Judges and not of four. The very fact that the Judgment of Krishnaswami Iyer, J., who had dropped out of the case before delivery of Judgment was published in the Law Reports along with the opinions of the four other Judges may have created that impression. The course adopted by the learned Chief Justice of the time in directing the Judgment of Krishnaswami Iyer, J., to be published in the Law Reports was itself perhaps ill-advised and certainly misleading. What his Lordship ought to have done was to constitute another Full Bench with some other Judge put in the place of Mr. Justice Krishnaswami Iyer for the re-hearing of the point referred to the original Full Bench. This the learned Chief Justice failed to do and the result is that there is a conflict still continuing in the Law Reports which is bound to be embarrassing. The learned Judges in *Sathapathiar* v. *Sivanarayana Pillai*[12] were certainly justified in their treatment of the conflict as best suited their reasoning and their judgment. They were not bound by the later Full Bench ruling which never could, or did, overrule the earlier Full Bench ruling. Whether the dissentient note struck in *Sathapathiar* v. *Sivanarayana Pillai*[12] is or is not sound in itself is a different matter. But, that it *could* well be struck by the learned Judges who decided that case does not appear to my mind to admit of any doubt. I cannot agree with the learned Chief Justice that

1. (1921) 41 M.L.J. 129: I.L.R. 44 Mad. 605 (F.B.).
2. (1891) 1 M.L.J. 603: I.L.R. 14 Mad. 408 (F.B.).
3. (1910) 21 M.L.J. 246: I.L.R. 35 Mad. 47 (F.B.).
4. (1911) 22 M.L.J. 85.
5. (1913) 26 M.L.J. 460.
6. (1913) 26 M.L.J. 604.
7. (1913) 25 M.L.J. 405: I.L.R. 38 Mad. 118 (F.B.).
8. (1916) 30 M.L.J. 592.
9. (1921) I.L.R. 45 Mad. 449.
10. (1923) 45 M.L.J. 203: I.L.R. 46 Mad. 815.
11. (1940) 1 M.L.J. 820.
12. (1932) 64 M.L.J. 66: I.L.R. 56 Mad. 534.

"inasmuch as *Chinnu Pillai* v. *Kalimuthu Chetti*[1] had in numerous judgments extending over a period of twenty years been accepted as settling the law, it is with great respect, difficult to understand the need for this further discussion."

The need was felt by the learned Judges in *Sathapathiar* v. *Sivanarayana Pillai*[2] because they felt themselves and rightly, in my opinion, free to discuss the relative merits of the two Full Bench rulings of equal strength in *Rangaswami* v. *Krishnayyan*[3] and *Chinnu Pillai* v. *Kalimuthu Chetti*[1], the conflict between which has not been so far settled by this Court. I wonder too whether any subordinate court of this State may not so long as the two conflicting Full Bench decisions prevail in the law reports without a settlement of the conflict by a fuller Bench feel free, as the learned Judges in *Sathapathiar* v. *Sivanarayana Pillai*[2] felt free, to choose for itself either the one or the other of the Full Bench decisions as it pleases. The conflict between the two Full Bench rulings is, in my opinion, one which ought to be resolved in a proper manner in a case in which the question, on which the conflict exists, actually arises for determination. As Leach, C.J. himself remarks in *Seshamma* v. *Narasimha Rao*[4],

"If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench for which the rules of this Court provide. If this course is not adopted, the Courts subordinate to the High Court are left without guidance."

So, in my opinion, if there are two conflicting Full Bench decisions of equal strength on any point, it is necessary that the conflict should be submitted to a fuller Bench for determination in any case in which the question on which the conflict exists does arise for decision. If this course is not adopted, Courts subordinate to the High Court are left without guidance as to which Full Bench ruling to follow and which to reject. Even Judges of this Court may be left with no sure guidance as to which of the two Full Bench decisions to follow and which to reject and will accordingly be inclined to feel themselves free, as did the learned Judges in *Sathapathiar* v. *Sivanarayana Pillai*[2] to choose either the one Full Bench ruling or the other as best suits their sense of reasoning with the result that confusion only becomes worse confounded. In my opinion there is no question of *stare decisis* such as precludes a consideration of the relative merits of the two Full Bench rulings by a Bench competent by reason of its numerical strength to pronounce upon such merits. *Stare decisis* in favour of *Chinnu Pillai* v. *Kalimuthu Chetti*[1] may be a good ground for such competent Full Bench overruling the decision in *Rangaswami* v. *Krishnayyan*[3]. *Stare decisis* cannot be a ground inhibiting Judges of this Court or even Subordinate Judges from choosing for themselves between *Rangaswami* v. *Krishnayyan*[3] and *Chinnu Pillai* v. *Kalimuthu Chetti*[1] unless this Full Bench or a Full Bench of at least equal strength overrules the former decision and upholds the latter. If as I presume, *stare decisis* was the consideration which influenced the learned judges in *Dharmarao* v. *Bapannayya*[5] not to refer the conflict for determination by a competent Full Bench I can only say that they failed in their duty to do so under a misconception that the principle of *stare decisis* forbade such reference. I may add that in this very case in the interests of early guidance to be afforded to subordinate courts as well as to Judges here and by way of an exception to the ordinary rule of practice that a Full Bench ought not to busy itself with answering hypothetical questions I should have possibly been prepared to entertain the question on which the conflict exists and hear arguments of counsel thereon, had my learned colleagues been clearly similarly inclined. There has been no formal reference of the question to this Bench by the Full Bench of three Judges who earlier heard this appeal and in the actual circumstances of the course which the hearing of this appeal has taken I regret that an opportunity for the resolution of the conflict has not arisen in this case.

1. (1910) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
2. (1932) 64 M.L.J. 66: I.L.R. 56 Mad. 534.
3. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
4. (1940) 1 M.L.J. 400 : I.L.R. (1940) Mad. 454 at 475 (F.B.).
5. (1941) 1 M.L.J. 15.

My regret stands further accentuated by the consideration that my learned brother, Viswanatha Sastri, J., is, on the merits of the question inclined in favour of *Rangaswami* v. *Krishnayyan*[1] in preference to *Chinnu Pillai* v. *Kalimuthu Chetti*[2] although, regarding the case as one of *stare decisis*, to use his expression,—but in my opinion with all respect wrongly so regarding the case—he has felt himself not called upon to consider the question of conflict any further and to decide in favour of *Rangaswami* v. *Krishnayyan*[1], in accordance with the inclination of his mind. I for one do not regard as heretical any expression of view in favour of the ruling in *Rangaswami* v. *Krishnayyan*[1] and against the ruling in *Chinnu Pillai* v. *Kalimuthu Chetti*[2] in the view that I have expressed that there is really no question of *stare decisis* for application in the present case. After all as pointed out in Broom's Legal Maxims (10th edition, pp. 90 and 91) the Rule of *Stare decisis* only means that where a rule has become settled law it is to be followed although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason is wanting, or although the principle and the policy of the rule may be questioned. The rule can in my opinion bear no application to a situation in which there is conflict between two Full Bench decisions of equal strength. The re-habilitation of the ruling in *Rangaswami* v. *Krishnayyan*[1] as against the ruling in *Chinnu Pillai* v. *Kalimuthu Chetti*[2], if that is going to be the result of any reference of the question to a sufficiently Full Bench for determination, will only mean the re-importation of the leaven of logic into a situation, highly illogical created by the ruling in *Chinnu Pillai* v. *Kalimuthu Chetti*[2]. If, on the other hand, the result of any such reference is to be the other way, we can then—but not till then—console ourselves with the thought that after all, law is not always logical and that what was wrongly treated as settled law had indeed become the settled law of the land so as not to imperil titles already created. Whether the result is to be one way or the other is not a matter which I can anticipate or on which I propose to express anything like a definite opinion of my own in the absence of arguments before us as to the relative merits of the two Full Bench rulings.

The next observation which falls to be made with reference to the present case is that all the three reported decisions whose mutual conflict has led to a Full Bench hearing of this appeal (the decisions in *Marappa Gaundan* v. *Rangaswami Gaundan*[3], *Vadivalam* v. *Natasam*[4] and *Venkatapathi* v. *Pappiah*[5]) related to suits simply for the recovery by the non-alienating co-parcener or co-parceners of his share or their shares of the particular item or items of joint family property alienated by a co-parcener, without a prayer for general partition and not to a suit like the one in the present case which is for a general partition after setting aside the alienation impugned. The conflict between *Marappa Gaundan* v. *Rangaswami Gaundan*[3] and *Vadivalam* v. *Natasam*[4] and between *Vadivalam* v. *Natasam*[4] and *Venkatapathi* v. *Pappiah*[5] does not, in my opinion, call for resolution in the present case in which the plaintiff has become divided from his father, the first defendant by the institution of a suit for general partition and in which the equities on the setting aside of the alienation in question must be adjusted as between the members of a divided family. It is not disputed for the respondent that the equitable principle of apportionment of a common burden over the several parcels subject thereto and belonging to tenants-in-common on which the decision in *Vadivalam* v. *Natasam*[4] rests becomes applicable in the circumstances of the present suit. There is only one item alienated by the father prior to the insolvency and the only question which calls for consideration is whether although the plaintiff and first defendant were undivided at the time of the alienation, the binding portion of the consideration for the sale of that only item still remaining to be divided is not to be apportioned as the only debt now pertaining to the family between the separated interests of the father and the son in the manner laid down in *Vadivalam* v. *Natasam*[4]. It is manifest that the

1. (1891) 1 M.L.J. 609 : I.L.R. 14 Mad. 408 (F.B.).
2. (1910) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
3. (1899) I.L.R. 23 Mad. 89.
4. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
5. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 894.

answer must be in favour of the appellant and that this is quite sufficient for the disposal of this appeal.

Support for this manner of treatment and application of the case in *Vadivalam* v. *Natasam*[1] can be found in the judgment of Jackson, J., sitting singly in *Adinarayana Reddi* v. *Subbarayal Reddi*[2]. There defendant 2, the father of defendant 3, sold to the defendant 1 the *entire family property* of himself and his son and defendant 1 subsequently sold it to the plaintiff. Rs. 300, out of the consideration for the sale was found to have gone in discharge of mortgage debts binding on the family. The suit was decreed as to the half share of the second defendant with a charge for Rs. 150 given over the half share of defendant 3. The learned Judge first observes in his judgment thus :

> "If a manager of a Hindu family sells half the family estate for justifiable necessity the benefit must be distributed over the shares of the various members. At the same time, a manager can sell his own share for what he likes.
>
> The proper course is to divide the property by metes and bounds and to allot to the other members of the family their shares charged with the amount by which they have benefited by the liquidation of debts ".

Then the learned Judge refers to *Vadivalam* v. *Natasam*[1] to the facts thereof and the decision therein and proceeds to say :

> " In the present case the property should also be divided ; and defendant (3) would be entitled to his half share of the property sold, charged with Rs. 150—the amount by which he has benefited on the discharge of the mortgages. The other half-share belonging to the second defendant must be regarded as sold to defendant 1 and ultimately to the plaintiff.
>
> The point to keep in view in working out these equities is that as regards the vendor's own share the Courts held him to his sale and are not in the least concerned with the merits of his bargain. Therefore the vendee on partition steps into his shoes. Then each share is charged with its portion of relief obtained by the transaction ".

To a case like *Adinarayana Reddi* v. *Subbarayal Reddi*[2], or like the present in which the entire family estate and all the members of the family are present before the Court, whether the suit be at the instance of the alienee as in *Adinarayana Reddi* v. *Subbarayal Reddi*[2] or at the instance of the non-alienating co-parcener as here the application of *Vadivalam* v. *Natasam*[1] is simple and easy. In such a case, the actual division by metes and bounds of the property sold, with charge given over the share of the non-alienating co-parcener for a proportionate share of the consideration proved to be binding is beyond doubt the proper mode of adjustment of equities which gives effect to the two principles of distribution of a common burden over all the shares of the co-parceners and the right of any co-parcener to sell his own share for what he likes, to use the language of the learned Judge who decided *Adinarayana Reddi* v. *Subbarayal Reddi*[2]. The limitations within which only the two principles can be given effect to in a suit for partial partition in which the non-alienating co-parcener seeks to recover his share of the item alienated—a question which will be discussed and pronounced upon in a later portion of this judgment—did not arise for discussion or decision in that case, even as they do not strictly speaking arise for determination here. In this view of the matter, it is by no means strictly necessary to deal with the arguments of counsel addressed to us on the basis of a suit, pure and simpliciter, for recovery by a non-alienating co-parcener of his share of a specific item alienated for consideration found partly binding. Since my learned brothers have however chosen to deal with them and express their decision thereon in view of the importance of the questions debated and the length of time spent by the Court over the hearing relating to them, I shall not withhold my opinion on them but shall turn straight away and seriatim to the two lines of argument of Mr. Venkatasubramania Ayyar. Of them, the first has, in its turn, a two-fold aspect. One is that it seeks to demolish both *Marappa Gaundan* v. *Rangaswami Gaundan*[3] and *Vadivalam* v. *Natasam*[1] in so far as they make advertence to a share

1. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad.
2. A.I.R. 1927 Mad. 1116 (2).
3. (1899) I.L.R. 23 Mad. 89.

predicable as such in a member of a joint Mitakshara family in respect of any particular item of the family estate. The other is that it seeks to affirm *Marappa Goundan* v. *Rangaswami Goundan*[1] and invalidate *Vadivalam* v. *Natasam*[2] as to the reasoning on which the former decision rests in holding an alienee of such an item from a co-parcener disentitled to any equities whatsoever. This reasoning, it is contended, is sound but has been wrongly dissented from in *Vadivalam* v. *Natasam*[2].

With reference to the first aspect of the first line of argument there is, in my opinion, no real force, although there may seem to be, if you take some of the language of the learned Judges in the two cases in *Marappa Goundan* v. *Rangaswami Goundan*[1] and *Vadivalam* v. *Natasam*[2] literally. In the two cases alike, the learned Judges did use the word 'share' as if it related to the particular item alienated by a co-parcener whereas the truth of the matter in the eye of law is that there can be no share predicable in favour of a co-parcener in any item of the family property so long as the estate continues joint. The argument in this aspect is, as it seems to me, however, only a verbal criticism. To employ the words of a certain observation of Sir George Rankin in *Ramanna* v. *Jagannada*[3] even a member of a Mitakshara family may sometimes be forgiven for speaking of his share as his "1/3rd share", 1/4th or the like instead of using the more accurate but more elaborate expression "the share which if a partition were to take place today would be 1/3rd, 1/4th or the like". Neither the learned Judges in *Marappa Goundan* v. *Rangaswami Goundan*[1] nor the learned Judges in *Vadivalam* v. *Natasam*[2] could reasonably speaking, have been unalive to the basic principle of the Hindu Law which renders a share as such unpredicable in any item of the family estate with reference to any member of the family. They must be taken therefore to have meant by their use of the word 'share' to use the language of the learned counsel for the respondent, only that interest in the entire family estate which if attempted to be expressed in terms of an arithmetical fraction, can only be done by a *fraction*, no doubt defined as to its denominator by a number representing the actual number of co-parceners in existence at the date of alienation according to *Chinnu Pillai* v. *Kalimuthu Chetty*[4] or at the date of suit for partition by the alienee according to *Rangaswami* v. *Krishnayyan*[5] but as to its numerator undefined and incapable of being defined in the form of a concrete figure representing the net divisible assets till after their ascertainment within the circumstance of the complete stock-taking of a transaction of general partition. The essence of the difference between the Judges in the one case and the Judges in the other remains however for consideration, in that the former refuse to recognise any equity on the part of the alienee to be worked out in the suit for recovery by the non-alienating co-parcener of his share of the property alienated, while the Judges in the latter do recognise such an equity and work it out on the principle of apportionment of a common burden between two or more parcels subject thereto. The Judges in the two cases alike recognise the alienability for consideration in this Province of the share of a co-parcener in a joint family property and address themselves to the question of the equities available to the alienee on a setting aside of an alienation by the co-parcener, as only partially, and not altogether, supported by consideration binding on the family. Only, they differ in their answer to the question, because they differ rather fundamentally, maintains learned counsel for the respondent, in their perception of the true nature of a co-parcener's interest and the true effect of a conveyance by him of such interest. Here I agree with the learned counsel.

Before considering which of these two views is correct—which relates to the second aspect of the first line of argument of Mr. Venkatasubramania Aiyar and the further allied question whether and how far the working out of the equities in the manner laid down in *Venkatapathi* v. *Pappiah*[6] is sound, which relates to the second line of argument of learned counsel—it may not be inappropriate to refer

1. (1899) I.L.R. 23 Mad. 89.
2. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
3. (1941) 2 M.L.J. 58 : I.L.R. (1942) Mad. 886 at 892.
4. (1910) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
5. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
6. (1928) 55 M.L.J. 489: I.L.R. 51 Mad. 824.

to certain broad considerations more or less settled by judicial decisions or more or less indisputably emerging on principle which are relevant to this question of the working out of such equities and which I propose to formulate in the shape of the following propositions.

(1) A gift or devise by a co-parcener in a Mitakshara family of his undivided interest is, ordinarily speaking and subject to an exception in the case of a manager in favour of small gifts to female relations on special occasions or for pious, charitable or religious purpose, wholly invalid, void *in toto*. This principle cannot be evaded by the undivided member 'professing to make an alienatin for value, when such value is manifestly inadequate and inequitable' vide *Rottala Ranganatham Chetty* v. *Pulicat Ramaswami Chetti*[1] :

(2) That alienations of a co-parcener's share even if for consideration are inconsistent with strict Hindu Law was laid down by the Privy Council as early as *Suraj Bunzi Koer* v. *Shree Prasad Singh*[2]. The principle is that the property of the family belongs to all the members jointly as to a corporation, in the words of Shearar, J., in *Mahabir Persad* v. *Ramyad*[3] and no one of the individual members has any share in it which he can deal with as his property. In the well known and oft-quoted words of Lord Westbury in *Appovier* v. *Rama Subba Aiyan*[4] which have become the *locus classicus* on the point, according to the true notions of an undivided property in Hindu Law, the individual member of that family while it remains undivided can predicate of the joint and undivided property that he, that particular member has a certain definite share. No individual member of an undivided family could go to the place of the receipt of the rent and claim to take from the collector or receiver of the rents a certain definite share. *Appovier* v. *Rama Subba Aiyan*[4]. According to the strict theory of Mitakshara Law, each co-parcener has a proprietary interest in the *whole* of the co-parcenery property. No co-parcener can therefore alienate his interest in the property, without the consent of the other co-parceners (vide *Mulla's Principles of Hindu Law*, 10th Edn. page 304). At the same time it seems to have been felt by Courts that in equity a person who had parted with his money should receive something in exchange. So in *Deen Dayal Dhall* v. *Jug Deep Narain Singh*[5] the alienee was given a right limited to compelling the partition which his alienor might have been compelled, had he been so minded, before the alienation of his share took place.

(3) According to the Law of Mitakshara as administered in the Provinces of Madras and Bombay, and the Central Provinces, including Bihar, a co-parcener of an undivided family may sell, mortgage or otherwise make an alienation for value of his undivided interest be it in the co-parcenery property as a whole or in a specific item thereof or be it by way of a whole specific item without the consent of the other co-parceners. In all the other Provinces a co-parcener cannot sell, mortgage or otherwise alienate for value his undivided interest in the joint family property without the consent of the other co-parceners and the father who was a co-sharer with his minor son cannot give such a consent on behalf of his minor son. An alienation made by a co-parcener without the consent of the other co-parceners has been held to be only voidable at the option of the other co-parceners, the alienating co-parcener himself not being competent to impeach it. In all the Provinces in India, the undivided interest of a co-parcener in the joint family property may, during his life-time be seized and sold, in execution of a decree against him for his own debt ; provided the attachment was made before his death, it is immaterial whether the sale is before or after death (*vide* Mayne on Hindu Law and Usage, 11th edition, paragraph 381). There can be little doubt as their Lordships of the Privy Council observe in *Suraj Bunsi* v. *Sheo Persad*[6] that all such alienations whether voluntary or compulsory are inconsistent with the strict theory of a joint

1. (1903) I.L.R. 27 Mad. 162 (F.B.).
2. (1880) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).
3. 12 B.L.R. 90, 94.
4. (1866) 11 M.I.A. 75.
5. (1877) L.R. 4 I.A. 247 : I.L.R. 3 Cal. 198 at 209 (P.C.).
6. (1888) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 at page 166 (P.C.).

and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition. As their Lordships further observe in the later case in *Lakshman Dada Naick* v. *Ramachandra Dada Naick*[1].

"The question therefore is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences as what are the limits of an exceptional doctrine established by modern Jurisprudence".

(4) As the purchaser of a co-parcener's interests gets only an equity to enforce a partition, he takes the share upon partition subject to all the liabilities in the hands of the vendor, as for example, a liability to pay the alienor's father's debts. But where the alienation is itself in discharge of binding debts, the alienee cannot, in a suit for partition, be saddled with other family debts as any such condition would amount to a direction that the same property be sold twice over for this purpose, a position which no Court with power to apply the principles of equity could ever contemplate with equanimity.

(5) The equity which a purchaser from a co-parcener acquires is enforceable by him alike as a defendant in a suit of the non-alienating co-parcener for general partition and as plaintiff in a suit of his own for general partition. That it is enforceable by him as such defendant has been ruled by this Court in *Davud Beevi-ammal* v. *Radhakrishna Aiyar*[2] and *Ramaswami* v. *Venkatarama*[3] on the strength of the Privy Council ruling in *Ramakishore* v. *Jainarayana*[4] notwithstanding the view to the contrary in *Subba Goundan* v. *Krishnamachari*[5] and cannot be seriously doubted or disputed.

(6) The alienee's own suit to enforce the alienation in his favour by means of general partition in effectuation of such equity as he obtains by the conveyance in his favour is not technically a suit for partition in the sense of the Mitakshara Law and the decree which he may obtain for enforcing the transfer either in whole or in part by partition of the family property will not by itself break up the joint ownership of the members of the family in the remaining property or the corporate character of the family. On the other hand, the co-parceners objecting to the alienation may, without bringing a suit for general partition sue for a decree for their shares in the property alienated by the co-parcener. The distinction rests upon the ground that in a suit for partition by the purchaser, an account of the whole estate must be taken in order to see what interest, if any, the alienor possesses; but as the co-parceners may wish to remain undivided amongst themselves, notwithstanding an alienation by one of them of his interest in the joint estate as a whole or in any item thereof, which does not *per se* bring about a disruption of status, they are entitled to confine the suit between themselves and the stranger purchaser to the property in dispute. This is, in fact, a well-established exception to the rule ordinarily obtaining against partial partition although it is not as well-established whether the result of such a suit which, while affirming the unauthorised alienation as to the alienor's own share, repudiates it as to the remainder, is to make of the share or shares of the property alienated which is or are recovered by the non-alienating co-parcener or co-parceners, his or their separate property or to leave it as joint family property still. On the other hand, it is competent to the non-alienating co-parcener or co-parceners to exercise his or their right of interdict against the unauthorized alienation and sue to recover the entire property alienated, in which case, if the suit succeeds, the property is got back for the family as its estate.

(7) Where in the suit for general partition with the alienee either as plaintiff or as defendant, as mentioned *supra*, his right is worked out by allotment to the alienor's share of the very item alienated as it may have been, whether in whole or in part, or by allotment to the alienor's share of other items, after ascertain-

1. (1880) L.R. 7 I.A. 181 : I.L.R. 5 Bom. 48 at 62 (P.C.)
2. (1922) 44 M.L.J. 309.
3. (1923) I.L.R. 46 Mad. 815.
4. (1903) 25 M.L.J. 512 : L.R. 40 I.A. 213 : I.L.R. 40 Cal. 966 (P.C.).
5. (1921) I.L.R. 45 Mad. 449.

ment of the not divisible residue of the family assets with due provision made for all binding family obligations, and in full *quid pro quo* for the consideration paid which is wholly not binding on the joint family, there are no further equities to be adjusted even as there will be none *a fortiori* where the consideration is wholly binding on the family and the alienation is to be upheld wholly. An alienation may be upheld in its entirety though the necessity was only partial, in other words, even though the whole consideration received was not for a necessary purpose or for the discharge of antecedent debts. Where the necessity for a particular sale is only partial, *i.e.* where the money required to meet the necessary purposes is less than the amount sought to be raised by the sale, the real question for determination is whether the sale itself is one justified by legal necessity. The reason for this is that it is not always possible for the managing member to sell just that share of the family property which will bring in the precise sum which is wanted to clear the debts which are binding. But in a case where the circumstances only disclose a partial necessity, the sale will however be valid only where the purchaser acts in good faith and after due enquiry, and is able to show that the sale itself is justified by legal necessity, though he is under no obligation to enquire into the application of any surplus of the consideration.

(8) The question of equities can only arise where the alienation in question is to be found partially supported and partially unsupported by necessity, or, in the case of the father alienating, by antecedent debts. Any such question can only be part and parcel of the law of *restitutio in integrum* which requires that a person ought not, after setting aside an alienation, to be permitted to retain the benefit of the consideration received thereunder.

(9) Any equity can only be given effect to according to equitable principles not exceeding the limits set by law, as otherwise it would cease to be an equity, in the language of Lord Blansburgh in the Privy Council in *Nagappa Chettiar* v. *Brahdambal Ammani*[1]. In that case the Privy Council upset the decree of the High Court which had with reference to the valid portion of the consideration for a sale of an impartible zamindary by the father challenged by the son, directed the ascertainment of a proportionate number of villages out of the total number sold, in order to uphold the sale to the extent of such proportionate number. The course adopted by the High Court was condmned by the Privy Council as tantamount to splitting the parcels sold with a view to making a new bargain between the parties. Similarly when in *Musit Ulla* v. *Damodar Prasad*[2] the High Court disapproved of a like direction by the trial Court as an unworkable decree, the Privy Council expressed its concurrence with the view of the High Court.

It is with these broad considerations borne in mind that we have to consider the question of working out of equities in favour of an alienee from a co-parcener under a transaction which is only partially supported by binding consideration. The question is by no means admitting of an easy answer and calls for resolution of the conflict between the decisions in *Marappa Gaundan* v. *Rangaswami Gaundan*[3], *Vadivalam* v. *Natasam*[4] and *Venkatapathi* v. *Pappiah*[5] in the light of and without prejudice to the propositions above formulated. Why I say 'in the light of and without prejudice to the propositions above formulated' is because I consider it no part of the province of this Full Bench, in spite of its strength of number to do anything by way of upsetting settled law for the purpose of settling conflicting law. As I think, we ought, on the other hand, to lay down the law on the point under consideration, consistently and not inconsistently with the law undisputedly prevailing on allied points. True it is that consistency on abstract grounds of logic cannot always prevail in the realm of Judge-made law. It may also be that as said by Lord Halsbury once, Law is not a logical science. But if that dictum of the learned

1. (1935) 68 M.L.J. 452 : L.R. 62 I.A. 70 : I.L.R. 58 Mad. 350 (P.C.) at p. 362.
2. (1926) 51 M.L.J. 792 : L.R. 53 I.A. 204 : I.L.R. 48 All. 518 (P.C.).
3. (1899) I.L.R. 23 Mad. 89.
4. (1912) 23 M.L.J. 256: I.L.R. 37 Mad. 435.
5. (1928) 55 M.L.J. 489: I.L.R. 51 Mad. 824.

Lord cannot, as appears from *Rangaswami Gaundan* v. *Nachiappa Gaundan*[1] avail as a source of consolation for presuming an illogical extension of principle in interpreting the existing case-law on a subject it can hardly be doubted or disputed that only logical applications and extensions of existing legal principle should stand encouraged and all illogical applications and extensions of legal principle should stand discouraged. So much is in my opinion required for that healthy, if slow and gradual, broadening out from precedent to precedent which is of the essence of the living mechanism of a system of justice governed by the authority of decided cases.

Now, the wider argument of Mr. Venkatasubramania Aiyar is that the holder of a mere equity like the alienee from a co-parcener can invoke no equities to his aid against the non-alienating co-parcener seeking to set aside the alienation when the Court finds it to be supported only partially by binding consideration. When such an alienee is described as a person who has acquired only an equity, what is meant however is, not that he has no legal interest whatsoever in the property alienated such as entitles him to equities on the setting aside of the alienation with reference to the binding part of the consideration, but that for the materialisation of such interest in the property which he can properly call exclusively his own, he is bound still to take steps whether in a suit of his own or in a suit for general partition instituted by the non-alienating co-parcener or co-parceners. Equities arise because of the partially binding character of the transaction and do not stand excluded because the title of the alienee is not at the very inception a perfect right to a specific item. The title may be inchoate in the sense that in the allotment at a general partition he cannot claim the item as his own or mesne profits thereon as from the date of the alienation. The title may be defeasible or even turn out illusory in the sense that on allotment at the general partition he may get other item or items, or nothing at all in substitution. But subject to such infirmities, he does certainly derive from the alienation a legal right not a bare right *in personam* to use the language of Bakewell, J., in *Manjayya* v. *Shanmuga*[2] but a right to something much nearer to real property than a mere claim to partition, to use the language of Wallace, J., in *Narayana Sah* v. *Sankar Sah*[3], something 'specific, existing and definite' in the language of Lord Justice James in the Privy Council in *Tuffuzzool Hossain Khan* v. *Rughoonath Pershad*[4]. On the non-alienating co-parcener or co-parceners seeking to recover his share or their shares of the specific property alienated the question is whether he is not entitled to put forward any equities at all, as arising with reference to the portion of the consideration found binding. If the non-alienating co-parcener or co-parceners is or are permitted to recover his share or their shares of the particular property alienated without an adjustment of equities, not only will he or they be thereby allowed undue advantage but there will also be no further occasion afforded to the alienee to enforce equities. Just as in a later suit for general partition by him, he cannot, if as I think *Sourimuthu* v. *Pachia Pillai*[5] and not *Kandaswami Udayar* v. *Velayudha Udayar*[6] lays down the correct law, ask for allotment to his alienor of the share recovered which will have become his separate property under *Chinna Sanyasi* v. *Suriya*[7], *Kadegan* v. *Periya Munuswami*[8] and *Sourimuthu* v. *Pachia Pillai*[5] notwithstanding Wallace, J.'s view to the contrary in *Davud Beevi* v. *Radhakrishna*[9] so too he cannot ask for the adjustment of equities either. On this question of working out of equities of course, the position in law might well be different if the Courts did not recognise the right to partial partition at all on the part of the non-alienating co-parcener or co-parceners. That right being there, the only question is whether there is anything unjust in allowing to the alienee such adjustment of the equities arising out of the partial validity of the transaction as is possible in law in the very suit for partial

1. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
2. (1911) 26 M.L.J. 576 : I.L.R. 38 Mad. 684.
3. (1929) 57 M.L.J. 685 : I.L.R. 53 Mad. 1 at 15 (F.B.).
4. (1871) 14 M.I.A. 40 at p. 50.
5. (1925) 49 M.L.J. 679: I.L.R. 49 Mad. 483.
6. (1926) 51 M.L.J. 99 : I.L.R. 50 Mad. 320.
7. (1882) I.L.R. 5 Mad. 196.
8. (1903) 13 M.L.J. 477.
9. (1922) 44 M.L.J. 309.

partition instituted by the non-alienating co-parcener or co-parceners. In my opinion the answer to the question must be in the negative.

Even in *Marappa Gaundan* v. *Rangaswami Gaundan*[1] relied on by the learned advocate for the respondent the equities of the alienee were not negatived on the ground that he was the holder of an equity only. The question that arose there was whether Rs. 120—out of the price paid by the defendant to the plaintiff's father having gone to discharge a mortgage debt which the plaintiffs also were bound to pay, their interests in the property comprised in the sale by their father should be held liable for their share of the Rs. 120—namely Rs. 80—. In negativing the liability, Subramania Aiyar, J., who delivered the judgment of the Court, consisting of himself and Boddam, J., first makes the following observation :—

"In making the purchase the defendant was with reference to the plaintiffs but a volunteer, and he cannot, as against them, claim by way of equity a charge on their shares for the Rs. 80 even though this sum was applied towards the discharge of their joint debt. (Cf. *Sivaganga Zamindar* v. *Lakshmana*[2])."

It is not quite easy to understand precisely what the learned Judge meant by the use of the word 'volunteer' in the sentence quoted. Nor does a reference to *Sivaganga Zamindar* v. *Lakshmana*[2] remove the difficulty of obscurity involved in his observation. In this last case, in execution of a money decree obtained against the holder of an impartible zamindari a creditor attached certain immovable property, a portion of the zamindari, which he described as property of the debtor. This was sold by the Court and purchased by one Lakshmana. A suit having been brought by a son of the judgment-debtor after his father's death to recover the property from Lakshmana, it was held that all that Lakshmana acquired was life interest of the judgment-debtor in the property and that, therefore, the plaintiff was entitled to recover. As appears from page 197 of the report the purchaser seems to have contended that as his purchase money was applied to pay off the debts on the estate for which the zamindari and the plaintiff were liable he in equity was entitled either to have possession of the property bought or to hold the property until he should be recouped with the purchase money. The contention was repelled by Kernan, O.C.J., thus :

"I do not see what equity the purchaser can have. He did not get an assignment of the decree ; he was a volunteer in buying against the plaintiff. He made a bad speculation as it turned out on account of the death of the zamindar, but if he had lived, the purchaser probably by having possession of the zamindar's residue would be able to make money from his bargain ".

At pages 200 and 209 of the report which are part of the judgment of the other learned Judge, Muthuswami Aiyar, J., this is what we find :

"Another contention is that if the appellant's title to the zamindari is declared, he should be declared entitled to its possession on payment of his father's debt or the purchase money. The purchaser bought the late zamindar's interest, whatever that was, for the money which he advanced. If the zamindar had lived long it would have been a profitable speculation rather than a losing speculation. In the event which has occurred, it has turned out to be a losing speculation. I do not see how this can give rise to any equity in favour of the purchaser ".

It is difficult to find any parallelism of facts between the case in *Sivaganga Zamindar* v. *Lakshmana*[2] and the case before the Court in *Marappa Gaundan* v. *Rangaswami Gaundan*[1] such as justifies the use to which in the sentence quoted from the later case the decision in the earlier was sought to be put. Perhaps all that was meant by the learned Judge (Subramania Aiyar, J.) in the later case was that if the Court came to the conclusion that there was no justification for the sale by the plaintiff's father the purchaser must be regarded as a mere volunteer notwithstanding that the purchase money may have been applied in discharge of binding debt. I am not satisfied that the legal position indicated thus by the learned Judge is really correct. Whatever that may be, proceeding further, the learned Judge observes thus :

"Even if there were any doubt as to whether the defendant was a volunteer one must hesitate to countenance the introduction of a new rule such as that suggested having regard to the practical inconvenience which is likely to arise in giving effect to it. Now a sale of joint property by a co-

1. (1899) I.L.R. 23 Mad. 89.
2. (1885) I.L.R. 9 Mad. 188 at pp. 197, 200 and 201.

parcener though made without legal necessity is in this presidency valid to the extent of the vendor's share. Suppose that share is really worth the whole of the amount paid by the vendee as the price why should he get anything more? Next suppose that the share is worth less than the price paid. The vendee cannot in such a case reasonably ask for a charge for more than the difference between the real value of the share which he gets and the price he had actually paid. It is scarcely necessary to say that questions as to such valuation are often not capable of easy and satisfactory settlement. The simpler and better view undoubtedly is that if the vendee wishes to stand by a sale which is valid only partially such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether his remedy is only against the vendor in a suit for the return of the price paid on the ground that the consideration for the payment failed. This view will on the one hand avoid all necessity for an enquiry into matters alluded to before and on the other tend to act as a check on a disposition on the part of speculative persons to enter with some co-parceners into transactions calculated to affect the rights of other co-parceners who are not parties thereto. The contention of the defendant is clearly unsustainable and cannot be accepted ".

It will be seen from the foregoing quotation from *Marappa Gaundan* v. *Rangaswami Gaundan*[1] that the reason given by the Court in support of its conclusion, negativing the equities is not the circumstance that the alienee is only the holder of a bare equity but the practical inconvenience in giving effect to them in a manner not till then recognised as well as the check which a refusal of the kind of equities claimed would operate to bring into existence against collusive transactions between some co-parceners and speculative persons who may enter into transactions with them prejudicially to the interests of the other co-parceners who are not parties thereto. The conclusion reached by the Court in that case was, that the vendee must either be content with the vendor's share if he wishes to stand by a sale valid only partially or must sue the vendor for the return of the price paid on the ground of failure of consideration if he wishes to repudiate the transaction altogether.

During the argument as well as for some time thereafter, it seemed to me that this view might well be accepted as based on the whole on considerations calculated at once to preserve the interests of co-parceners in family properties and to ensure a rough and ready rule in the administration of justice. It also semed to me that the conclusion reached by the learned Judges in *Marappa Gaundan* v. *Rangaswami Gaundan*[1] as to the remedy to be pursued by the alienee in a case where the alienation might not be binding on the family was on lines impliedly, if not statedly, similar to what a Full Bench of this Court in *Baluswami Aiyar* v. *Lakshmana Aiyar*[2], adopted in dealing with a suit for specific performance of a contract for sale by the managing member of a joint Hindu family found not to be binding upon the other members of the family, the purchaser in such a case having been held not entitled to enforce specific performance of the entire contract, but if he was so minded, to have such performance on payment of the full consideration for the share of the alienor only; there was nothing wrong as I thought in the principle of the ruling in *Marappa Gaundan* v. *Rangaswami Gaundan*[1] above adverted to.

I have, however, on a closer consideration of the matter since reservation of judgment come to the conclusion that there would be grave and serious injustice involved in refusing altogether as that ruling does equities to the alienee with reference to the binding part of the consideration for the sale in his favour while allowing the non-alienating co-parcener or co-parceners to sue for his share or their shares of the property alienated. After all, if the alienee should think that working out of equities in the suit for partial partition by the non-alienating coparcener—whatever the mode of such working out may be—which is another question might not be altogether as much to his advantage as working out of equities in a suit for general partition, it would be open to him to file such a suit and ask for stay of the coparcener's suit till the disposal of his own or obtain a joint trial of both by appropriate application. If he does not do so, but wants in the co-parcener's suit itself a working out of equities, is he to be refused such working out? Viewing the matter from this standpoint I must repel the argument of Mr. Venkatasubramania Aiyar so far as it is directed to a re-affirmance of the ruling in *Marappa Gaundan* v. *Rangaswami Gaundan*[1].

1. (1899) I.L.R. 23 Mad. 89. 605 (F.B.).
2. (1921) 41 M.L.J. 129 : I.L.R. 44 Mad.

The question then is whether assuming *Marappa Gaundan* v. *Rangaswami Gaundan*[1] to be unworthy of acceptance, the ruling in *Vadivalam* v. *Natasam*[2] suffers, as contended by the learned counsel for the respondent from any serious legal infirmity such as would invalidate it and entail its rejection as well. It is contended by council that the infirmity about the decision is two-fold ; (1) in that it rules that it cannot be doubted that a co-parcener is entitled to part with his own share in any family property for any consideration he pleases. (2) in that it holds that it is equally clear that as between the vendor and the vendee in the absence of any contract to the contrary the consideration for the sale will be apportioned between all the items of property sold in cases of dispute.

In order to prove the first infirmity said to beset the decision in *Vadivalam* v. *Natasam*[2] counsel relies on the Full Bench ruling in *Rottala Ranganathan Chetti* v. *Pulicat Ramaswami Chetti*[3] to the effect that the principle that no co-parcener can make a gift of his interest cannot be evaded by the undivided member professing to make an alienation for value, when such value is manifestly inadequate and inequitable. Counsel contends, therefore, that a question as to the proper consideration for the alienation of a co-parcener's interest is not a matter with which the other members of the family are in no way concerned. The learned Judges in *Vadivalam* v. *Natasam*[2] it is urged, erred in holding that a co-pascener is entitled to part with his own share in any family property for any consideration as he pleases.

In order to make out the second infirmity the learned advocate for the respondent has drawn our attention to a series of decisions beginning with *Deendayal* v. *Jugdeep Narain Singh*[4] and ending with the two decisions of this Court reported in *Krishnamurthi Iyer* v. *Nataraja Aiyar*[5] and *Subbiah* v. *Venkateswaralu*[6]. Counsel contends that all that the alienee from a co-parcener acquires being an equity to work out his rights standing in the shees of his alienor, the learned Judges in *Vadivalam* v. *Natasam*[2] are wrong in assimilating the case in question to a case of a sale of more items of property than one in which as between the vendor and the vendee in the absence of a contract to the contrary the consideration will be apportioned between all such items in cases of dispute.

It is urged that *Vadivalam* v. *Natasam*[2] is only the logical consummation of the fundamental misconception first ventilated in this Court in *Venkatachala* v. *Chinnayya*[7] that a share in any item as such of joint family property alienated by a co-parcener is at all capable of passing to the alienee. This, it is said, is opposed to *Approvier's case*[8]. The decision in *Venkatachala* v. *Chinnayya*[7] it may be mentioned, is the very first case which was relied on before us by the learned advocate for the appellant in the course of his argument and there is no wonder that the argument for the respondent has been directed to a prominent attack against it. In order to appreciate the relative arguments of counsel on both sides in regard to this decision, it may be necessary to know what exactly the facts of the case were. The facts as well as the actual decision are stated as follows by Bashyam Aiyangar, J., in *Ayyagiri Venkatramayya* v. *Ayyagiri Ramayya*[9] quite correctly, if I may say so with respect.

"In that case, the vendor (one Subbaraya Mudali) as one of two co-parceners was entitled to a moiety of the joint family property. He sold one entire village and put the purchaser in possession thereof. After the death of the vendor the surviving co-parcener brought a suit to recover his one half share in the village. The purchaser resisted the suit on the ground that the entire village formed less than a moiety of the whole family property and that, therefore, the conveyance would operate to vest in him the whole village. Though the principle was recognised 'that each co-parcener has a vested present undivided estate in his share which he may at any time convert into an estate in severalty by a compulsory or voulntary partition, and that such estate was transferable like any other interest in property' yet the contention that the vendee was entitled to the whole village was overruled on the ground that though the extent and value of the village in question was less than the

1. (1899) I.L.R. 23 Mad. 89.
2. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
3. (1903) I.L.R. 27 Mad. 162 (F.B).
4. (1877) L.R. 4 I.A. 247 : I.L.R. 3 Cal. 198 (P.C.).
5. (1948) 1 M.L.J. 430.
6. (1948) 1 M.L.J. 478.
7. (1870) 5 M.H.C.R. 166.
8. (1866) 11 M.I.A. 75.
9. (1902) I.L.R. 25 Mad. 690 at 715 (F.B.).

extent and value of a moiety of the entire family property, yet as the vendor was entitled only to one moiety in the village, the conveyance could operate to convey only a moiety of the village".

In the course of the judgment in that case, *Venkatachala* v. *Chinnayya*[1] there occurs the passage at page 170 of the report to this effect :

"The estate of each co-parcener gives him only the right to enjoy a fair proportion of the benefits of the whole family property in common with the other co-parceners. But as respects the proprietary right to the corpus of the property, there is a perfect unity of title which makes the co-parcenery to some extent of the nature of a joint tenancy, and until a partition takes place co-parceners continue seized by one and the same title of the whole and every portion of the property alike, the law recognising the right of one co-parcener to hold possession and manage for the joint benefit of himself and the rest.

By the sale in the present case, therefore, the vendor, Subbaraya, could not in our judgment transfer to the first defendant's father a valid title to any specific portion of the joint family property but only to his beneficial estate as an undivided co-parcener with the incidental right of partition, and it follows that the first defendant is not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale."

Mr. Venkatasubramania Aiyar's complaint is that while the law is correctly stated in the rest of the passage quoted the deduction made from it as expressed at the end of the passage namely

"that the first defendant is not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale"

is erroneous. That is why, says counsel, the Court in dealing with the argument for the defendant-appellant that a half of the purchase money should be made good to him, observed :

"Had any portion of the purchase money . . . . . . been expended . . . . for the benefit of the joint estate the plaintiff's legal right to possession might upon equitable grounds have been decreed subject to the refund of half the purchase money . . . . ."

Counsel in effect contends that the case cannot be regarded as authority for anything more than the proposition as stated by Collins, C.J. and Muthuswami Aiyar, J., in the Full Bench case in *Rangaswami* v. *Krishnayyan*[2] where after referring to *Veeraswami Gramani* v. *Ayyaswami Gramani*[3] as well as *Venkatachala* v. *Chinnayya*[1], the learned Judges observe :

"The principle on which these decisions rest is that the vendor could confer a valid title not to any specific portion of the joint family property, but only to his beneficial estate as an undivided co-parcener with the incidental right of partition".

It is also contended by Mr. Venkatasubramania Aiyar that the case in *Vadivalam* v. *Natasam*[4] which reflects the error of *Venkatachala* v. *Chinnayya*[1] in so far as it proceeded not on the basis of a suit for general partition and of the stock-taking incidental thereto as the proper remedy for an alienee from a co-parcener but on the basis of a fractional iterest in the alienated item as unimpeachably conveyed *in presenti* to the alienee which corresponds to the quantum of interest of the coparcener in the entire property of the co-parcenery is itself vitiated by fundamental error. It is also pointed out by the learned counsel that the idea of a tenancy-in-common resulting with reference to an item of property alienated from the fact of the alienation as held in *Subba Rao* v. *Ananthanarayana Ayyar*[5] to which one of the Judges who took part in *Vadivalam* v. *Natasam*[4], Sundara Iyer, was a party lies at the root of the decision in *Vadivalam* v. *Natasam*[4] and that such an idea does not really hold the field on account of later decisions as well as earlier. Reference is made in this connection to paragraph 386 of Mayne on Hindu Law and Usage, pages 487 and 488 and to the footnote 'W' in particular at the later page. The paragraph runs as follows :—

"Where the transfer is of an undivided interest in the whole of the family property the transferee will get whatever may be allotted to the transferer's share in a suit for partition. A co-parcener may alienate either his undivided share in the whole of the family property or his undivided share in certain specified item of the family property or the whole of a specific item of the family property

1. (1870) 5 M.H.C.R. 166.
2. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 at 417 (F.B.).
3. (1863) 1 M.H.C.R. 471.
4. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
5. (1912) 23 M.L.J. 64.

In all these cases, the alienee does not acquire an interest in the property so as to become a tenant-in-common with the members of the family entitled to possession but only an equity to stand in his vendor's shoes and to work out his rights by means of a partition."

The footnote refers to *Suraj Bunsi Koer* v. *Sheo Pershad*[1], *Manjaya* v. *Shanmuga*[2], *Maharaja of Bobbili* v. *Venkataramanjulu*[3] as dissenting from the dicta to the contrary in certain other cases also referred to in the footnote. Reference is also made by Counsel to the view of Sadasiva Aiyar, J., in *Soundararajan* v. *Arunachalam Chetti*[4] Sadasiva Iyer, J., being the other learned judge who had taken part in *Vadivalam* v. *Natasam*[5]. So, learned counsel contends that the decision in *Vadivalam* v. *Natasam*[5] must be taken to have been tangibly coloured by notions of joint tenancy and tenancy-in-common derived from English law which are not by their nature strictly speaking applicable to the case of a joint Hindu family of which one co-parcener alienates his interest in a particular item of the family property. I am inclined to think that these points of criticism levelled by learned counsel against the reasoning of the ruling in *Vadivalam* v. *Natasam*[5] are entitled to great weight. Assuming so, the question still remains whether the decision itself is wrong as contended by the learned counsel or can be supported, notwithstanding these points.

It is difficult as I have already observed to hold, so long as the view declared by a Full Bench ruling of this Court in *Iburamsa Rowther* v. *Thiruvenkataswami Naick*[6], in accordance with practice and precedent going back to *Venkatachala* v. *Chinnayya*,[7] prevails that the co-parceners objecting to the alienation may, without bringing a suit for general partition, sue for a decree for their shares in the property alienated by a co-parcener, that the equities arising out of the partial character of the validity of the transaction should not be taken into consideration at all by the Court in such a suit. Where one of two co-parceners makes an unauthorised alienation, surely the other co-parcener may either exercise his right of interdiction and sue for the recovery of the entire property alienated or affirm the alienation to the extent of the share of the vendor and sue for the recovery of his share. If he does the former at the option of the alienee, he might be given an unconditional decree for possession with liberty to the defendant alienee to work out his equities in a separate suit for partition (vide *Iburamsa Rowther* v. *Thiruvenkataswami Naick*[6], *Hardi Narain Sahu* v. *Ruder Perkash Misser*[8] and *Suraj Bunsi Koer* v. *Sheo Pershad*[1]) or he might be given a decree conditional on refunding the amount found binding on the family on whose behalf clearly he is suing, as in the case of widow's alienations sought to be set aside by reversioners, or Karnavans' alienations sought to be set aside by junior members of the tarwad, or dharmakarthas' alienations sought to be set aside by the succeeding dharmakarthas or guardians' alienations sought to be set aside by or on behalf of the ex-ward or the ward respectively. Even where he chooses to affirm the sale as to the alienor's share and sue for his own share, does it not look *prima facie* equitable that he should be made liable for his proportion of the consideration found to be binding?

True, *prima facie*, it does look so, as a matter of off-hand parity of reasoning. But then this overlooks what Subramania Aiyar, J., rightly points out in *Marappa Gaundan* v. *Rangaswami Gaundan*[9] namely, the possibility that the share sold is worth much more than that for which it is sold, and the hardship which that way arises to the other co-parceners to whom the value of the vendor's share is by no means a matter of no concern having regard tot he Full Bench ruling in *Rottala Ranganathan Chetti* v. *Pulicat Ramaswami Chetti*[10]. Further, the working out of equities in a suit concerning a particular item of family property alienated by a co-parcener and the valid portion of the consideration for the alienation thereof involves the difficulty that the portion of the property recovered by the non-alienating co-parcener may not be liable for other debts of the family if such portion possibly becomes,

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1. (1880) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).
2. (1911) 26 M.L.J. 576: I.L.R. 38 Mad. 684.
3. (1914) 27 M.L.J. 409: I.L.R. 39 Mad. 265.
4. (1915) I.L.R. 39 Mad. 159 at p. 172 (F.B.).
5. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
6. (1916) 20 M.L.J. 743 : I.L.R. 34 Mad 269 (F.B.).
7. (1870) 5 M.H.C.R. 166.
8. (1883) I.L.R. 10 Cal. 626.
9. (1899) I.L.R. 23 Mad. 89.
10. (1903) I.L.R. 27 Mad. 162 (F.B.).

as a result of the decree in the suit the separate property of the non-alienating co-parcener. In fact if regard is had to the strict theory of Hindu Law, that the alienee from the co-parcener acquires nothing more than an equity, working out of equities otherwise than in a suit for general partition by him is not to be permitted to him at all. Moreover it cannot be denied that the more satisfactory mode after all of working out of equities is furnished by a suit for general partition in which the net divisible residue can be ascertained and an allotment can be made thereafter to the share of the alienee as standing in the shoes of the alienor. It cannot be disputed too that a suit of the non-alienating co-parcener for partial partition is not liable to be converted into a suit for general partition at the instance of the defendant so that the more comprehensive working out of equities as in a suit for general partition may be adopted. Referring to the decisions in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[1] and another decision cited before them in *Iburamsa Rowther* v. *Thiruvenkataswami Naick*[2] the Full Bench observe in their judgment at page 275 of the report thus:

> "Those cases however do not lay down that the member of the family suing for his share could be driven by the purchaser from another sharer to institute a suit for general partition".

Having regard to these several considerations, I am of opinion that although so long as a suit for partial partition at the instance of the non-alienating co-parcener stands recognised in law, there must, inevitably, be a corresponding working out so far as possible, of partial equities, only pertaining to the particular item alienated and depending on the partial character of the validity of the consideration for the alienation of such item, such working out cannot be on the basis adopted in *Vadivalam* v. *Natesam*[3] however equitable *prima facie* such basis may seem.

In a case decided by a Full Bench of this Court, *Narayana Sah* v. *Sankar Sah*[4] the breach in the water-tight compartment of ancient Hindu Law relating to property of a joint Hindu family evidenced by the gradual development of the case-law connected therwith has been noticed in some detail by Wallace, J. and Anantakrishna Aiyar, J. Wallace, J., also refers in his judgment in that case to the way in which the breach has become widened with reference to the present state of law in the case of an insolvency of a co-parcener. The question in the Full Bench case was whether when there had been a partition of one or more members in a joint Hindu family, the other members remaining united, is this partition to be taken into account in determining the shares due to the various branches in a subsequent partition as laid down in *Manjanatha* v. *Narayana*[5] or should the subsequent partition be made *rebus sic stantibus* at the time of such subsequent partition. The Full Bench answered the question in the manner laid down in *Manjanatha* v. *Narayana*[5]. Coutts Trotter, C.J., in his judgment observes at page 5 of the report:

> "The point is a very short one, and were the whole matter to be regarded as being at large, I should attach very great weight to the arguments addressed to us with much learning by Mr. K. S. Krishnaswami Ayyangar. There can be no doubt of the logic of the statement that, until an actual partition arises, no member of a co-parcenary can be said to have a share, nor can any branch of the whole family; but in my opinion, it is far too late to apply all these logical rules in their strictness to Hindu Law as we find it today. Modifications have been found necessary as, for instance, in the case of the alienee from a member of the co-parcenary, who is allowed to stand in his shoes and enforce a partition. See *Suraj Bunsi Koer* v. *Sheo Persad Singh*[6] where their Lordships frankly concede that the sanctioning of such transactions can be justified not by strict Hindu Law but by necessary implications of equity. Similarly, with regard to a partial partition as in the present case, I think it may be taken as settled law now, that the separation of one branch of the family does not involve a notional partition of the whole property including all the members, with the corresponding legal fiction that the remaining branches or members are to be deemed to have reunited".

Wallace, J., at pages 15 and 16 of the report observes:

> "I do not think the conclusion can be resisted that, as the law stands, it involves the proposition that a co-parcener possesses and can transfer something much nearer to real property than a mere claim to partition. It is an interest in property, indefinite from the point of view that it may fluctuate

1. (1902) I.L.R. 25 Mad. 690 (F.B.).
2. (1916) 20 M.L.J. 743: I.L.R. 34 Mad. 269 (F.B.).
3. (1912) 23 M.L.J. 256: I.L.R. 37 Mad. 435.
4. (1929) 57 M.L.J. 685; I.L.R. 53 Mad. 1 (F.B.).
5. (1882) I.L.R. 5 Mad. 362.
6. (1880) L.R. 6 I.A. 88: I.L.R. 5 Cal. 148 (P.C.).

in extent from time to time, but definite and ascertainable at any particular point of time, and actually made definite and ascertained by the act of the co-parcener seizing and using it for his benefit, and holding it as against the possession and use of it to which the joint family as a whole is entitled. The act of alienation makes definite the indefinite interest which the co-parcener has and fixes it so that it is unaffected by any internal change within the joint family or by any of the rules of Hindu Law about devolution on death. So far, the Courts have not gone so far as to hold that an alienation *per se* is such an expression by the alienor of his unequivocal intention to separate as is sufficient to effect a severance of the alienor from the joint family, and at present the law is that the alienor, in spite of the alienation, remains a member of the joint family, *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[1] although the suit by the alienee for partition would presumably sever an alienor entirely from the joint family, and the alienee must always sue for partition of the alienor's whole share, *Nanjayya* v. *Shanmuga*[2] ".

Anantakrishna Aiyar, J., at page 20 of the report points out :

" The Hindu Law texts do not contemplate cases of partial partition—partial, either as regards the property to be divided, or partial, as regards the co-parceners who seek to become divided. But such partial partitions have been taking place for a long time and the law relating to the same is practically Judge-made law ".

The learned Judge proceeds further to remark at page 23 :

" Seeing that partial partition was not recognised by the old Hindu Law givers and none of the Hindu law texts refer to the same, it is clear that the rules relating to such partial partitions should be sought for in places other than original Hindu Law Texts. The law relating to partial partition is essentially Judge-made law. Such law was moulded out of considerations of principles of equity. Therefore, one has to look to principles of equity in adjudicating on questions relating to partial partitions ".

Then again at age 25 of the report referring to the dictum of the Privy Council in *Lakshman* v. *Ramchandra*[3], namely :—

" The question therefore is not so much whether an admitted principle of Hindu Law shall be carried out to its apparently logical consequences as what are the limits of an exceptional doctrine established by modern Jurisprudence."

The learned Judge remarks :

" The Hindu Law text-writers knew nothing of partial partition. Therefore the thoeory and incidents of joint family and joint family property according to the genius of the Mitakshara are not the sole questions that should govern us, but it is the nature and extent of the suitable principles relating to partial partition established by modern decisions that have to be really considered and applied to such cases."

I must express my respectful concurrence with the mode of approach adopted by all the learned Judges of the Full Bench on the question referred to them for decision as well as in particular with the remarks of Anantakrishna Aiyar, J., on the true character of the doctrine of partial partition and the considerations of equity which have to be borne in mind by Courts in dealing with cases of partial partition.

The result of my consideration of the case, so far, is that, in my opinion, the equities arising from out of the partial character of the validity of the co-parcener's alienation must not be left out, as was done in *Marappa Gaundan* v. *Rangaswami Gaundan*[4] but must be worked out, not however, on the basis laid down in *Vadivalam* v. *Natasam*[5]. The question then is whether they should be worked out as laid down in *Venkatapathi* v. *Pappiah*[6].

Before dealing with this question I propose to say a few words more in regard to the contention of Mr. Krishnaswami Iyer that the equities must be worked out in the manner laid down in *Vadivalam* v. *Natasam*[5]. The learned counsel for the appellant has sought to fortify his position by maintaining that *Vadivalam* v. *Natasam*[5] which is the primary authority in his favour has been accepted as good law in later decisions of this Court down to *Venkatapathi* v. *Pappiah*[6] as well as, in a way, by the Privy Council in *Masit Ullah* v. *Damodar Prasad*[7]. Of such decisions of this Court the one important decision which calls for consideration is *Seetha Rama*

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1. (1902) I.L.R. 25 Mad. 690 (F.B.).
2. (1913) 26 M.L.J. 576 : I.L.R. 38 Mad. 684.
3. (1880) L.R. 7 I.A. 181 : I.L.R. 5 Bom. 48 at page 62 (P.C.).
4. (1899) I.L.R. 23 Mad. 89.
5. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
6. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.
7. (1926) 51 M.L.J. 792 : L.R. 53 I.A. 204 : I.L.R. 48 All. 518 (P.C.).

Naidu v. *Balakrishna Naidu*[1]. That was a case decided by Wallis, J. (as he then was) sitting on the Original Side of this Court. The suit in question was one brought by the plaintiffs who were the sons of the first defendant, for a cancellation of the alienation of their father and for partition. Dealing with the alienation of item 5, the learned Judge held that out of the total consideration of Rs. 850, therefor, Rs. 414, had been accounted for as for purposes binding on the family while Rs. 426 was left unaccounted for. The learned Judge was prepared to allow the alienation to the extent of Rs. 414, and in dealing with the equities to be worked out with reference to Rs. 436 the learned Judge observed at page 610 as follows :

"If the alienation were by a widow or a guardian or dharmakartha, in the circumstances of the present case the alienation to a much greater extent than was necessary would be set aside on payment to the alienee of the amount which was held binding. It is, however, contended that this is not the proper way to deal with an alienation by a co-parcener where th t alienation is only partially binding because according to the law now established in this presidency such an alienation is in any event binding to the extent of the co-parcener's share as it existed at the date of the alienation without any liability to increase or diminution by virtue of subsequent changes in the joint family. Consequently, it is contended that the alienees in this case acquired a one-third share in the property alienated independently altogether of the sum of Rs. 414 which was held to have been advanced by him for purposes binding on the joint family. As regards this sum—there is the decision in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] before the decision in *Chinnu Pillai* v. *Kalimuthu Chetti*[3] that the alienee is only entitled to the share o his alienor and has no further claim on the shares of the other co parceners in respect of the sum for which the alienation was rightly made. This view has been dissented from by Sundara Aiyar and Sadasiva Aiyar, JJ. in a very recent case in *Vadivalam* v. *Natasam*[4] and does not so far as I can judge appear to rest on any sound principle. It appears to me that the right way to look at it is this : the alienee acquired by the alienation a one-third share of the first defendant in this case. That one-third share must of course be burt ened with a one-third of the joint liability of the family for Rs. 414 : but there is no reason so far as I can see why the shares of the other co-parceners should not similarly be burthened with their proportionate share of the liability and therefore I hold it is binding on them to the extent of two-thirds of Rs. 414, and in the result that the allenee is entitled to one-third share, *plus* two-thirds of Rs. 414 as a charge upon the shares of the other co-parceners."

It is clear that the learned Judge in this case definitely ruled out the decision in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] as resting on no sound principle. I agree. I have already discussed that case in the course of this judgment and do not propose to say anything more about it. The learned Judge has further accepted *Vadivalam* v. *Natasam*[4] as sound law. So far as this view of the learned Judge is concerned, two points have been attempted to be made by the learned counsel for the respondent. One is that this view rests upon the same fallacious reasoning as the ruling in *Vadivalam* v. *Natasam*[4]. I have already dealt with this aspect of the matter and do not propose to say anything more. Mr. Venkatasubramania Aiyar further emphasises the reference to *Chinnu Pillai* v. *Kalimuthu Chetti*[3] in the course of the passage cited, as indicating a misunderstanding on the part of the learned Judge as to the true scope of the Full Bench ruling and as vitiating his decision as well as the decision in *Vadivalam* v. *Natasam*[4]. The learned counsel contends that while the Full Bench no doubt ruled that the fractional interest of the alienee of a co-parcener is what the co-parcener was entitled to on the date of the alienation in accordance with the number of members then in existence, the Full Bench did not as supposed by the two learned Judges in *Vadivalam* v. *Natasam*[4] and by the single Judge in *Seetharam Naidu* v. *Balakrishna Naidu*[1] rule that the fractional interest would attach to any particular item alienated without reference to the stock-taking of the entirety of the assets and liabilities of the family incidental to a general partition. It does not seem to me that this contention founded on the sentence in the passage quoted, namely :

"As regards this sum, there is the decision in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] before the decision in *Chinnu Pillai* v. *Kalimuthu Chetti*[3] that the alienee is only entitled to the share of his alienor and has no further claim on the shares of the other co-parceners in respect of the sum for which the alienation was rightly made"

and in particular upon the words

1. (1913) 26 M.L.J. 604.
2. (1899) I.L.R. 23 Mad. 89.
3. (1913) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.)
4. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.

" before the decision in *Chinnu Pillai* v. *Kalimuthu Chetti*[1]" in the sentence is well-founded. The real purpose of the reference to *Chinnu Pillai* v. *Kalimuthu Chetti*[1] can be gathered from the later part of the judgment of the learned Judge where he observes thus in continuation of the passage already set forth by me. Says the learned Judge:

> " I need only allude to the contention which was put forward by Mahadeva Aiyar that the proportion of the alienee was liable to be affected by subsequent additions to the family. It seems to me that this is inconsistent with the principles laid down in *Chinnu Pillai* v. *Kalimuthu Chetti*[1]".

I am inclined to think that it is only for the purpose of refuting this contention of Mr. Mahadeva Aiyar that *Chinnu Pillai* v. *Kalimuthu Chetti*[1] was at all referred to by the learned Judge. In my opinion, there is nothing in his judgment which suggests that he was putting *Chinnu Pillai* v. *Kalimuthu Chetti*[1] to any further effect than that just indicated. If that is so, there is no misunderstanding of *Chinnu Pillai* v. *Kalimuthu Chetti*[1] on the part of the learned Judge such as vitiates his reasoning in affirmation of the ruling of Sundara Aiyar and Sadasiva Aiyar, JJ., in *Vadivalam* v. *Natasam*[2].

The Privy Council decision in *Masit Ullah* v. *Damodar Prasad*[3] is one of the decisions to which I propose to refer in the context of the discussion. That is a decision which Mr. Krishnaswami Aiyar drew our attention to in support of his contention that *Vadivalam* v. *Natasam*[2] has been referred to with approval by the Privy Council and must, therefore, be accepted. The suit in question in the Allahabad case before the Judicial Committee was one by the son in a Mitakshara family of North-West Provinces to set aside a sale by the father of a joint family property for Rs. 18,400. Out of this amount of consideration, Rs. 16,400 was proved to have been utilised for payment of the debts of the plaintiff's great-grandfather, not illegal or immoral in their nature. Rs. 2,000 was left unaccounted for and the evidence of the plaintiff's father in regard to how it had been spent having been withheld from the Court the sale was upheld by the Privy Council altogether. The main question in the case was whether or not a Hindu governed by Mitakshara is liable for the debt of his great-grandfather in the same manner as he is liable for the debts of his father or grandfather. The trial Court having answered that question in the affirmative but having found that out of the total consideration, a sum of Rs. 2,000 had not been accounted for passed a decree declaring that the plaintiff is entitled to have proportionate property released from the sale deed and only to the extent of his share. The High Court on appeal answered the question of law as to the great-grandson's liability for debts of the great-grandfather in the negative and further found that the plaintiff was not entitled to anything more than Rs. 3,077 which was actually left in the hands of the vendees for payment to certain creditors of his father (defendant) and which had been proved to have been paid to these persons by the vendees. The decretal part of the judgment of the High Court is to be found set forth at page 522 of the report in these terms :

> " The result is that the plaintiff is entitled to a decree directing that he may recover possession of one half of the property specified at the foot of the plaint, subject to payment into Court for the benefit of the defendants vendees of a sum of Rs. 1,561-2-6.".

The amount in question was apparently the plaintiff's share of the binding debt found by the Court. On further appeal to the Privy Council the question of law was answered by their Lordships in the affirmative, that is in agreement with the Subordinate Judge and in disagreement with the High Court. Further, it was held by their Lordships on the evidence and probabilities that the sum of Rs. 2,000 and odd which had been held by the Subordinate Judge to have been not properly accounted for must be treated as proved, because the evidence of the father as to the way in which the amount was utilised was not forthcoming and that raised a presumption against the plaintiff. At the end of the judgment of the Privy Council

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1. (1913) 21 M.L.J. 246 : I.L.R. 35 Mad. 47.
2. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
3. (1926) 51 M.L.J. 792 : L.R. 53 I.A. 204 : I.L.R. 48 All. 518 (P.C.).

there is this observation which their Lordships make after answering the question of law and dealing with the question of fact in the manner above stated :

"In their Lordships' judgment, the ruling in *Vadivalam* v. *Natasam*[1] does not apply to the facts of this case."

It is contended by Mr. Krishnaswami Aiyar from this that that ruling must be taken to have received the approval of the Privy Council because all that their Lordships have said is that it did not apply to the facts of the case before them, not that it was wrong in principle. While I am not inclined to think this way of looking at the reference by their Lordships to the ruling in *Vadivalam* v. *Natasam*[1] can be regarded as conclusively correct, there is no doubt that the Privy Council ruling does certainly seem to support the learned counsel for the appellant by way of suggesting a *prima facie* point which must be accepted unless there is any reason to the contrary established. It certainly is possible to hold from the reference by their Lordships of the Privy Council to the ruling in *Vadivalam* v. *Natasam*[1] in *Masit Ullah* v. *Damodar Prasad*[2] that the inference by implication sought to be extracted by the learned counsel for the appellant from that reference is not by any means unreasonable. Of course, if on its own merits *Venkatapathi* v. *Pappiah*[3] is to be preferred to *Vadivalam* v. *Natasam*[1] a question with which I shall presently deal, the fact of the reference to *Vadivalam* v. *Natasam*[1] by the Privy Council in *Masit Ullah* v. *Damodar Prasad*[2] cannot operate as an obstacle in the way of the respondent ; because the reference to *Vadivalam* v. *Natasam*[1] in *Masit Ullah* v. *Damodar Prasad*[2] is not in the nature of an express statement of categorical approval, but only a cautious abstention from any pronouncement on its merits, in view of its inapplicability to the facts of the same before their Lordships.

Now, therefore, to turn to the question of the merits of the ruling in *Venkatapathi* v. *Pappiah*[3] as a question open to consideration untrammelled by anything said in *Masit Ullah* v. *Damodar Prasad*[2] as to *Vadivalam* v. *Natasam*[1], it is well to know how exactly the question arose in the later decision of the High Court so far as it is material for the purpose of the present discussion. There was a sale effected by the plaintiff's father of certain joint family property worth about Rs. 2,000, for Rs. 600 of which Rs. 400 was proved to have been utilised for the discharge of debts binding on the family. The argument for the appellant which fell to be considered was that the whole sale was to be set aside on condition of the plaintiff paying to the vendee Rs. 400 which he was willing to do, instead of the Court upholding the sale to the extent of the share of the plaintiff's father. The argument was based upon *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*,[4] but was repelled by the Court (Kumaraswami Sastri and Ramesam, JJ.), Ramesam, J., who delivered the judgment observing thus :

"But even in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[4] what was held was that the transaction could be upheld against the family in respect of the alienor's interest in the joint family property only to the extent of the value received and that if the conveyance had been of a reasonable portion of the joint family property for the discharge of an antecedent debt, the conveyance as such would bind the sons also ; but in the circumstances of the particular case it was held that the vendee could not claim the benefit of the sale even as regards the father's share. In that case, even if the sale was regarded as a sale of the father's share, the consideration would be grossly inadequate and to give effect to the sale of the father's share would be to evade the principle of Hindu law that it is not competent to an individual member of a Hindu family to alienate by way of gift his undivided share, or any portion thereof, and this principle cannot be evaded by the undivided member professing to make an alienation for value when such value is manifestly inadequate and inequitable."

Ramesam, J., thereafter proceeds to deal with *Marappa Gaundan* v. *Rangaswami Gaundan*[5], and *Vadivalam* v. *Natasan*[1], as being cases more in point for and more akin to the case before the Court, in which the transaction was upheld as a sale of the alienor's share only, where the consideration was not grossly inadequate

1. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
2. (1926) 51 M.L.J. 792 : L.R. 53 I.A. 204 : I.L.R. 48 All. 518 (P.C.).
3. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.
4. (1903) I.L.R. 27 Mad. 162 (F.B.).
5. (1899) I.L.R. 23 Mad. 89.

if regarded as consideration for the share only. Once again distinguishing the case before the Court from the case in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[1], the learned Judge observes :

"In the present case if the sale is regarded as a sale, of the father's share only, as the share was worth Rs. 500 the sale could not be regarded as for a grossly inadequate consideration and as practically effecting a gift of his share and there is no objection to upholding the sale as one of the father's share only. In this respect the facts of the case before us do not resemble the facts in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[1], but resemble the facts of the other cases mentioned above."

From the rest of the discussion in *Venkatapathi* v. *Pappiah*[2], there are two things which become clear. One is that the learned Judges in that case did not accept the decision in *Marappa Gaundan* v. *Rangaswami Gaundan*[3], as correct in so far as it refused altogether any equity in favour of the refunding of any portion of the purchase money to the vendee found binding on the estate. The other is that the learned Judges equally clearly refused to accept the principle of *Vadivalam* v. *Natasam*[4] found expressed at page 438 of the report that :

"It cannot be doubted that a co-parcener is entitled to part with his own share in any family property for any consideration he pleases."

This principle which the learned Judges admit as no doubt correct where the vendor is a divided member, they refuse to accept where the vendor is still a member of the joint family as, if accepted in the latter case as well it would conflict with the statement of law in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*,[1] where it was observed that :

"the principle that a member of a joint family cannot make a gift of his share cannot be evaded by making a sale for a grossly inadequate consideration and practically making a gift of the property."

The learned Judge therefore held thus :

"We agree with the observations in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[1] and are inclined to dissent from the observations in *Vadivalam* v. *Natasam*[4]."

Thereafter, the learned Judges proceed to consider how exactly the equities in the case would have to be worked out consistently with the Full Bench ruling in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[1], with which they agree. In considering the question they observe next :

"The result would be if the consideration is distributed over all the shares and if we then try to uphold the sale even as regards the alienor's share, the sale of that share should (not) be for a possibly inadequate consideration. In the present case, the sale of the father's share which is worth Rs. 500 at least would be for Rs. 100 which is his one-fourth share of the consideration proved. Looked at from this point of view the sale of the father's share too would be for an inadequate consideration with the result that it cannot be upheld on the principle laid down in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[1]. In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share. If it is less than the value of the alienor's share no further equity in favour of the vendee arises. If it is more, for the excess a charge may be given for the share of the co-parceners."

The learned Judges further point out in this connection that :

"It may be that in such a case where the consideration is found to be binding on the whole family the effect of allotting the consideration wholly to the alienor's share would be to give rise to some equity in favour of the alienor, for the result of such aolltment would be to make him bear the whole of the debt, whereas it is a debt really binding on the whole family. If the family is divided, as a result of this transaction it may be that he may file a suit for contribution but if the family continues undivided there is no need for such equity."

Finally this is what their Lordships say :

"To sum up three possible cases arise :

(1) Where the whole of the consideration, even after being allotted to the alienor's share only, is grossly inadequate, the whole transaction will have to be set aside making the consideration proved a charge on the family property. That would be a case resembling *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*.[1]

1. (1903) I.L.R. 27 Mad. 162 (F.B.).
2. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824
3. (1899) I.L.R. 23 Mad. 89.
4. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.

(2) Where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share, but is less than the value of such share, the then transaction may be upheld as the sale of the alienor's share only and the other members who question the transaction are entitled to recover their share of the property without being subjected to any other equity. The case would then resemble *Marappa Gaundan* v. *Rangaswami Gaundan*[1]. In such a case if the members are divided and the alienor leaves other heirs than the members who question the transaction, he or his heirs may have a right to contribution.

(3) Where the consideration proved exceeds the value of the alienor's share, the transaction may be upheld as the sale of the alienor's share only and for the excess a charge may be given over the shares of the other members."

It will be seen from the foregoing that so far as the first of the rules laid down in the case is concerned there can be no doubt about its soundness. The Full Bench in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[2] fully supports it; and there has been no reason shown for the appellant why it should not be accepted. It was argued that the matter of adequacy or inadequacy of the consideration for the alienation of a share of the co-parcener is a matter of no moment whatsoever to the other co-parceners. The ordinary principle that anybody can sell his own property for any consideration he pleases must, it is said, apply to the case of an alienation of a co-parcener of his own share in the family property. I am not however prepared to accept this contention. The case in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[2], has held the field for about half a century and rests on a principle which considering the corporate character of the joint family has never been questioned. In the case contemplated by the rule in question the only equity that can be worked out is of the kind indicated therein which is what in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[2], itself allows for.

The real question is as to rules (2) and (3) and the basis on which they rest. They come in it will be seen, only where even distributing the binding consideration amongst all the sharers, it is impossible to uphold the sale as a sale of the alienor's share even, on account of the inadequacy of the proportionate part of the binding consideration even for a sale of the alienor's share only. The exact meaning of these rules has given rise to considerable debate before the Court because of some doubt felt by us during the hearing in regard to the meaning of the word 'consideration' employed in more than one place in the formulation of the rules—as to whether it means the entire consideration named in the deed or the binding part of the consideration. I have carefully pondered over the doubt since reservation of judgment and come to feel on the whole that the meaning of the rules is by no means open to real or serious doubt, whatever their soundness. It seems to me that where "whole consideration" is referred to in the rules, that means the whole consideration actually paid for the deed. On the other hand, where the expression used is "the consideration proved," it obviously refers to the consideration proved to be binding upon the joint family.

Rule (2) in my opinion deals with a case in which the whole consideration is not grossly inadequate and the consideration proved to be binding can be regarded as the price of the alienor's share but is less than the value of such share. That the rule should be so read—*i.e.*, by introducing there into the words 'the consideration' proved to be binding—is clear from two circumstances: one is that then only will the illustration in *Marappa Gaundan* v. *Rangaswami Gaundan*[1], referred to in the rule stand justified. The other is that rules (2) and (3) are converse to each other and rule (3) uses the expression 'consideration proved' which as contrasted with the expression 'the whole consideration' or 'the whole of the consideration' occurring elsewhere in the formulation of the rules means 'consideration proved to be binding.' Moreover, from the last sentence of rule (2) which refers to the right of contribution of the alienor and after his death, of his heirs at a subsequent partition in the family it is clear that the consideration proved

1. (1899) I.L.R. 23 Mad. 89. 2. (1903) I.L.R. 27 Mad. 162 (F.B.).

must refer to the consideration proved to be binding as except on the hypothesis of binding character no right of contribution in respect of the amount assigned to the share of the alienor is reasonably conceivable. The rules have been understood in this manner by the learned Subordinate Judge in the Court of trial and the learned District Judge on appeal in the present case and no difficulty has been expressed by them inthe matter of understanding the rules on account of vagueness of language. To condemn the rules on the ground of such vagueness and therefore to overrule them, or to refuse to apply one or the other of them in a given case to which one or other is capable of being applied if understood properly is to create an imaginary difficulty where in fact there is none and to do serious injustice to the learned Judges who decided *Venkatapathi* v. *Pappiah*[1]. It is of course a different matter if the rules themselves are unsound if understood in the way mentioned by me and adopted by the Courts below in the present case. Moreover, the rules have been incorporated into Mayne on Hindu Law and Usage in the latest as well as the immediately prior editions and it cannot be presumed, that they have been mechanically incorporated by the learned editors without satisfying themselves about what is meant by them

Now to analyse the rules so incorporated with reference to the principles on which they rest in order to examine the soundness of their foundation, it is clear that after refusing though not in so many terms to accept the view of the learned Judges in *Marappa Gaundan* v. *Rangaswami Gaundan*[2], that no equities ought to be worked out at all, the learned Judges in *Venkatapathi* v. *Pappiah*[1], set about to ascertain the rules for working out the equities in the light of the very considerations of the true value of the share set forth in *Marappa Gaundan* v. *Rangaswami Gaundan*[2], as grounds rendering such working out impracticable. It is equally clear that they so set about the task on the basis of the principle of the Full Bench ruling in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[3], that the adequacy of the consideration for the sale by a co-parcener of his interest is by no means a matter of no moment to the other co-parceners. It is also clear that they set about the task after accepting the principle of distribution of the binding portion of the consideration over the several shares consistently with *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[3] and considerations of the true value of the share, but not, in the manner contended for by the appellant before us, *i.e.*, as though the shares were like different items of property subject to a common burden which is liable to be apportioned over them irrespective of the true value of the share alienated as a matter of no moment to the other co-parceners. The learned Judges set about the task by seeking to assign the entire binding portion to the share of the alienor if it is less than the true value of the alienor's share; and by leaving it to him or his heirs to claim contribution at the subsequent partition; and where the binding portion exceeds the value of the share by recognising a charge over the shares of the non-alienating co-parceners for such excess. As already noticed, these rules (rules 2 and 3 as numbered by the learned Judges) come into operation where, even distributing the binding consideration amongst all the co-parceners' shares, it is impossible to regard the sale of even the alienor's share as anything but for a possibly inadequate consideration. Where on the basis of such distribution there is no such inadequacy the sale stands as in respect of the alienor's share. It will be seen that this is a rather limited mode of working out the equities in favour of the alienee but more consonant to the conception of co-parcenary continuing even after the alienation and even in respect of the share recovered according to *Kandaswami* v. *Velayudha*.[4] Although in the first instance in the case contemplated by rule (2) the burden is thrown entirely on the alienor's share there is the provision made for contribution

1. (1928) 55 M.L.J. 489: I.L.R. 51 Mad. 824.
2. (1899) I.L.R. 23 Mad. 89.
3. (1903) I.L.R. 27 Mad. 162 (F.B.).
4. (1926) 51 M.L.J. 99: I.L.R. 50 Mad. 320

at the subsequent partition in the family. Then again, in the case contemplated by rule (3) although not expressly so stated, there is room, I imagine similarly for adjustment of rights between co-parceners arising out of possibly more burden being thrown on the alienor's share in the first instance, at the partition to be later on effected between them. The equities laid down by the learned Judges are such as recognised the principle of continuing jointness between co-parceners notwithstanding the alienation without at the same time offending against the rule of partial partition well established in Hindu Law from as long ago as *Venkatachala Pillai* v. *Chinnayya Mudaliar*[1]. These equities commend themselves to me to be better in the sense that they do not go beyond but conform to the limits set by law to use the language of Lord Blanesburgh in *Nagappa Chettiar* v. *Brahadambal*[2]. To set about working out equities in the manner laid down in *Vadivalam* v. *Natasam*[3], is in my opinion to revolutionise the Hindu Law by seeking to place the interest of co-parcener on precisely the same footing as the interest of any absolute owner of property in a manner opposed to fundamental conceptions as to the nature of the interest acquired by an alienee from a co-parcener too deep-rooted to be destroyed altogether. Whatever the inroads on the original incidents of joint family holding of property already sanctioned by decided cases in the interests of alienees who have parted with consideration or of the personal creditors of a co-parcener who has become adjudged an insolvent whether at his own instance or on the petition of a creditor, the right of the alienee remains no more than an equity even according to the latest cases of this Court in *Krishnamurthi Iyer* v. *Nataraja Iyer*[4] and *Subbiah* v. *Venkateswaralu*[5] and according to the implication of the observation of Sir George Rankin in the Privy Council decision in *Ramanna* v. *Jagannatha*[6], referred to earlier in this judgment. While, that may not forbid working out of equities altogether as already observed by me in the course of this judgment, the equities to be worked out must be ascertained within the limits set by law and must be conceived not on the basis that the co-parceners have become altogether separated *quoad* the item which is the subject-matter of the alienation by one of them and of the suit for recovery of his share by the non-alienating co-parcener without any need of further adjustments as to that item between them at a later suit for partition in respect of the remainder of the joint family estate but in accord and harmony with the settled principle of continuing jointness of the family, even after such recovery of the share be it as his separate property or private family property with reference to the rest of the property of the family till the jointness becomes disrupted by subsequent partition at which the further equities by way of rights of contribution as between the alienor and his co-parceners may be worked out as arising from the result of the suit of the non-alienating co-parcener. The ground apparently on which the burden of the entire binding debt is thrown in the first instance upon the alienor's share in rules (2) and (3) in the ruling in *Venkatapathi* v. *Pappiah*[7], is that in alienating his share for a purpose only partially binding on the joint family property and without the consent of the other members of the family the alienating co-parcener has been guilty of something in the nature of bad faith though not in the sense of a breach of trust in the strict sense of the latter expression in relation to the rest of the members of the co-parcenary. But at the same time he is not penalised for his conduct in the ultimate result as the assignment or attribution of the binding portion in its entirety to his share leaves him still with his rights of contribution at a subsequent partition between himself and the other members of the family.

The learned Judges in the case in *Vadivalam* v. *Natasam*[3], in my opinion, wrought a social reform in the guise of a judicial decision which was not within their province. On the other hand, the learned Judges in *Venkatapathi* v. *Pappiah*[7], have attempted

1. (1870) 5 M.H.C.R. 166.
2. (1935) 68 M.L.J. 452 : L.R. 62 I.A. 70 : I.L.R. 58 Mad. 350 at 362 (P.C.).
3. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
4. (1948) 1 M.L.J. 430.
5. (1948) 1 M.L.J. 476.
6. (1941) 2 M.L.J. 58 : L.R. 68 I.A. 75 : I.L.R. (1942) Mad. 886 at 892 (P.C.).
7. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.

to deal with *Marappa Gaundan* v. *Ramaswami Gaundan*[1] and *Vadivalam* v. *Natasam*[2] together, by going further than the one but not so far as the other and evolved a formula of compromise or *via media* between the two decisions, in consonance with well-established principles, meting out justice alike to the alienee and to the non-alienating co-parcener. The ruling in *Venkatapathi* v. *Pappiah*[3] holds the scales as even as possible between the two parties without making of equity a principle of unilateral operation. It is anomalous enough that under the law as it stands, the alienating co-parcener is able to realise the full value of his share by an alienation for consideration and continues to enjoy all the same the advantages of a subsisting state of co-parcenary between himself and the other members of his family. It is to add another anomaly to the situation to hold as the learned Judges in *Vadivalam* v. *Natasam*[2], held, that the alienee, who acquires only an equity in the sense of a right "subject of course to the equities in favour of the other members of the family against the transferor" to use the language of Kumaraswami Sastri, J., in *Baluswami Iyer* v. *Lakshmana Iyer*[4], is entitled to the kind of equitable apportionment laid down by those learned Judges, notwithstanding the unfair and inequitable conduct of the alienor by means of which he obtains an undue advantage over his co-parceners. If the co-parceners of a joint Hindu family were in exactly the same position as ordinary co-owners or tenants-in-common the position might differ, and well attract the principle at the basis of *Vadivalam* v. *Natasam*[2]. On the one hand, for us to refuse equities altogether on the basis of the ruling in *Marappa Gaundan* v. *Rangaswami Gaundan*[1], may be to set the dial back from where it has progressed to in *Vadivalam* v. *Natasam*[2]. On the other hand for us to sanction the working out of the equities in accordance with the later decision will be to sanction the abrupt precipitation of the motion of the clock which the learned Judges in *Vadivalam* v. *Natasam*[2], rather daringly and unwarrantedly promoted. These learned Judges were not right in taking such action and no wonder the learned Judges in *Venkatapathi* v. *Pappiah*[3], disapproved of the decision reached in the earlier case. These learned Judges after taking note of the Full Bench ruling in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetty*[5], contravened by the learned Judges in *Vadivalam* v. *Natasam*[2], after recognising the principle of distribution of the binding portion of the consideration over all the shares, given effect to by the learned Judges in *Vadivalam* v. *Natasam*[1], in disregard of the considerations as to the true value of the property alienated, adumberated in *Marappa Gaundan* v. *Rangaswami Gaundan*[1], only to be rejected for no valid reason, laid down the three rules for working out the equities in favour of the alienee in a sufficiently just and practical manner calculated to satisfy the claims of the alienee as well as of the non-alienating co-parceners. I do not consider the mere simplicity of a formula for working out such equities like the one laid down in *Vadivalam* v. *Natasam*[2] to be sufficient virtue in itself to attract my judgment. If it were, there would be that virtue even about the ruling in *Marappa Gaundan* v. *Rangaswami Gaundan*[1]. I consider that, however lacking in the simplicity of the ruling in *Marappa Gaundan* v. *Rangaswami Gaundan*[1] or the ruling in *Vadivalam* v. *Natasam*[2] we ought not on that ground to discard the view of the learned Judges in *Venkatapathi* v. *Pappiah*[3], whose names are not a whit less illustrious than those of the learned Judges responsible for the decision in *Vadivalam* v. *Natasam*[2], especially when that view is the only possible view in harmony with binding precedent as well as the surviving basic principles of the holding of property by the joint Hindu family of the Mitakshara school after all the inroads on it which decided cases of binding authority have made. To add one more to the list of such inroads which has the effect of further assimilating the share of the co-parcener in joint family property to any ordinary, separate property possessed by a person in co-ownership with another so as to destroy the basic distinction between the two kinds of property is a feat from which I shrink with that inevitable conservatism of judicial outlook, which is part of my

1. (1899) I.L.R. 23 Mad. 89.
2. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
3. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad.
4. (1921) 41 M.L.J. 129 : I.L.R. 44 Mad. 635 (F.B.).
5. (1903) I.L.R. 27 Mad. 162 (F.B.).

constitution. It may be that the progressive conditions of modern Hindu society do require relaxation of some of our ancient rules of law. It may be that some of us do sometimes feel that the share of a member of a joint Hindu family should become much more of a fluid asset than it is at the present day in the interests of commerce and business, in the interests of social as well as individual prosperity. I am afraid, however, I cannot share the view of my learned brother Viswanatha Sastri, J., that there will not be many to shed a tear over a conclusion which deals a further blow to the tottering joint family structure. I, for one, am an ardent admirer of the Mitakshara joint Hindu family system with the innumerable virtues which it enshrines and cannot witness such a blow except in a spirit of genuine concern. Whatever that may be, any change in the law can come in through judicial decisions only within limits which govern Courts and for anything beyond must come in by way of legislation. The question for the Court in such a case, to use the language of the Privy Council in *Lakshman* v. *Ramachandran*[1], is not so much whether an admitted principle shall be carried out to its apparently logical consequence as what are the limits of an exceptional doctrine established by modern jurisprudence. The doctrine of equity in favour of an alienee from a co-parcener can never in my opinion, however much extended already by judicial decisions, be further extended so as to lay the axe at the very root altogether of the nature of the interest which a co-parcener holds in the joint family estate. *Vadivalam* v. *Natasam*[2], sought to so extend the equity. *Venkatapathi* v. *Pappiah*[3], discountenanced the attempt. A regrettable feature of the situation perhaps is that the learned Judges in the latter case did not then and there refer the question on which they differed from the earlier decision to a Full Bench for determination. Anyhow, now, as the question has come up for determination, I prefer the later decision to the earlier and while recognising, in disapproval of the ruling in *Marappa Gaundan* v. *Rangaswami Gaundan*[4], that equities have to be worked out in favour of the alienee from a co-parcener with reference to the binding portion of the consideration on cancellation of the alienation at the instance of the non-alienating co-parcener, I prefer to have the equities worked out in accordance with the rules laid down in the later decision rather than in accordance with the rule laid down in the earlier. It is significant to note that although *Vadivalam* v. *Natasam*[2], was referred to in Coutts Trotter's edition of Mayne on Hindu Law and Usage, the reference has been removed from the edition of Srinivasa Aiyengar, even as it is not to be found in the latest edition of Chandrasekhara Aiyar, J. The view of law that I am taking may not perhaps look like quite as logical as the view of the learned Judges in *Vadivalam* v. *Natasam*[2]. But that decision went to one extreme even as *Marappa Gaundan* v. *Rangaswami Gaundan*[4] had remained at the other extreme. Either of these decisions might be more logical in the abstract than the decision in *Venkatapathi* v. *Pappiah*[3]. But after all, it is not abstract logic that so much matters in cases of this kind as the logic of relative consistency between decisions on the same or similar topics. I hold that the balanced and poised view of the learned Judges in *Venkatapathi* v. *Pappiah*[3] savouring, it may be, of the mathematical bent of mind of one of them and founded, undoubtedly, in the instincts of a sober and healthy outlook, neither unduly progressive or unduly conservative, characteristic of both of them meets the requirements of the situation with which we are dealing in a manner most consonant to considerations of law as well as equity.

To the process of working out of equities as laid down in *Venkatapathi* v. *Pappiah*[3], it is difficult to see what just exception the alienee can take. Where the binding part of the consideration is either equivalent to or less than the value of the share of the alienor he cannot have any cause of complaint. Where it exceeds he gets a charge for the excess over the share or shares of the other member or members.

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1. (1880) L.R. 7 I.A. 181 : I.L.R. 5 Bom. 48 at p. 62 (P.C.).
2. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
3. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.
4. (1899) I.L.R. 23 Mad. 89.

If the binding consideration is the basis on which the question of equities in his favour is to be considered according to *Venkatapathi* v. *Pappiah*[1] how can he complain of it when that is the only basis on which the validity of the alienation in his favour is itself to be considered, where there is no consent to the alienation proved on the part of the other members of the family? After all, the alienation is that of the co-parcener's interest in the joint family which ordinarily cannot be disposed of except for fully binding consideration or with the consent of all other members of the family. The alienee acquired that interest, no more, and no better, for the value which he pays. Where that value happens to exceed the binding portion of the consideration he has only to thank himself if it turns out eventually that he has paid more than he ought to have paid for the share which is all that he bargained for and which he ought not to have bargained for at all except on the basis of consent of the other co-parceners or on the basis that all that he is paying is for purposes binding on the family. It is only a qualified estate that a co-parcener owns and possesses and no alienee from him can claim equities so as to convert it into an unqualified estate. There are limitations attached to it as inherent incidents and the co-parcener cannot alienate nor the alienee acquire more than the limitations warrant. Such limitations exist in the case of a widow and daughter in what is not her stridhanam property and neither there nor here can any Court destroy them or do away with them, however unpalatable they may be. The fact of payment of consideration which is of the essence of the equity invokable by the alienee can only justify the working out of equities consistently with the limitations attaching to the estate conveyed. If no Court can destroy or do away with such limitations directly, neither can it destroy nor do away with them indirectly under the guise of working out of equities. No Court has the power to enlarge an estate beyond the limits set by law and if the equities worked out consistently with such limits still leave the alienee in the position that he is not thereby getting the full *quid pro quo* for the consideration paid by him, he has of course his remedy under the ordinary law for damages for breach of covenant for title, where the covenant exists as usually it does. Where, however, the covenant stands excluded by the terms of the bargain between the parties he has only to please himself with what he gets as a result of the working out of equities according to the rules in *Venkatapathi* v. *Pappiah*[1].

I may also mention in this connection that there is to be found in 27 M.L.J. Notes of Indian Cases at page 62 a learned note expressing preference of *Marappa Gaundan* v. *Rangaswami Gaundan*[2], to *Vadivalam* v. *Natasam*[3] and setting forth grounds for the preference. Although for the reasons given by me in the foregoing I cannot accept *Marappa Gaundan* v. *Rangaswami Gaundan*[2] as sufficiently meeting the requirements of equity in favour of an alienee for consideration it seems to me to use the language of the learned Editors, that from their tenderness to purchasers and creditors Courts have proceeded sufficiently far in derogation of the rights of co-parceners that they may properly be asked to halt and consider whether it is right to remove altogether, what seems to be a desirable check on a disposition on the part of speculative persons to enter with some co-parceners into transactions calculated to affect the rights of other co-parceners who are not parties thereto which the learned Judges in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] had in mind. *Venkatapathi* v. *Pappiah*[1] preserves the check not in the wrong manner laid down by *Marappa Gaundan* v. *Rangaswami Gaundan*[2], *i.e.* by refusing equities altogether but in the right manner best calculated to reconcile the interests of the alienee as well as of the other co-parceners, *i.e.* by working out the equities in the limited manner and measure sanctioned by its three rules. I accordingly accept it.

Considerations of equity are sometimes apt to mislead Courts and deflect them from the proper path of law. That happened for instance in the case in

1. (1928) 55 M.L.J. 489: I.L.R. 51 Mad. 824.
2. (1899) I.L.R. 23 Mad. 89.
3. (1912) 23 M.L.J. 256: I.L.R. 37 Mad. 435.

Govindu v. *Venkatapathi*[1] where Leach, C.J. delivering the judgment of the Court consisting of himself and Lakshmana Rao, J., in a case which related to the validity of an alienation by a limited estate holder like a Hindu widow held thus :

> " Where owing to lapse of time it is impossible to produce evidence of necessity in support of an alienation by a Hindu widow or evidence of enquiry by the alienee and there is no ground for suspecting abuse by the widow of her power to alienate for a necessary purpose, we consider that the cases quoted (noticed above in this judgment) provide ample authority for the Court disregarding the ordinary rule of Hindu Law and drawing an inference in favour of the validity of the alienation. In such circumstances, it would be unreasonable not to recognise an exception to the rule ; otherwise grave injustice might result ".

This view of the learned Chief Justice and Lakshmana Rao, J., has been since over-ruled by a Full Bench of this Court consisting of the present Chief Justice, Satya-narayana Rao and Viswanatha Sastri, JJ. (*Subramaniyam* v. *China Sooraya*[2]) Viswa-natha Sastri, J., in his judgment observes :

> " In our opinion, it is not permissible for us to convert a rule of evidence into a rule of substantive law. Lapse of time does not alter the incidence of the burden of proof nor does it dispense with evidence direct or circumstantial, to prove justifying necessity for an alienation by a limited owner under the Hindu Law ".

Equity ought never in my opinion to be pressed into service for over-stepping the limits set by law.

To sump up now the several conclusions reached by me on this part of the case :

(1) *Marappa Gaundan* v. *Rangaswami Gaundan*[3] cannot be accepted as good law in so far as it refuses equities altogether to the alienee in the suit for partial partition by the non-alienating co-parcener ; (2) *Vadivalam* v. *Natasam*[4] cannot be accepted as good law in so far as, while rightly sanctioning the working out of equities in such a case, the rule adopted by it for the purpose is one opposed to fundamental conceptions pertaining to the nature of a co-parcener's interest in the family estate as well as to the nature of the right which the alienee acquires ; (3) *Venkatapathi* v. *Pappiah*[5], must be accepted as good law as sanctioning the working out of equities in accordance with such fundamental conceptions and within and only within the limits set by law.

These conclusions I have reached, bearing in mind and applying to the case on hand the principles embodied in propositions Nos. 1 to 9 formulated in an earlier part of this judgment. After reaching these conclusions, I have also anxiously considered whether I should differ from my learned brothers on what may seem to be a point of practice and procedure, the proper mode of working out of equities in favour of the alienee from a co-parcener where the alienation is only partially supported by binding consideration. I have finally made up my mind to differ for the reason that the point is so much mixed up with principles of substantive law that if differ I do, differ I must.

I may mention two points of relatively subsidiary importance before I close my treatment of this part of the case. One is that both the rulings in *Marappa Gaundan* v. *Rangaswami Gaundan*[3] and *Venkatapathi* v. *Pappiah*[5] are shown side by side with each other in Mayne on Hindu Law and Usage in the present edition as well as in the edition immediately prior to it. It is stated first at page 508 in paragraph 407 of the latest edition :

> " Where an alienee stands by an alienation which is only partially binding he must be content with the alienor's share. If he wishes to repudiate the transaction altogether his *only* remedy is by a suit against the vendor for the return of the price paid on the ground that the consideration for the same has failed ".

In the same paragraph it is further stated :

> "When an objecting co-parcener sues to set aside the alienation the following rules of the Madras High Court in *Venkatapathi* v. *Pappiah*[5] are applicable."

1. (1946) 1 M.L.J. 407 : I.L.R. 1947 Mad. 105.
2. (1950) 1 M.L.J. 527 : I.L.R. (1950) Mad. 1053 (F.B.).
3. (1899) I.L.R. 23 Mad. 89.
4. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
5. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.

The rules are thereafter stated. From the juxtaposition of the two passages quoted, without notice of any conflict between them it may appear that the remedy suggested to the alienee in *Marappa Gaundan* v. *Rangaswami Gaundan*[1] is one which co-exists with the remedy by way of working out of equities as laid down in *Venkatapathi* v. *Pappiah*[2]. I wish to make it clear that in my opinion that is so, notwithstanding the difficulty created by the word 'only' underlined (italicised) by me in the first passage. It is only in the sense that equities were refused altogether to the alienee against a non-alienating co-parcener by the ruling in *Marappa Gaundan* v. *Rangaswami Gaundan*[1] where he chose to stand by the alienation, that it must be taken that the ruling in *Marappa Gaundan* v. *Rangaswami Gaundan*[1] is no longer in my opinion good law. The remedy of a suit against the vendor for the return of the price paid on the ground of failure of considefatilon in the case of total repudiation of the transaction by the non-alienating co-parcener stands altogether unaffected by the ruling in *Venkatapathi* v. *Pappiah*[2]. The remedies are alternative and it is open to the alienee to choose the one or the other as he pleases. If it is a question of working out of equities as I have already said that must be in accordance with the ruling in *Venkatapathi* v. *Pappiah*[2] which I consider to be correct and not in accordance with the ruling in *Vadivalam* v. *Natesam*[3] which I consider to be wrong.

The other subsidiary point with which I propose to shortly deal is as to the effect of section 44 of the Transfer of Property Act (as amended in 1929, by the omission of the words 'Hindu or Buddhist' in the concluding part of section 2 of the Transfer of Property Act) on the right of mesne profits which under well-settled decisions of this Court stands denied to an alienee from a co-parcener. It is the opinion of Mayne on Hindu Law and Usage in the latest edition as well as the edition immediately prior thereto (*vide*—paragraph 391, page 493 of the latest edition) that the result of the amendment of the Act in 1929 is that:

"While the transferee of a share of a dwelling house belonging to an undivided family is not entitled to joint possession, the transferee of a share of other immovable property is entitled to joint possession and enjoyment; he would be tenant-in-common entitled to mesne profits if he is kept out of possession."

As pointed out by my learned brother, Satyanarayana Rao, J., in his judgment, this opinion has not been followed in this Court by Chandrasekhara Aiyar, J., in Second Appeal No. 940 of 1945 or by Thyagarajan, J., in Second Appeal No. 2339 of 1945 and 95 of 1946 or in the Letters Patent Appeal decided by Horwill and Balakrishna Aiyar, JJ. against the latter decision in affirmance of the view of Thyagarajan, J. The view expressed by Mulla in his commentary on the Transfer of Property Act (3rd Edn.) which has been followed in these decisions for the reasons given therein is in my opinion preferable to that expressed in Mayne on the Hindu Law and Usage.

There remains for treatment only the question of the effect of a coparcener's adjudication in insolvency and the administration of his share of the family estate by the Official Receiver upon the decision of this case. The way in which argument was framed by the learned counsel for the respondent on this point has been set forth by me in a very early part of this judgment. As I observed there the question does not strictly arise for determination in this case because of the allegations in the plaint of a continuing jointness between the plaintiff and the first defendant down to the date of suit. What I am saying therefore on this question is bound to be obiter even as what this Bench saying on the question as to the proper mode of working out of equities is bound to be. Since on this question also the other members of the Court have expressed their opinion it may not be out of place for me to say just a few words of my own on this question.

The point which Mr. Venkatasubramania Aiyar sought to make is that with the crystallisation of the share of a co-parcener on his adjudication for separate

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1. (1899) I.L.R. 23 Mad. 89.
2. (1928) 55 M.L.J. 489: I.L.R. 51 Mad. 824.
3. (1912) 23 M.L.J. 256: I.L.R. 37 Mad. 435.

treatment by the Official Receiver or Official Assignee, there is an automatic severance of status which comes about in the family. Partition, says learned Counsel, is as defined by Mitakshara and other relevant texts "the adjustment of diverse rights regarding the whole (of the joint estate) by distributing them over particular portions of the aggregate". Therefore, as in the case of an unilateral declaration by a co-parcener of his intention to become divided so, according to Mr. Venkatasubramaniam, there results irrespective of any such volition on the part of the co-parcener a fixation of his right on insolvency. It is absolutely beyond doubt that the ancient texts on Hindu Law never contemplated any such situation as of insolvency or any such result as of severance. I respectfully agree on this question with all that has been said by my learned brothers in their judgments. Their treatment of the question is so exhaustive and their conclusion is so obvioulsy sound to my mind that I reckon it to be a sheer waste of judicial time to seek to add one single further word of my own to their judgments.

In the result, I agree with the decree proposed by my learned brother, Satyanarayana Rao, J.

Panchapakesa Ayyar, J.—I have gone through the judgments of my learned brothers and am in agreement with them that this Second Appeal should be allowed with costs throughout and the respondent made to pay half the binding debt (Rs. 3,511) as a condition precedent for recovering his half share in the property alienated by his father, P.W. 1, before his insolvency, and for claiming mesne profits, and that the rule in *Vadivalam* v. *Natasam*[1] should be applied, in preference to the rules in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] and *Venkatapathi* v. *Pappiah*[3], but subject to the application of the rule in *Rottala Ranganathan Chetti* v. *Pulicat Ramaswami Chetti*[4] as it is too well settled to be disturbed now and as it also, according to me, embodies the simplest and most easily workable rule of sound equity and justice. I am also of opinion that even apart from the ruling in *Vadivalam* v. *Natasam*[1] the scope of this suit, a partition suit brought by the respondent for getting his half share in the entire remaining family properties divided and delivered to him allowing the appellant alienee to retain the father's half share in the alienated properties, is wide enough to work out the equity of the alienee under the Hindu Law, as a purchaser for value from an undivided co-parcener, in this suit itself, by stepping into his alienor's shoes and working out his right to get his share partitioned, and give him the relief regarding half the binding debt discharged by executing the sale deed in his favour. I am also convinced that the insolvency of the father and the administration of his interest in the joint family properties by the Official Receiver did not effect a severance in status between father and son and make this suit in consequence not a suit for partition. In view of the importance of the matter, I wish to add a few words on some aspects of the general and particular arguments so ably and vividly addressed to us by Mr. Venkatasubramania Iyer for the respondent. His arguments were a passionate plea to set aside the rule in *Vadivalam* v. *Natasam*[1], on the ground of alleged error, inconsistency with the law laid down by the Mitakshara and in the ruling in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] and *Venkatapathi* v. *Pappiah*[3] and its inequity, and also to rule that the suit would not amount to a general suit for partition, allowing of the equity to be worked out apart from the rule in *Vadivalam* v. *Natasam*[1], as the insolvency of the father and the administration of his interest in the joint family properties by the Official Receiver had effected a severance in status, leaving no more scope for partition or equity. After listening to his arguments with great attention and respect, I am unable to agree with them.

There is no doubt whatever in my mind that a private purchaser from an undivided Hindu co-parcener in Madras, Bombay and Madhya Pradesh (old Central Provinces and Berar) get not merely a right *in personam* or a right to sue, as urged by Mr. Venkatasubramania Iyer, but a tangible property right, whether in law or

1. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
2. (1899) I.L.R. 28 Mad. 89.
3. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.
4. (1903) I.L.R. 27 Mad. 162 (F.B.).

equity it does not very much matter, a right which, according to settled decisions which it is too late to question or disturb, does not disappear at the death of the alienating coparcener (see *Bhagwan Bhau* v. *Krishnaji*[1], and *Ramappa* v. *Yellappa*[2]) and which gets fixed at the alienating co-parcener's estimated fractional share in the joint family properties at the time of the alienation, as it were crystallising it as on that date (*Chinnu Pillai* v. *Kalimuthu Chetti*[3] and *Dharma Rao* v. *Bapanayya*[4].) In a very early case, *Viraswami Gramani* v. *Ayyaswami Gramani*[5] quoted with approval by the Privy Council in *Suraj Bansi Koer* v. *Sheo Prasad Singh*[6], this Court decided, on the basis of an equity not recognised by the Mitakshara but invoked by Colebrooke, Ellis and Strange, that in the Presidency of Madras one co-parcener may dispose of his ancestral undivided estate even by contract and conveyance to the extent of his own share and *a fortiori* that such share may be seized and sold in execution for his separate debt. This equity is, in my opinion, not altogether undeducible from Hindu Law and need not be wholly attributed to English Law, an alien system, as urged by Mr. Venkatasubramania Iyer. Equity was well-known to Hindu Sages who put "*swasya cha priyamatmana* :" (what is approved by one's conscience, literally, what is acceptable to one's soul) as a source of law along with the *Sruti*, *Smriti* and *Sadachara* : (*vedas*, *Sastras* and valid custom ; *see* Manu II. 12 ; Yajnavalkya I. 7 etc.). Hindu sages wanted equity to step in, in order to render justice where the text of the *sastra* would operate to bring about inequity. Brihaspati's text (quoted in *Vyavaharanirnaya of Varadaraja* and other books) runs :

KEVALAM SASTRAMASRITYA NA KARTAVYOHI NIRNAYA:
YUKTIHINE VICHARETU DHARMAHANI: PRAJAYATE.

(The decision should not be based only on the *sastras*. By an inequitable judgment there is permanent loss of Dharma).

Nor is Hindu Law devoid of examples of change of law for equitable considerations, despite texts, even Vedic texts, to the contrary. Thus, a vedic Text, describing women as "nirindriya" : (devoid of the necessary limbs), was sought to be used to deprive women of all right to property by giving it the meaning "*impotent*", and quoting the well-known text "*Anansaukliba patitan*". But, Varadaraja and others got over this property disqualification by giving an equitable interpretation to the word "*nirindriya*" and making it merely a disqualification to receive a share in the *soma* juice in a certain sacrifice ! Emperor Dushyanta seems to have been responsible for giving posthumous children in the womb a share at partition, out of equitable considerations, enunciating the equitable doctrine. "The king stands as the father of all unborn posthumous children".

The reverse also happened sometimes. Vyasa said categoricially : (see Viramitrodaya)

STHAVARAM DVIPADAMCHAIVA YADYAPI SVAYAMARJITAM
ASAMBHUYASUTAN SARVAN NA DANAM NA CHA VIKRAYA:
YE JATA YEPYA JATASCHA YE CHA GARBHEVYAVASTHITA:
VRITHIM CHA TEBHIKAMKSHATI NA DANAM NA CHA VIKRAYAM.

(Though immoveables and bipeds (slaves or serfs attached to land are meant) have been acquired by a man himself, a gift or sale of them should not be made without consulting all the sons. They who are born and they who are yet unbegotten and they who are still in the womb require the means of support. So, no gift or sale of these should be made). But this rule has been abrogated, though quoted both in the *Mitakshara* and the *Dayabagha* for equitable reasons, regarding self-acquired property, on the ground that it is mere religious and moral injunction and merely recommendatory, and not a rule of positive law, and mandatory, and that Yajnavalkya's text permitting such gift or sale will prevail.

1. (1920) I.L.R. 44 Bom. 967.
2. (1927) I.L.R. 52 Bom. 307.
3. (1910) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
4. (1941) 1 M.L.J. 15.
5. 1 M.H.C.R 471.
6. (1880) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).

Manu treats sale without ownership as theft, and such a sale, if made secretly (say, without the knowledge of the other co-parceners) will increase the presumption of guilt. The seller of immoveable property who did not give possession to the purchaser, after receiving the consideration from him, was held liable for punishment like a thief, and the purchaser was given compensation in money or in equivalent property (*see* Texts of Manu, Brihaspati, Katyayana, Sankha and Vyasa, quoted in the *Vyavaharanirnaya* of Varadaraja, pages 274 and 277—Adyar Ed., 1942 edited by Professor K. V. Rangaswami Ayyangar). The equity given by Colebrooke, Ellies and Strange, and by our Courts, to the purchaser from an undivided co-parcener, whether of his entire interest or his interest in a specified item or the whole of a specified item can easily be fitted in with the equity given by Brihaspati, Katyayana, Sankha and Vyasa, as it is only compensation in money or in equivalent property in a suit for partition or partial partition. The imperfect alienor is made to give over his right of partition to the alienee for value and repair the damage just as the raper or seducer of a woman in Hindu times was made to repair the damages by marrying her in *Rakshasa* and *Paisacha* forms! So I see no violent departure from ancient Hindu law principles in granting this equity. Indeed, an ancient and vigorous law, like Hindu Law, existing for at least three thousand years, continuously, must, it is obvious, change from time to time in some way for adjusting itself to changing times and conditions to meet the needs of a progressive society. The sages recognised this, as is shown by Parasara's famous verse:

KRITE TU MANAVA DHARMASTRETAYAM GAUTAMA: SMRITA;
DWAPARA SANKHA LIKHITA: KALAU PARASARA SMRITA

(PARASARA I. 24.)

(In the *Krita* age the *Dharamsastra* of Manu, in *Treta* age that of Gautama, in *Dwapara* age the *Dharmasastras* of Sankha and Likshita, and in *Kali* age the Dharmasastra of Parasara shall be followed).

It will be a mistake to regard Hindu Law as static and unprogressive, as some western historians do. It has always been changing with the changing times though imperceptibly so far, like the waters of the Ganges or the stones of the Himalayas. The recognition of the purchaser's equity was necessitated by the paramount need to enable undivided co-parceners to raise money on their undivided shares, and get a good value for sale of such shares, by giving them "specific, existing and definite" rights (recognised in *Tuffuzzool Hossain Khan* v. *Raghoonath Pershad*[1]) in the joint family properties when making such purchasers.

I consider the rule in *Vadivalam* v. *Natasam*[2], to be more simple and workable and not less equitable than the rule in *Marappa Goundan* v. *Rangaswami Gaundan*[3] or the somewhat extended rule in *Venkatapathi* v. *Pappiah*[4]. When a non-alienating co-parcener's right to sue for his share is an alienated item (leaving the alienating co-parcener's share in that item with the alienee) is recognised, as in *Venkatachala* v. *Chinnayya*[5], *Iburamsa Rowther* v. *Thiruvenkataswami*[6], *Ramasubbayya* v. *Ganapathiraju*[7], etc., and a right of partial partition virtually conceded to him, I do not see any inequity in allowing the alienee his equity regarding the share of the binding debt due by the non-alienating co-parcener in that partial partition suit itself. What is sauce for the gander ought to be sauce for the goose too! The Hindu texts mentioned above allow of both compensation in money as well as equivalent property in all such cases of sale without proper and full title. There is no reason in law or equity to throw the entire binding debt on the alienating co-parcener's share, as the decisions in *Marappa Gaundan* v. *Rangaswami Gaundan*[3] and *Venkatapathi* v. *Papiah*[4], virtually do. I cannot see how a purchaser

1. (1871) 14 M.I.A. 40.
2. (1912) 23 M.L.J. 256: I.L.R. (1937) Mad. 435.
3. (1899) I.L.R. 23 Mad. 89.
4. (1928) 55 M.L.J. 489: I.L.R. 51 Mad. 824.
5. (1870) 5 M.H.C.R. 166.
6. (1910) 20 M.L.J. 743: I.L.R. 34 Mad. 269.
7. (1940) 2 M.L.J. 1021: I.L.R. 1940 Mad. 405.

for value, like this appellant, can be termed a "volunteer" in the best known sense of that term, namely, a person who has paid no consideration. Nor is he a person who never intended to buy what he claims, like a man buying a widow's estate claiming the reversion. Nor is he a man volunteering to buy what he knows to be against law, like a man buying the High Court building even for consideration from a High Court peon or gardener, or buying some property from a lunatic or ignorant *purdhanashin* guardian of a minor, even for consideration, after using undue influence or fraud. It is also significant that in *Venkatapathi* v. *Papiah*[1] the purchaser is given under proposition three, some more equity in such partial suit than in *Marappa Gaundan* v. *Rangaswami Gaundan*[2]. I agree with my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., that the three propositions laid down by Ramesam, J., in *Venkatapathi* v. *Papiah*[1], are not capable of being given definite meanings without doubts and misgivings, as the word "consideration" has been used by Ramesam, J., in two senses, namely, the entire consideration named in the deed and the binding part of that consideration. So, I am for adopting the rule in *Vadivalam* v. *Natasam*[3], laid down by two eminent Hindu Judges and followed in so many later rulings of this Court by other eminent Judges, once for all, and also the rulings in *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[4], *Chinnu Pillai* v. *Kalimuthu Chetty*[5] and *Dharma Rao* v. *Bapanayya*[6] subject to the rule in *Rottala Ranganathan Chetty* v. *Pulicat Ramaswami Chetti*[7], prohibiting gifts to pass off in the guise of sales for nominal amounts, in preference to the rulings in *Marappa Gaundan* v. *Rangaswami Gaundan*[2] and *Venkatapathi* v. *Pappiah*[1].

Mr. Venkatasubramania Iyer urged that the principle of *stare decisis* should not be applied in this case as the rulings in *Vadivalam* v. *Natasam*[3], *Ayyagiri Venkataramayya* v. *Ayyagiri Ramayya*[4], *Chinnu Pillai* v. *Kalimuthu Chetti*[5] and *Dharma Rao* v. *Bapanayya*[6], are wrong and inequitable. I do not consider them to be wrong or inequitable. I may also say that the principle of *stare decisis* will apply even if they are wrong. The Privy Council has in *Brij Narain* v. *Mangala Prasad*[8], said :

> "In such a matter as the present, it is above all things necessary, as *stare decisis*, not to unsettle what has been settled by a long course of decisions".

In law, as in custom, certainty and long observance are of far greater importance than logicality or abstract equity. Even Hindu Nyaya Sastras recognise this principle under the doctrine of Visha Vriksha Nyaya (poison tree argument) which is stated as follows :

> "Even a poison tree planted by oneself should not be cut down after it has taken root and has been enumerated."

For that reason I am not for following the ancient and abandoned course of the stream of law represented by the decisions in *Rangaswami* v. *Krishnayyan*[9], and *Sathapathiar* v. *Sivanarayana*[10] (which have greater logicality and abstract equity) and the supporting observations in *Venku Reddi* v. *Venku Reddi*[11], and I am for following the new and current courses of the stream of law represented by the rulings in *Chinnu Pillai* v. *Kalimuthu Chetti*[5] and *Dharma Rao* v. *Bapanayya*[6], as laying down the present law on this point. Decisions followed uniformly for three decade like *Chinnu Pillai* v. *Kalimuthu Chetti*[5], do not deserve to be disturbed.

I agree with my learned brothers that the purchaser from an undivided Mitakshara co-parcener in this State does not become a tenant-in-common with the non-alienating co-parceners and is not entitled to joint possession with them or to get mesne profits from them, despite the omission of the word "Hindu" from sec-

1. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.
2. (1899) I.L.R. 23 Mad. 89.
3. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
4. (1902) I.L.R. 25 Mad. 690 (F.B.).
5. (1910) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
6. (1941) 1 M.L.J. 15.
7. (1903) I.L.R. 27 Mad. 162 (F.B.).
8. (1923) 46 M.L.J. 23 : L.R. 51 I.A. 129 : I.L.R. 46 All. 95 (P.C.).
9. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
10. (1932) 64 M.L.J. 66 : I.L.R. 56 Mad. 534.
11. (1926) 52 M.L.J. 387 : I.L.R. 50 Mad. 535.

tion 2 of the Transfer of Property Act, making section 44 of that Act applicable to the Hindus as well. I agree with the reasons given by my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., for that, and have nothing to add.

I am clearly of opinion that the frame of the suit brought by this respondent is ample enough to allow of the purchaser's equity being worked out in this very suit, and the respondent made to pay half the binding debt as a condition precedent for recovering his half share in the properties alienated to the appellant and the mesne profits on that half share. The pleadings show that it is a general suit for partition, and the suit is filed on the basis of non-division between the respondent and his father on the date of the suit. The respondent also examined his father, as P.W. 1 to prove non-division between the two till the date of the suit. The plaint has not been amended. And I cannot also conceive of permission being given to amend the plaint at this stage. Besides, the alienation in favour of the respondent was before the father's insolvency, and neither the subsequent insolvency of the father nor the administration of his interest in the family property by the Official Receiver will have the effect of severing the father's interest from the respondent's interest.

The analogy of conversion of a co-parcener to Islam or Christianity effecting a severance in a Hindu joint family without agreement or unilateral consent, and indeed, against the will of one and all the members, was relied on by Mr. Venkatasubramania Iyer, to show that even adjudication in insolvency will effect a similar severance, as agreement and consent, even unilateral, is not needed to effect severance. He relied also on the observation of the Privy Council in *Venkatapathiraju* v. *Venkatanarasimharaju*[1].

"A division of right or severance of the joint status, may result, not only from an agreement between the parties, but from any act or transaction which has the effect of defining their shares in the estate, though it may not partition the estate".

I agree with my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., that the phrase "any act or transaction" in that passage has reference only to an act or transaction of the parties, such as the expression of an intention to become divided, the institution of a suit for partition, the execution of a document with the necessary recitals, etc., all involving an expression of "*buddhivisesha*" (the exercise of the will of a co-parcener), and that it has no reference to acts of purely third parties like an attachment or Court sale of a co-parcener's interest or his adjudication in insolvency. It may well be said that a Hindu can never become a member of a joint family by mere consent, and can never leave it without consent. Conversion effects a severance of the convert from the joint family only by virtue of Act XXI of 1850 removing the Hindu Law disqualification from inheritance regarding a convert who was regarded as dead in Hindu Law, obsequial ceremonies being performed for him, and given be no share at all, and the decision of the Privy Council in *Abraham* v. *Abraham*[2], comparing the situation arising from conversion to one arising from partition. It may also be noticed that in this case an implied consent of the converted co-parcener and the unconverted ones to partition may perhaps be with some strain inferred, as the unconverted ones will not be willing to have common mess, dwelling and worship, the essence of a Hindu joint family with the converted man. In Insolvency, however, there is no such implied consent, or impossibility of having common mess, dwelling and worship. Shakala says:

EKAPAKENAVASATANEKAMEKAM DEVARCHANAM GRIHE
VAISVADEVAM TATHAIVAIKAM VIBHAKTANAM GRIHE GRIHE

(Those who live in the same mess have one worship and one fire likewise in their home are co-parceners. Separated co-parceners have got separate worship and fire in each house).

(Shakala, quoted in the *Mayuka*).

It is not necessary for a Hindu joint family to have any property (see *Janakiram* v. *Nagamony*[3]). Hindu sages did not say anything about insolvency perhaps

1. (1936) 71 M.L.J. 558: L.R. 63 I.A. 397: I.L.R. (1937) Mad. 1 (P.C.).
2. (1863) 9 M.I.A. 195 (P.C.).
3. (1925) 50 M.L.J. 413: I.L.R. 49 Mad. 98.

because there were no provisions in those days or insolvents being adjudicated and protected and their available assets distributed. The equity rule has been extended by modern Courts for the benefit of the insolvent and his creditors as to purchases from an undivided co-parcener. For the reasons given in detail in the judgments of my learned brothers Satyanarayana Rao and Viswanatha Sastri, JJ., with which I fully agree, I am satisfied that neither adjudication as an insolvent nor administration in insolvency effects a severance of the joint family status of the insolvent *vis-a-vis* the other co-parceners. No decision has ever laid down like that. All decisions proceed on the footing that no severance of joint family status takes place by insolvency or administration in insolvency. Mr. Venkatasubramania Iyer urged that the adjudication or at least the administration in insolvency effected a change from the common right of the insolvent to the *Dravyasamudayam* (collective wealth) into a crystallised separate right to a share (*ekadesavyavasthapana* mentioned in the Mitakshara) and so effected a severance. But, as pointed out by my learned brothers, Satyanarayana Rao and Viswanatha Sastri, JJ., the *ekadesavyavasthapana* of the Mitakshara obviously refers only to an actual partition of the properties by metes and bounds, or heaps and shares, and not to any division by status. Besides, what is to happen in the case of the adjudication as insolvent of a co-parcener of a joint family owning or holding no property? What about the unattachable properties not vestable in insolvency in the Official Receiver like Trust properties, properties exempt under section 60, Civil Procedure Code, etc.? Indeed, even the very able argument of the learned counsel for the respondent in this *respect* is like the argument on a hopelessly untenable point, referred to in the *Nyaya* books, where no sooner is one objection met than two more appear, and where the argument is compared to a well dug in sandy soil where the sides will always be falling in!

In this case, happily, there is no difficulty in working out the equity as there are no other family debts or liabilities proved, and there is no increase or decrease even in the number of the co-parceners, and only the debt of Rs. 7,022 has to be divided into two, and the plaintiff made to pay his half share as condition precedent.

So, I am also of the opinion that the decree of the Courts below must be modified by directing the plaintiff to deposit into the trial Court a sum of Rs. 3,511— as a condition precedent to his recovering his share in the suit properties in the hands of the appellant and the mesne profits from that half share (which can be claimed only from the date of such deposit), and that the respondent should pay the appellant's costs throughout and agree to the decree proposed to be passed by my learned brother Satyanarayana Rao, J.)

K.S. ——— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAGHAVA RAO AND MR. JUSTICE VENKATARAMA AYYAR.

T. Dakshinamoorthy .. *Petitioner**

v.

Thulja Bai and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), section 7 (3) (a) (i) and (ii)—Building used for residential purpose let out for non-residential purpose—Structurally building meant for residential purpose—Landlord if can ask to be put in possession on the ground of his requiring it for his own residence—Building whether residential or non-residential—Considerations to be borne in mind by Court in deciding question.

What is at the inception a residential building may well become a non-residential one by force of the terms of a letting, and that any conversion, after the letting of a residential building into a non-residential one may well take place within and only within the limits which the statute prescribes. That if prior to a letting a building happens to have been of one character it must for ever keep that character irrespective of what the effect of the letting or of the acts of parties subsequent to the letting may be, seems to be a difficult, if not impossible, position, having regard to the con-

* C. M. P. No. 4955 of 1950. 9th November, 1951.

sideration, above set forth. The original design of the structure may have been one suitable to residence, but if by the letting it becomes non-residential in character, there is no reason why one may not take it as such for the purpose of section 7, sub-section (3). If a landlord has let out a building for a residential or non-residential purpose as the case may be, it is only fair that when he seeks an order directing the tenant to put him in possession of the property, he has to show that he fulfils the requirements of sub-clause (*i*) or (*ii*) of clause (*a*) of sub-section (3) of section 7. Having let out the building as for a non-residential purpose, it would be unfair if he were allowed to urge the requirements of the building for his own occupation which is really a condition of his seeking to recover a residential building let out by him. The purpose of the letting and the condition of the landlord's recovery have alike reference to a residential or non-residential purpose according as a given case falls under sub-clause (*i*) or sub-clause (*ii*) of sub-section (3) (*a*) of section 7.

In deciding the question whether a building is residential or non-residential the Court must have regard to the following considerations :

(1) Where there is an instrument of tenancy specifically and explicitly declaring the purpose of letting as residential or non-residential, no difficulty generally arises. (2) Where there is no such instrument of tenancy, the question will have to be considered on the basis of direct evidence *aliunde* concerning the purpose of the letting, which may be adduced in a case. (3) If no such evidence too is forthcoming, the Court can only look at the evidence concerning the user of the premises by the tenant down to the date of the application for eviction, as acquiesced in by the landlord. For, such user and such acquiescence afford a safe basis for an inference of agreement between the parties as to the purpose of the letting. (4) Where there is evidence of such user, but there is no evidence of such acquiescence, the structural design, the antecedent user of the building by the landlord as known to the tenant and other surrounding circumstances, if any, will also have to enter into the determination of the question whether the building is or is not residential. (5) Difficulty may sometimes still remain, *i.e.*, even after applying the tests above indicated, if the building is found let for both kinds of purposes, residential and non-residential, no distinction being made between one part as let for one purpose and the other for the other purpose. In such a case what has to be determined as a question of fact is, what was the real, main and substantial purpose of the letting?

Where the Court finds the letting to be equally for residential and non-residential purposes and not mainly or substantially for the one or the other kind of purpose the application by the landlord may well stand whether filed under section 7 (3) (*a*) (i) or section 7 (3) (*a*) (ii) of the Act.

On the facts found and in the light of the legal principles indicated above it was held that the purpose of the letting being non-residential, the mere structural fitness of the building for residence at the time of the letting would not avail the landlord to contend that because he is not in occupation of a residential building of his own in the city and requires the building in question for his own occupation, he can evict the tenant from the premises.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in H. R. A. No. 932 of 1949 on the file of the Court of Small Causes, Madras and to quash the order therein dated 29th March, 1950, (L.Dis. No. 2485 of H.R.C./49, Additional Rent Controller, Madras).

R. Ramamurthi Iyer for *Nagarajan* and *A. Viswanathan* for Petitioner.

P. S. Panjatchara Mudaliar for 1st Respondent.

(This petition coming on for hearing before Rajamannar, C.J. and Panchapakesa Ayyar, J., on 18th January, 1951, the Court made the following Order of Reference to a Full Bench :)

The Chief Justice.—Under section 7 (3) of the Madras Buildings (Lease and Rent Control) Act, a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession (1) in the case of a residential building, if he requires it for his own occupation and if he is not occupying a residential building of his own in the city, town or village concerned.

The Act does not contain a definition of a residential building. There is, however, a definition of "building". "Building" means,

"any building or hut or part of building or hut, let or to be let separately for residential or non-residential purposes."

The only question in this case is whether the building which is the subject-matter of the application is a residential or a non-residential building. The findings which are material for a determination of this question are as follows: For several years the building was being used for the residence of the petitioner and P.W. 2. Then, it was let to a tenant who was carrying on business in *Chappalas* and thereafter to the present tenant for his business in hides and skins. Structurally

the building appears to have been meant for residence rather than for carrying on business. The locality in which the building is situate is predominantly a business locality.

If the sole test for determining whether a building is residential or not is the purpose for which the building was let to the tenant in occupation at the time of the application for eviction, then, undoubtedly, the building is a non-residential building. But the appellate tribunal in this case, the Chief Judge of the Court of Small Causes, has held that as it was once used for residential purposes and was structurally such that it must have been intended for residence, mere user for a number of years as a non-residential building would not make it non-residential and therefore it must be deemed to be a residential building. In coming to this conclusion he was largely influenced by the observations made by this Court in a decision to which I was a party in C. M. P. No. 6150 of 1948. In that case the building was actually being used as a restaurant at the time of the application for eviction, but, by its nature and by its structure it was a residential building. Both the Rent Controller and the appellate tribunal held that it was a residential building. In view of the fact that by its nature and structure the building was residential in character it was held, that the appellate tribunal was justified in its finding. I went on to say:

"If by reason of the original character it was residential, the fact that for sometimes—may be even for a long time—it was being used for purposes other than residence, would by itself not make the building non-residential."

Reliance was placed on section 11 (1) of the Act, but we were inclined to hold that what was contemplated by that section was structural alteration which converted a residential building into a non-residential building.

Since that decision I have come across other cases in which conflicting considerations have placed me often in a state of uncertainty as to the meaning to be given, to a "residential building." in section 7 (3). If the definition of 'building' gives a clue, then, a residential building is a building let or to be let for residential purposes. That furnishes no doubt a simple test which has also the merit of reasonable certainty. But I have found it difficult to adopt that test in the case of a building which, for instance, might be the family house of the owner in which he and his predecessors had been residing for years and therefore was at one time a residential building which, however, has been let for business purposes at the material period. The question will then arise whether there has been a conversion of a residential building into a non-residential building. I was at one time inclined to think that the conversion contemplated was by means of a structural alteration. But my attention has been drawn to the decision in *Williams* v. *Perry*[1] in which Swift, J., observed:

"I can see no reason why a dwelling house should not be converted into business premises just as much by the agreement of the parties and their user as by structural alteration."

These remarks appear to me to show a way out of the difficulty.

I expressed more than once the desirability of the Legislature clarifying the position by a definition of a residential building, but evidently there has been no attempt in that direction. As this is a matter which constantly comes up throughout the State, it is desirable that there should be an authoritative ruling laying down at least certain broad tests to find out if a building is or is not a residential building within the meaning of the Madras Buildings (Lease and Rent Control) Act.

The petition will be posted before a Full Bench.

Panchapakesa Ayyar, J.—I agree.

In pursuance of the above order, this petition coming on for final hearing, the Court delivered the following

JUDGMENT: *Raghava Rao, J.*—This matter comes up on a reference to a Full Bench by my Lord the Chief Justice and Panchapakesa Ayyar, J. The question

1. (1924) 1 K.B. 936.

is whether the premises in the possession of the petitioner, the tenant, are in the nature of a non-residential building, of which it is not open to the landlord, the respondent to ask for possession, under section 7 (3) (*a*) (i) of Madras Act XXV of 1949, The Madras Buildings (Lease and Rent Control) Act.

The findings of fact material to the determination of the question are stated in the order of reference thus:

"For several years the building was being used for the residence of the petitioner and P.W. 2. Then, it was let to a tenant who was carrying on business in chappals and thereafter to the present tenant for his business in hides and skins. Structurally the building appears to have been meant for residence rather than for carrying on business. The locality in which the building is situate is predominantly a business locality."

The reference has been necessitated by the fact that the Bench which has made it has doubted the soundness of the view expressed in C.M.P. No. 6150 of 1948 to which the learned Chief Justice himself was also a party concerning the test for determining whether a building is residential or not within Madras Act XXV of 1949. That view is that if by reason of the original nature and structure of the building it was residential, the fact that for some time—may be even for a long time—it was being used for purposes other than residence, would by itself not make the building non-residential. In the order of reference it is observed that if the definition of "building" in the Act gives a clue, then a residential building is a building let or to be let for residential purposes. The question is whether the view which favours regard for the original structural design or the view which emphasises the importance of the letting of the building as for a residential purpose is to be preferred.

To have regard to the provisions of the Act so far as they throw light upon the matter, we find first that the preamble states that:

"It is expedient to regulate the letting of residential and non-residential buildings . . . and to prevent unreasonable eviction of tenants therefrom."

Next the definition of "building" in section 2 (1) is that it means

"any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes."

"Let" in the definition apparently means "let at the time of the passing of the Act" while "to be let" in the definition means "to be let after the passing of the Act." "Residential building" of which as such there is no definition in the Act must in the light of the definition of "building" mean "any building or hut or part of a building or hut let or to be let separately for residential purposes."

Section 7 (3) (*a*) (i) provides that:

"A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession—(i) in the case of a residential building, if he requires it for his own occupation and if he is not occupying a residential building f his own in the city, town or village concerned;

(ii) in the case of a non-residential building, if he is not occupying for purposes of a business which he is carrying on, a non-residential building in the city, town or village concerned which is his own or to the possession of which he is entitled."

Then we have section 11 (1) which states that:

"No residential building shall be converted into a non-residential building except with the permission in writing of the Controller."

It may be relevant also to notice at this juncture that section 4 of Madras Act VIII of 1951 has replaced section 3 of the Madras Act XXV of 1949 by something more detailed than and in some respects differing from the provisions of the latter section. Sub-section (5) of section 3 of the Act of 1949 as amended in 1951 contains three provisos, of which the second and the third are material to the present discussion, namely:

"Provided further that if the building is a residential building, it shall not be converted into a non-residential building unless the permission in writing of the Controller is obtained under section 11, sub-section (1):

Provided also that no structural alterations shall be made in the building, unless the consent of the landlord is also obtained therefor."

From these provisions the following material factors emerge: (1) that the Act must be so construed as to prevent unreasonable eviction of tenants; (2) that while "residential" according to its ordinary Dictionary meaning (*vide* the Concise Oxford Dictionary, 3rd Edition, 1944, page 998) may mean one of two things:

(i) "suitable for or occupied by private houses, (*e.g.*, residential estates, street, quarter) and

(ii) "Connected with residence (*e.g.*, residential qualifications)," the latter of which is the one pertinent to the present context, the statute brings in, with reference to what a "residential building" means, by its definition of "building" the idea that the residential building must be one let or to be let for purposes connected with residence; (3) that the residential or non-residential character of the building for the purpose of a landlord's application under section 7 (3) (*a*) of the Act must be determined with reference to the date and purpose of the letting, the twofold condition for the application to succeed under (i) being that the landlord requires it for his own occupation, and that he is not occupying a residential building of his own and under (ii) the condition being that he is not occupying for the purposes of a business which he is carrying on a non-residential building which is his own or to the possession of which he is entitled; (4) that the status which a building commands as a residential building under the letting shall not be converted into that of a non-residential building apparently by the tenant, except with the permission in writing of the Controller; and (5) that the two provisos to sub-section (5) of section 3 as amended, when read together, suggest that the conversion of a residential building into a non-residential building need not always be by structural alterations, but that if the conversion is by such alterations, the consent of the landlord in addition to the permission in writing of the Controller, is also a pre-requisite for such a conversion.

It seems to us therefore that what is at the inception a residential building may well become a non-residential one by force of the terms of a letting, and that any conversion, after the letting of a residential building into a non-residential one may well take place within and only within the limits which the statute prescribes. That if prior to a letting a building happens to have been of one character it must for ever keep that character irrespective of what the effect of the letting or of the acts of parties subsequent to the letting may be, seems to our minds to be a difficult, if not impossible, position, having regard to the considerations above set forth. The original design of the structure may have been one suitable to residence, but if by the letting it became non-residential in character, there is no reason why one may not take it as such for the purpose of section 7, sub-section (3). It seems to us that if a landlord has let out a building for a residential or non-residential purpose as the case may be, it is only fair that when he seeks an order directing the tenant to put him in possession of the property, he has to show that he fulfils the requirements of sub-clause (i) or (ii) of clause (*a*) of sub-section (3) of section 7. Having let out the building as for a non-residential purpose, it would be unfair if he were allowed to urge the requirement of the building for his own occupation, which is really a condition of his seeking to recover a residential building let out by him. The purpose of the letting and the condition of the landlord's recovery have alike reference to a residential or non-residential purpose according as a given case falls under sub-clause (i) or sub-clause (ii) of sub-section 3 (*a*) of section 7.

It is true as observed in the order of reference that this sort of test might sometimes work a hardship as for instance in the case of a building

> "which might be the family house of the owner in which he and his predecessors had been residing fo years and therefore was at one time a re idential building which however has been let for business purposes at the material period."

On the other hand, there is no denying too that, as also observed in the order of reference, the clue afforded by the definition of "building" in the matter of the determination of the question whether a building is residential or non-residential "furnishes a simple test which has also the merit of

reasonable certainty." Between these two conflicting tests we have no doubt but that the latter ought to be preferred as more consonant to considerations connected with the object and purpose of the Act as explained above and the scope and intendment of its several relevant sections as set forth already. This Court always listens and listens with due attention to an argument *ab inconvenienti* or even *ad misericordiam*. We feel however perfectly clear that the argument of hardship cannot prevail here.

The learned advocate for the respondent has urged that the definition of "building" cannot be treated as affording a clue to the determination of the question whether a building is residential or non-residential. He says that the object of the definition of "building" is not that, and that the idea of the definition is to show, that there can be a letting of a part as well as the whole of the building. Surely that is not a complete reading of the definition of "building" which also refers to residential or non-residential purposes in connection with the letting of the building in whole or in part. Counsel also urges that this view of what 'a residential building' is, does not fit in with the meaning of that expression as used for the second time in section 7 (3) (*a*) (i). His point seems to be that one and the same meaning ought to be attached to that expression as used in both the places in section 7 (3) (*a*) (i) and that such meaning must be "a building suitable for residence by its structural design" and not "a building let or to be let for residential purposes; " for "if he is not occupying a residential building of his own" in that provision cannot mean "if he is not occupying a building let or to be let for residential purposes." The suggestion seems to have some plausibility of reason behind it; but there is no rule of law which in any and every case forbids the interpretation of the same expression in two different senses as used in two different places although in one and the same provision of the statute. "Residential building" in the first place where it is used may well mean "a building let or to be let for the residential purposes"; where it is next used, it may as well mean simpliciter "a building of a residential character". After all, the definition of "building" given in section 2 of the Act only operates where there is nothing repugnant in the subject or context, as is made clear by the opening words of the section. If the definition cannot be applied for the ascertainment of the meaning of the expression 'a residential building' in the second place in which it is used in section 7 (3) (*a*) (i) but can be applied for such a purpose with reference to the first place in which the expression "residential building" occurs, there is no reason why the clue afforded by the definition of "building" may not be pressed into service for the ascertainment of the meaning of the expression "residential building" as it occurs in the first place, though not as used in the second. The purpose of residence involved and implied in the expression "residential building" in both the places is of course there; only the idea of letting is there in the first context, while it is not there in the second.

For the purpose of determining whether a building is residential or non-residential according to the view expressed above of what a "residential building" means we have to bear in mind a few salient considerations, which we propose to indicate.

(1) Where there is an instrument of tenancy specifically and explicitly declaring the purpose of the letting as residential or non-residential, no difficulty generally arises. (2) Where there is no such instrument of tenancy, the question will have to be considered on the basis of direct evidence *aliunde* concerning the purpose of the letting, which may be adduced in a case. (3) If no such evidence too is forthcoming, the Court can only look at the evidence concerning the user of the premises by the tenant down to the date of the application for eviction, as acquiesced in by the landlord. For, such user and such acquiescence afford a safe basis for an inference of agreement between the parties as to the purpose of the letting. (4) Where there is evidence of such user, but there is no evidence of such acquiescence, the structural design, the antecedent user of the building by the landlord as known to the tenant and other surrounding circumstances, if any,

will also have to enter into the determination of the question whether the building is or is not residential. (5) Difficulty may sometimes still remain, *i.e.* even after applying the tests above indicated, if the building is found let for both kinds of purposes, residential and non-residential, no distinction being made between one part as let for one purpose and the other for the other purpose. In such a case it seems to us, that what has to be determined as a question of fact is, what was the real, main and substantial purpose of the letting?

As supporting or bearing on these considerations as affording the relevant tests, I wish to refer next to a few decisions of the Courts in England rendered under the Rent Restrictions Acts prevailing there, which have been cited by learned counsel for the petitioner. It may the noted that, broadly speaking, in England there is distinction made in those Acts between "a dwelling house" and "business premises".

In the case of *Williams* v. *Perry*[1] premises which were occupied from 1914 till 1919 partly as business premises and partly as a dewlling house, were in 1919 let to the defendant solely as business premises. It was held that the premises were not within the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. At the end of the judgment of Swift, J., with which Acton, J., agreed, there is the observation at page 940 of the Report quoted in the order of reference before us which is relevant to the present discussion.

"I can see no reason why a dwelling house should not be converted into business premises just as much by the agreement of the parties and their user as by structural alteration."

In the case of *Hyman* v. *Steward*[2] the question which arose was whether the dwelling house there in question had become converted into business premises and therefore disentitled to the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, by reason of abandonment of all residence whatsoever on the part of the tenant. The County Court Judge found on the facts proved that there had been no such change of user as to destroy the character of dwelling house with which the premises were impressed by the tenancy agreement and gave judgment for the defendant, which was upheld on appeal. The main point about this decision so far as material to this case is that it shows that the character of dwelling house may well be impressed upon premises by the terms of the tenancy agreement. The further fact to notice is that in Greer, J.'s judgment at page 712 of the Report, there occurs this observation:—

"I confine myself to saying that if there had been a complete change of user of the premises by reason of the defendant entirely ceasing to use them as a dwelling house and using them all for business or trade purposes, and if the plaintiff had not interfered and was estopped by acquiescence from preventing the altered user of the premises as business premises, I think that the premises could then have been described as premises let entirely for business purposes, and not partly for residential and partly for business purposes."

That shows that in England where premises are let as a dwelling house, conversion thereof into business premises can be effected by such conduct on the part of the tenant acquiesced in by the landlord as is sufficient to erect an estoppel against the landlord from pleading that the premises must be regarded as still continuing as a dwelling house. Here, we have limits set by our own Act to such conversion.

The next case *Vickery* v. *Martin*[3] is a decision of the Court of Appeal and is interesting as only showing that in England there is in section 3 sub-section (3) of the Rent and Mortgage Interest (Restrictions) Act of 1939 which repeats in practically the same words of section 12, sub-section 2 (ii) of the previous Act of 1920 a specific provision that it is not sufficient to exclude a dwelling house from the operation of the Act merely to show that part of the premises is used as a shop or office or for business, trade or professional purposes. It is in view of this specific provision that Lord Green, M. R., says thus at page 684 of the Report:

"I decline, with the language of the sub-section before me, to embark on an inquiry what is the substantial use, or what, in the language of the County Court Judge, is the principal or the ancillary use, of these premises."

1. (1924) 1 K.B. 936.
2. (1925) 2 K.B. 702.
3. (1944) 1 K.B. 679.

We do not have here a provision to that effect, and where a house is found let for the both residential and non-residential purposes, as I have already stated, the question will arise, what was the main, real and substantial purpose of the letting, residential or non-residential ?

The case of *Wolfe* v. *Hogan*[1] is important as containing a discussion of the general considerations pertinent to the determination of the question whether premises of which possession is sought by a landlord are "let as a separate building" within the meaning of section 12, sub-section (2) of the Rent and Mortgage Interest (Restrictions) Act of 1920. Those considerations are laid down in this decision of the Court of Appeal on practically the same lines as we have adopted earlier in this judgment in enunciating the salient considerations connected with the evidentiary material on the basis of which Courts here have to decide whether a building is or is not residential within the meaning of our Act. It is not, in our opinion, necessary to deal further with this decision.

We propose next to turn to two decisions not cited at the Bar, the one reported in *Krishna Nair* v. *Valliammal*[2] and the other reported in *Waller* v. *Thomas*[3], which bear upon the test of "real, main and substantial purpose of the letting" referred to above by us as coming up for application in a case where a building as a whole is found let for both kinds of purposes, residential and non-residential no distinction being made between one part as let for one kind of purpose and the other for the other kind of purpose. In the Madras case, decided by Panchapakesa Ayyar, J., what has been ruled by the learned Judge is that in determining whether certain premises are residential or non-residential, the main or primary purpose for which they are let out or taken or used must be considered. The premises in that case were held to have been let out for a residential purpose, although a portion thereof was used for making *appalam* when people were not sleeping there and was used for sleeping purpose when *appalams* were not made there. Says the learned Judge at page 76 of the Report :—

"I consider that, in such cases, the primary purpose for which the building is let out or used should be the determining factor. A lawyer may use a room of his house for giving legal advice to his clients ; an astrologer may use a room of his house for giving predictions; a barber may use a room of his house for shaving his clients ; but such use of a room will never make a house itself one used for non-residential purposes."

Cases in which premises are used exclusively for business purposes or exclusively for dwelling purposes present no difficulty. It is in cases in which the purpose of the letting happens to be both ways that a test has to be sought for the resolution of the difficulty arising from the dual character of the premises as let. The test laid down by the learned judge seems to our mind to be sound.

The case remaining still for consideration is the English case referred to above. The question there arose whether a public house which contained dwelling house accommodation constituted a dwelling house which fell within the general provisions of Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, or constituted business premises which fell within section 13 of the Act. Both the learned judges who composed the Divisional Bench, Lust, J. and McCardie, J., ruled that the premises were in the nature of a dwelling house and not in the nature of business premises. McCardie J.'s judgment is, however, the one which contains matter relevant to the present discussion. The learned judge says first at page 553 of the Report that,

"under the Increase of Rent (Restriction) Acts prior to 1920 the Court of Appeal had to consider this very point in *Epsom Grand Stand Association* v. *Clarke*[4], and there held in the clearest terms that a public house was a 'dwelling house' for the purpose of these Acts."

He then reproduces a passage from Banks L.J.'s judgment in the *Epsom case*[4], which expresses the reasoning in support of the conclusion in that case thus :

"Was this a dwelling house? The house was dwelt in, and it was let to the defendant for that purpose. In the fullest sense it was a dwelling house, and none the less so because it was also a public house. He could not accept Mr. Disturnal's contention that because it was let for business purposes it could not be dwelling house within the Act. If that contention were accepted it would exclude a great many premises which the legislature did not intend to be excluded."

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1. (1949) 2 K.B. 194.
2. (1949) 1 M.L.J. 74.
3. (1921) 1 K.B. 541.
4. (1919) W.N. 170.

McCardie, J., then proceeds to observe :

"That is a definite decision of the Court of Appeal, but I confess to feeling that juristic criticism may be properly applied to it. I feel with the deepest respect that the true test is to ascertain the dominant purpose and principal user of the premises. One might well have thought that the dominant purpose and object of a public house was to carry on the business of a licensed victualler and that the provision of accommodation for the occupants was a mere adjunct of the business. One might have said that premises do not cease to be 'business premises' because dwelling accommodation necessary for the purpose of the business is attached. However the Court of Appeal have taken a different view and we must loyally follow it."

Then the learned judge proceeds to point out that the Act of 1920 recognised the Epsom decision and treated it as an integral part of the scheme of the Act : for section 12, sub-section 2 (ii) provided that the application of the Act should not stand excluded by reason only that part of the premises was used as a shop or office or for business trade or professional purposes. Reading the Epsom decision in conjunction with the words of the Act of 1920, says the learned judge in conclusion :

"I cannot avoid the conclusion that this house must be treated as a dwelling house within the general provisions of the Act rather than as business premises under section 13 with the special modifications therein provided."

Here in our statute as we have already observed, we do not have any provision such as came to be enacted in the English Act of 1920 by way of giving effect to the Epsom decision ; and if the juristic criticism applied to the Epsom decision by McCardie, J., is to be accepted as sound, there is no reason why the test of dominant purpose and principal user propounded by the learned judge should not be regarded as applicable to cases arising under our statute.

It is true that the test of dominant purpose and principal user is not always easy of application. Applied certainly it can be, speaking generally, though with some difficulty in some cases. Such difficulty in the actual application of the test in such cases will only mean that a margin of judicial discretion in the matter of the determination of the question of the character of the building as question of fact has necessarily to be allowed for. Instances of transactions inspired by mixed motives and intents in which the question of the main, real and dominant motive and intent has to be canvassed for validating or invalidating them are not uncommon in other branches of law. There can in our judgment be no reason of principle why a canvass of the main, real and dominant purpose should be regarded as not legitimate in this branch of law in cases where the letting is actuated by mixed purposes.

It only remains to add that where the Court finds the letting to be equally for residential and non-residential purposes and not mainly or substantially for the one or the other kind of purpose the application by the landlord may well stand whether filed under section 7 (3) (*a*) (i) or section 7 (3) (*a*) (ii) of the Act.

Judging the case before us on the facts found and in the light of the legal principles indicated in the foregoing, we are of opinion that the purpose of the letting being non-residential, the mere structural fitness of the building for residence at the time of the letting does not avail the respondent to contend that because he is not in occupation of a residential building of his own in the City and requires this building for his own occupation he can evict the petitioner from the premises.

This application accordingly succeeds with costs. (Advocate's fee Rs. 100.)

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE KRISHNASWAMI NAIDU.

Rampalli Ramachandrudu .. *Appellant* *

v.

Sait Bakraj Gulabchand Firm and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 46—Order of precept—Whether a step in execution proceedings—If appealable.

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* A. A. O. Nos. 212 and 337 of 1951. 14th February, 1952.

An order directing a precept under section 46, Civil Procedure Code, is one which tends to facilitate the execution of the decree and is not a step in the execution proceedings and as such is not appealable. It follows that an order extending the time for a precept is also not appealable.

Kasiwar De v. *Aswini Kumar Pal*, A.I.R. 1926 Cal. 249 and *Rai Kissenji* v. *Sri Kissen Mackar* I.L.R. (1939) 2 Cal. 370, followed.

Appeal against the orders of the District Court of East Godavari, dated the 9th August, 1950 and the 30th August, 1950, in E.A. No. 73 of 1950 and in E.A. No. 107 of 1950 respectively in O.S. No. 18 of 1934.

G. Balaparameswari Rao for Appellant.

P. V. Vallabacharyulu for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—These appeals arise out of the orders passed by the District Judge of East Godavari extending the time for a precept issued to the Court of the District Judge of West Godavari to keep in attachment properties belonging to the appellant who is a judgment-debtor in the suit out of which the applications for precept and its extension were made. Mr. P. V. Vallabacharyulu for the respondent raises a preliminary objection that an order directing a precept is not appealable, as it is not one relating to execution, discharge or satisfaction of the decree. For this argument he relies upon the observations of Sen, J., in *Rai Kissenji* v. *Sri Kissen Mackar*[1]. The learned Judge observes as follows :—

"After there is an attachment pursuant to a precept under section 46 of the Code of Civil Procedure, further steps have to be taken before the decree can be executed. First, there must be an application under section 39 of the Code to the Court, which passed the decree, for transmission of the decree to the Court which is to execute the decree. Then there must be an application for execution of the decree to the Court to which the decree has been transferred and the application must be in tabular form as provided in Order 21, rule 11 of the Code of Civil Procedure when the executing Court is not the High Court. If the Court, to which the decree has been transferred, is the High Court, then the application for the execution must be in Form I of the Rules of this Court and must contain, in addition to the particulars mentioned in Order 21, rule 11, certain other particulars (*vide* Chapter XVII, rule 10 of the Original Side Rules). It is thus clear that after an attachment under a precept there must be an application for execution in the proper form and it is only upon such application that execution can issue. The order issuing a precept is, therefore, not an order directing the execution and the attachment under a precept is not an attachment in execution proceedings. In the case of *Kasiwar De* v. *Aswini Kumar Pal*[2], it was held that an application for an attachment under section 46 of the Code of Civil Procedure cannot be regarded as an application for execution. This was a case regarding rateable distribution, but the principle underlying this view applies."

What happened there was when a precept was directed to be issued to the Sheriff of Calcutta by the Civil Court of Benares and the properties in Calcutta were kept in attachment, the Sheriff claimed poundage for having the attachment made and the question was whether he was entitled to poundage at all. The learned Judge in considering that question found that a precept under section 46 is not a step in the execution proceedings but is merely a step taken to facilitate execution. Even if a precept has been ordered, still the decree-holder has to apply to the Court which passed the decree under section 39 of the Civil Procedure Code for transmitting the decree and thereafter an application under Order 21, r. 11, Civil Procedure Code, has to be filed to the Court to which the precept has been directed. We agree with the learned Judge that an order of precept under section 46 is one which tends to facilitate the execution of the decree and not a step in execution proceedings. The same view has been taken by the Calcutta High Court in an earlier case in *Kasiwar De* v. *Aswini Kumar Pal*[2] where Greaves and Cuming, JJ., held that an application for attachment under section 46 of the Civil Procedure Code cannot be regarded as an application for execution. The learned judges referred to earlier decisions in *Pallonji Shapurji Mistry* v. *Edward Vaughan Jordan*[3] and other cases. We agree with the principles set forth in the Calcutta cases referred to above.

We are, therefore, of opinion that the appeals are not maintainable and they are dismissed with costs one set.

K.C. — *Appeals dismissed.*

1. I.L.R. (1939) 2 Cal. 370.
2. A.I.R. 1926 Cal. 249 : 90 I.C. 527.
3. (1888) I.L.R. 12 Bom. 400.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

Arunachala Chettiar .. *Appellant**

v.

Vadla Koundan and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rules 89, 90, 91 and 92 (3)—Death of judgment-debtor after sale and before confirmation order—Effect of—Sale valid—Confirmation order alone a nullity.

Where in execution of a small causes Court decree the property belonging to the judgment-debtor was brought to sale and the auction conducted but before the confirmation order of sale was passed the judgment-debtor died, on the question whether in the absence of the legal representatives of the judgment-debtor having been brought on record the Court would be justified in making an order of confirmation of the sale in favour of the auction-purchaser,

Held, that an order of confirmation cannot be made without the presence of parties who are sought to be affected.

It has been established by decisions that before the confirmation the judgment-debtor's interest in the property could be attached and sold even by other creditors *i.e.*, his interest is not defeated and does not become vested in the auction-purchaser until there is a confirmation order.

The sale in this case cannot be set aside but the confirmation order will be a nullity in the absence of the legal representatives of the judgment-debtor.

Appeal against the decree of the District Court of South Arcot in A.S. No. 322 of 1946, preferred against the decree of the Court of the District Munsif of Kallakurichi in O.S. No. 23 of 1945.

M. S. Venkatarama Aiyar for Appellant.

K. S. Desikan and *K. Raman* for Respondents.

The Court delivered the following

JUDGMENT.—The only question of law which requires consideration in this second appeal by the unsuccessful plaintiff is whether the sale of the properties on the 9th November, 1942, in execution of a small cause decree and the confirmation thereof on the 12th December, 1942, is valid. The ground on which the confirmation was attacked is that after the date of sale and before confirmation, the judgment-debtor died on the 14th November, 1942, and as the confirmation order was passed without impleading the legal representatives of the judgment-debtor the confirmation was not binding and was of no effect. This contention was accepted by the lower Courts and the claim of the plaintiff to confirm his possession of the property which he purchased was negatived. There is no direct case on the point in any of the Courts except a decision of the Oudh Court in *Kamakshya Dutt Ram* v. *Shyam Lall*[1], which is relied on on behalf of the appellant and which seems to support his contention. The facts were similar and the judgment-debtor died there, as here, within thirty days from the date of sale. The learned Judges held that as there was no provision in the Civil Procedure Code requiring legal representatives of a judgment-debtor, when he dies after the sale, to be brought on record for the purpose of confirmation, there is no need to bring the legal representatives on record and that the confirmation after the death of the judgment-debtors without bringing the legal representatives on record even was valid. The position of a purchaser after the sale and before the confirmation is that he has only a sort of inchoate interest which might become a vested interest in the property after confirmation. No doubt the confirmation in the absence of applications either under Order 21, rule 89 or Order 21, rule 90, Civil Procedure Code, is automatic in the sense that there being no objection, confirmation of sale should follow as a matter of course. But that does not mean that an order for confirmation of sale can be made without the presence of the parties who are sought to be affected. Under Order 21, rule 92 the sale is to be confirmed if no application is made under rule 89 or rule 90 or rule 91. In a case where the judgment-debtor or his legal representatives are

* S. A. No. 1432 of 1948. 10th December, 1951.

1. A.I.R. 1929 Oudh 235.

parties to the proceedings they would undoubtedly be aware of the sale and within the period of limitation provided by law, namely, thirty days, they would be in a position to take steps to have the sale set aside either by deposit of the money, or if the sale was vitiated by irregularities, by an application under Order 21, rule 90. The position of others who are also entitled under rules 89 and 91 to apply for the relief provided under those rules would be different because it may be that they are not aware of the sale and they may have no means of knowing the same and therefore they may not have an opportunity to take proceedings under rule 89 or rule 91. In my opinion an answer to the question raised by the learned advocate for the appellant that the judgment-debtor's legal representatives are not necessary parties to a confirmation of sale is met by the language of Order 21, rule 92 (3). Under that sub-clause a suit to set aside an order made under rule 92 shall not be questioned in a suit by any person against whom such an order is made is significant as indicating that if even an order of confirmation is made under rule 91 (1), it must be an order made against a person which implies that the confirmation order is made against the judgment-debtor or in case of his death, against his legal representatives. The very object of that rule is to prevent the judgment-debtor, and in case he dies, his legal representatives, from agitating the question of the finality of the sale in a later proceeding and to compel them to take proceedings under rule 89 or 90 in cases in which the money is deposited or the requirements of rule 90 are satisfied. The decision of the Oudh Court, overlooked, in my opinion, the language of clause (3) of rule 92. It has been established by decisions that before confirmation the judgment-debtor's interest in the property could be attached and sold even by another creditor, *i.e.*, his interest is not defeated and does not become vested in the auction-purchaser until there is a confirmation order. The confirmation order therefore has got a double operation of divesting the judgment-debtor of his title in the property and vesting it retrospectively in the auction-purchaser to take effect from the date of the sale. I think therefore that the view taken by the Courts below is correct. But they were not justified in holding that the sale itself is a nullity. The only order which the judgment-debtor's legal representatives are entitled to attack is the order of confirmation of sale made behind their back. The sale therefore of 9th November, 1942, cannot be set aside but the confirmation is a nullity. It therefore follows that the plaintiff-auction-purchaser is not entitled to have the relief which he asked in the suit, namely, confirmation of his possession by virtue of the auction sale. It is unnecessary to indicate in this judgment whether or not the decree-holder is entitled now to bring the sale to completion by taking further steps in execution to bring any legal representatives on record and to have an order of confirmation made. That question does not arise for consideration in this second appeal and all that needs be stated is that the sale stands but the confirmation falls to the ground. The second appeal fails and is dismissed with costs. No leave.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE MACK.

The Cosmopolitan Club, Madras, represented by the Honorary Secretary P. M. Balasubramania Mudaliar .. *Petitioner** (*in both*).

v.

The Deputy Commercial Tax Officer, Triplicane Division, Mount Road, Madras and another .. *Respondents* (*in both*).

Constitution of India (1950), *Article* 226—*Scope of jurisdiction to issue writs—Other remedy—Existence of—Effect—Madras General Sales Tax Act* (*IX of* 1939), *section* 2—*Supply of refreshments to members of social club—Liability to sales tax.*

The maintainability of writ petitions under Article 226 of the Constitution is extremely difficult if not impossible to circumscribe, define and restrict. The mere failure of the petitioner (the Cosmo-

* C. M. P. Nos. 3414 and 3415 of 1951. 27th November, 1951.

politan Club) to object to the payment of sales tax (on the supply of refreshments to its members) since 1939 and to explore the long and tedious avenue of appeal and revision provided by the Sales Tax Act is not an impediment in the way of issuing a writ if it be found that the sales tax levy is really illegal.

The writs under Article 226 (1) are all discretionary writs, which are dependent on the facts of each case and the nature of the illegality and wrong alleged.

The general principle would be that Government should have notice of the alleged illegality or wrong on which the writ petition is founded before it is filed and gives a reasonable opportunity of investigating the grievance remedying it before such a step is taken. There is of course no provision in the Constitution requiring notice to Government before putting it on its defence as under section 80, Civil Procedure Code. There is no inflexible rule. The petitions in the instant case in the particular circumstances should not be rejected on the ground that the Government was not given previous notice. The legality of the levy of sales tax in the circumstances can only be properly investigated by the High Court on a petition under Article 226.

Where a social club being an association formed not for profit supplies refreshments to its members at a fixed rate the supply is not a transfer of property from the club as such to a member. The levy of sales tax on such supplies of refreshments by clubs to members must be held to be illegal.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of proceedings in G.O. Ms. No. 2472, Revenue, dated 21st September, 1949, in the matter of sales tax on the supply of refreshments to the members by the petitioner and quash the order therein.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* and *Srimathi Padmini Raghavan* for Petitioner.

(The Government Pleader (*P. Satyanarayana Raju*) and *Vepa P. Sarathi* for the State Counsel (*John and Row*) for Respondents.

The Court made the following

ORDER.—In these two petitions, the Cosmopolitan Club, Madras, represented by its Honorary Secretary seeks to challenge the legality of the levy of sales tax on the supply of refreshments to the club members. The first respondent impleaded is the Deputy Commercial Tax Officer of the Triplicane Division and the second respondent the State of Madras.

The prayer in C.M.P. No. 3414 of 1951 is for the issue of a writ of *certiorari* or other appropriate writ or order to quash G.O.Ms. No.2472, dated 21st September, 1949, of the Revenue Department, Government of Madras, which declined to grant exemption from such sales tax on a letter, dated the 22nd of August, 1949, addressed to the Honourable Minister for Finance of the Government of Madras. In that letter it was represented that there were about 1,200 members on the rolls of the club, which afforded amenities in sports, indoor games and in various directions to its members, and that refreshments were supplied to members as an amenity and not on any commercial basis. The letter was an appeal for exemption in the circumstances from the payment of sales tax. On this, the Government passed the Government order sought to be quashed on the ground that they did not see sufficient justification for exempting the sale of refreshments by the Cosmopolitan Club, Madras, from liability to pay sales tax. In the original letter of the Cosmopolitan Club Exhibit R-2 produced by Government, there was no specific objection to the levy of this tax as illegal under the Sales Tax Act. This allegation however appears in the common affidavit filed in support of these two petitions. C.M.P. No. 3415 of 1951 seeks for a writ by way of mandamus to direct the respondents to forbear from levying the collecting such sales tax in future.

These two petitions were admitted by Raghava Rao and Viswanatha Sastry, JJ., sitting as a Bench on the 9th of March this year. Mr. Jayarama Ayyar, who appears for the Cosmopolitan Club, says that he had to argue at some length before he persuaded them to admit them. There is no order of course giving any reasons for admission. The Government Pleader has, as may be expected, raised strenuous objections to maintainability, which I shall first consider.

The levy of sales tax was first made in 1939. The fiscally operative section is section 3 (*a*) of the Madras Sales Tax Act under which subject to the

provisions of the Act, every dealer shall pay for each year a tax on his total turnover for such year. Section 2 (*b*) defines a "dealer" as "any person who carries on the business of buying or selling goods", with the following very important explanation

"A co-operative society, a club, a firm or any association, which sells goods to its members is a dealer within the meaning of this clause."

The Cosmopolitan Club has been paying sales tax since 1939, which grew from a comparatively insignificant levy of a few rupees a year to a considerable sum. The first objection by the Government Pleader is that the club has raised no objection to the legality of the tax before the Deputy Commercial Tax Officer and has not explored the machinery of relief by way of appeal and revision provided by the Act itself. Under section 11, an assessee objecting to an assessment has a right of appeal within 30 days to the appellate authority, which is admittedly the Commercial Tax Officer. Section 12 specifically provides for a revision by the Board of Revenue. He also urges that the right of suit is also not barred as under section 18 no suit shall be instituted against the State in respect of any act done unless it is initiated within 6 months from the date of the act complained of. This section also clearly leaves open the ordinary right of suit subject to a restricted time limitation as has been held in *Province of Madras* v. *Satyanarayanamurthi*[1] by Govinda Menon and Basheer Ahmed Sayeed, JJ. It is also pointed out that under the Madras Amending Act VI of 1951 an appeal also lies to the newly constituted Sales Tax Appellate Tribunal with a right of revision to the High Court. There can be no doubt that there exists very elaborate machinery under the Sales Tax Act, which an aggrieved assessee can explore. It is true that ordinarily the existence of alternative remedies exclude the remedy by way of writ, nor will a court interfere to enforce the law of the land by this extraordinary remedy in cases where an action at law will lie for complete satisfaction. It is not necessary to refer to the wealth of English case-law quoted to support this position in Halsbury's Laws of England, Vol. IX, page 774. There have been however cases where writs by way of *certiorari* or mandamus have been granted to aggrieved persons despite their failure to explore other avenues open to them. In *The King* v. *Postmaster-General*: Ex parte *Carmichael*[2] the applicant Mrs. Carmichael had what Avory, J., held, a right of appeal under the Workmen's Compensation Act, which gave all the relief which she can require. I would be most reluctant to import into Indian Law the view of Avory, J., which is rather an extreme one, expressed in the following sentence:

"But even if that remedy is open to her, it is undoubtedly good law that if the application for a *certiorari* is made by a party aggrieved then it ought to be granted *ex debito justitiæ* and the Court has not the general discretion which it would have when the application is made by one of the public who is not personally concerned."

Halsbury's Laws of England, page 873, refers to a decision *R.* v. *Blathwayt*[3] in which a dissatisfied party was permitted to apply for a writ of *certiorari* instead of appealing, though it was held that he could not do so till the time for appealing had expired. It is not necessary to pursue further investigation into English writ case-law on this point in view of the decision of our own Supreme Court *Rashid Ahmed* v. *The Municipal Board, Kairana*[4]. That was an application under Article 32 of the Constitution to enforce the fundamental right to carry on a business. It was held that although the petitioner had a right of an appeal under the United Provinces Municipalities Act, it was not in the circumstances an adequate legal remedy, the existence of which would disentitle the petitioner from maintaining his application.

The maintainability of writ petitions under Article 226 of the Constitution is extremely difficult, if not impossible to circumscribe, define and restrict. I had occasion in a recent petition In re *Anandan Nambiar*[5] as a member of the Bench, which decided that matter, to make the following observation to which I adhere:

"Article 226 confers on us extremely wide powers of interference and a corresponding extremely heavy burden of responsibility . . . . . . It is only in exceptional cases that writs under these

1. (1951) 2 M.L.J. 340.
2. (1928) 1 K.B. 291.
3. (1846) 3 Dow. & L. 542.
4. 1950 S.C.J. 324: (1950) S.C.R. 566.
5. (1952) 1 M.L.J. 1.

wide powers 'for any other purpose' can in our opinion be issued, such as for instance when there has been a clear violation of statutory law, when principles of natural justice have been violated or perhaps where there has been *mala fide* discrimination against an individual to the detriment of his rights. It is impossible to define with exactitude the cases in which Article 226 of the Constitution can be rightly invoked. They should be comparatively exceptional and very few. But we view with growing apprehension and alarm the very large number of petitions under this Article seeking our intervention and to make it an avenue for redress. This may be partly due to a tendency to exploit it with legal ingenuity seeking fresh avenues for the invocation of this Article."

I propose to consider the question of maintainability and also the propriety of issuing a writ in the light of these observations I made then.

These are in many respects peculiar petitions, challenging as they do the validity of a sales tax which not only this club but other clubs also have been paying without demur or objection since 1939. Mr. Jayarama Ayyar has referred me to Article 265 of the Constitution according to which no tax shall be levied or collected except by the authority of law. I do not think that the failure of the Cosmopolitian Club to object to this tax since 1939 and to explore the long and tedious avenue of appeal and revision provided by the Act is an impediment in the way of issuing a writ, if it be found that the sales tax levy is really illegal. There are some other cogent reasons, which appeal to me for a finding that the remedy by way of a writ under Articles 226 is not only open to the petitioning club but is also the appropriate and correct one. In the first place, the appellate and revisional machinery provided by the Sales Tax Act is primarily intended for individual assessees, dissatisfied with the assessment made. This however is a case of the very legality of a sales tax levy itself on the petitioning club and similar social clubs being challenged. Before a suit can be filed for a declaration that the tax is illegal and claiming also consequential relief by way of refund of tax illegally collected, the whole gamut of the appellate and revisional machinery must take its course and then a suit with the possibility of an appeal and a second appeal, which may take years finally to conclude and in the meantime this tax, if ultimately held to be illegal, will continue to be collected. Social organisations like Clubs, which do not exist for profit or gain cannot afford the luxury of prolonged litigation, nor do they ordinarily seek litigation against Government presuming as they probably do that the tax as that they are called upon to pay are in accordance with law. This appears to be the reason why the legality of this Act has never been challenged before.

In evolving our own case-law under Article 286 of the Constitution which confers on High Courts far wider powers than those exercised by the Kings Bench Division in England, it is in my view neither necessary nor is it possible to follow the precedents in English prerogative writ and other writ case-law, in particular the distinction between writs of course or *ex debito justitiæ* and what are known as discretionary writs. If we follow for instance as a precedent the view of Avory, J., in *The King* v. *Postmaster-General* : Ex parte *Carmichael*[1] which I have referred to, our High Courts may be inundated with writ petitions to such a degree as to bring other work to a comparative standstill with the spate of legislation which has flooded this State and discretionary rules framed under statutes having the force of law, all providing avenues for appeal and revision. The only broad criterion that we can apply is whether in view of the nature of the case and the illegality alleged and the wrong complained of, a relief by way of writ is the correct and appropriate remedy. Article 226 confers on High Courts power to issue to any person or authority including in appropriate cases any Government, directions, orders of writs including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari* or any of them not only for the enforcement of fundamental rights in Part III of the Constitution but for any other purpose. It does not appear to be even necessary to confine and restrict a petitioner to a particular writ on English precedents nor would it be proper to dismiss a petition invoking relief by way of a writ of *certiorari* on the ground that the correct remedy would be a writ by way of mandamus or prohibition. I would prefer to take the view that there is no such thing in Article 226 as a writ of course or a writ by right and that the writs which lie

1. (1928) 1 K.B. 291.

under section 226 (1) are all discretionary writs, which are dependent on the facts of each case, and the nature of the illegality and wrong alleged.

A further preliminary point arises in view of an objection by the Government Pleader that the petitioning Club at no time specifically challenged the legality of this tax before filing this petition. In their letter to the Finance Minister, marked for ready reference as Exhibit R-2, dated 22nd August, 1949, the Club asked for exemption from this tax on grounds that the refreshments were supplied to members as in their homes without any profit motive and so on. The only section dealing with exemption is section 6 which empowers the Provincial Government by notification to exempt or reduce sales tax on specified classes of goods at all or specified points in a series of sales by successive dealers or by any class of persons. The Government Order passed by Government declining to grant exemption in favour of the petitioning Club is technically, legally or strictly correct as nowhere was the legality of this tax challenged as such in Exhibit R-2.

Mr. Jayarama Aiyar for the Club filed an uninitialled office copy Exhibit P-2 of Exhibit R-2 sent to him by the Club secretary containing a paragraph to the effect that two legal opinions Exhibits P-2 (*a*) and P-2 (*b*) had been taken to the effect that this tax was illegal. The Club secretary has also filed an explanatory affidavit Exhibit P-3 to the effect that the paragraph referring to the two legal opinions was deleted from the original letter contemplated (Exhibit P-2) and that the legal opinions Exhibits P-2 (*a*) and P-2 (*b*) were sent as enclosures to Exhibit R-2. This fact in however nowhere mentioned in Exhibit R-2, and an affidavit has been filed Exhibit R-4 by the Commercial Tax Officer that these two legal opinions were not received by Government at all. There appears to have been some confusion in this matter arising from the unbusinesslike manner in which social Clubs, which are not commercial concerns working for profit are managed by elected committees and honorary presidents and secretaries who draw no remuneration.

The lack of notice or representation to Government prior to the filing of a writ petition under Article 226 may assume considerable importance in some cases to the extent of justifying dismissal *in limine*. It is ordinarily just, convenient and also necessary that Government should have an opportunity of examining the illegality complained of before being summarily dragged to Court on a writ petition. Even section 80 of the Civil Procedure Code requires a statutory notice by a plaintiff to be served on Government two months before the filing of any suit. Such previous notice is not necessary in writ petitions where aggrieved persons challenged the validity of any legislation under which Government have acted, where Government has exercised quasi-judicial functions and the representations of the aggrieved petitioner have been heard. I would express the view that the general principle should be that Government should have notice of the alleged illegality or wrong on which the writ petition is founded before it is filed, and given a reasonable opportunity of investigating the grievance and remedying it before such a step is taken. In this particular case, the letter of the Club to Government though it asks for exemption, which may be construed as a discretionary favour, really gives reasons now advanced seriously for challenging the very legality of the tax. The legality has of course been challenged in the affidavit supporting these writ petitions, and in paragraph 3 of the counter-affidavit opposing it, there is the specific contention that

> "the supply of refreshments by the petitioner in law constitutes a sale or transfer of property in the refreshments by the Club to its members."

The Government Pleader concedes that the legal position has been examined, nor is there any likelihood in a case of this kind that Government would have conceded on a mere challenge of the legality of this tax paid without demur for over 10 years that they collected it illegally during this long period. There is of course no provision in the Constitution requiring notice to Government before putting it

on its defence as under section 80, Civil Procedure Code. There is no inflexible rule. I am of the opinion that in the particular circumstances of these petitions, they should not be rejected on this ground, and that the legality of this tax can only be properly investigated by this Court on a petition under Article 226.

The simple point for determination is whether the supply of refreshments by the petitioning Club to its members charging a fixed rate constitutes in law a sale. The Articles and Memorandum of Association of the Cosmopolitan Club Exhibit P-1 said to be based on those of the Eccentric Club, London, is that of a social or members' Club, not conducted for gain or profit, but with the objective of providing amenities to its members for meeting in the Club premises, for recreative and social activities varying from strenuous games to pastimes of less vigorous character, for social intercourse, for interchange of ideas on a variety of topics serious and light, ranging from Ethics and Philosophy to the prattle of idle gossip. I can take judicial notice of the necessity to sustain and refresh members of a Club indulging in these generally wholesome, social and recreative activities by a supply of refreshments, both liquid and solid.

The petitioning Club has admittedly been registered under section 26 of the Companies Act, though it does not require registration. Section 26 makes special provision for an association such as the petitioning Club, formed for promoting commerce, art, science, religion, charity or any other useful object and applies or intends to apply its profits, if any, or other income in promoting its objects being registered under the Companies Act. Such registration can only be ordered if the Central Government is satisfied with the *bona fides* of such a Club and that it is an association formed not for profit. The Club, if registered, has the privilege of limited liability without the addition of the word 'limited' to its name. Registration under section 26 of the Act is *prima facie* proof, if it were needed, that the petitioning Club is not an association for profit. Lord Halsbury in his Laws of England, Vol. IV, at page 484, para. 883, differentiates between two kinds of incorporated Clubs under the English Companies Act of 1929, *i.e.*, between what is in substance a members' Club, with the advantages incident to incorporation as a company, especially that of suing and being sued as a legal entity, and a proprietary Club with an incorporated company as proprietor instead of an individual. A proprietary Club is something quite different in which non-proprietary members may be excluded from any share in the management which is run for profit. (See *Cole* v. *Marton Park Wimbledon Golf Club, Ltd.*[1]) It is only a members' Club which is eligible for registration under section 26 of the Indian Companies Act.

There can in the first place be no doubt that the petitioning Club is a members' Club which is not conducted for profit or gain. In *Inland Revenue Commissioners* v. *Westleigh Estates Company, Ltd.*[2], it was held by the Court of Appeal reversing the decision of Rowlatt, J., that the Club being a members' and not a proprietary Club, the Club was not carrying on any "undertaking of a similar character to that of a trade or business" and was therefore not liable to corporation profit tax because its accounts showed a surplus of income over expenditure.

Now from its constitution, the petitioning Club is a society of persons, each of whom contributes funds, out of which the Club expenses are met. Such contribution is made by means of entrance fees, or monthly or annual subscriptions and other charges paid by members. It is not recognised as having any legal existence apart from the members of which it is composed. All the members of the petitioning Club are on an equal footing with an equal interest in the Club and its property. The President, Honorary Secretary, Treasurer and so on are all unpaid officers, nor would in effect a paid full-time secretary divest such a club of the distinctive features of non-proprietary members' Club. Each member has an equal legal interest not only in the Club property but also in the service of Club

1. (1927) 43 T.L.R. 400.   2. (1924) 1 K.B. 390.

servants.' The Club of course through its secretary employs servants including its cooks. It purchases on behalf of the Club and for the consumption of its members commodities on which sales tax is paid and some of these commodities are converted and cooked into edible food, and supplied to members when required. If a club has say 500 members, each member would have a 1/500 share in the service of the club cook, waiters and other servants. When he is supplied through his Club with refreshments and drinks, cigarettes, tennis-balls and so on, as he needs them for use, he is charged on his bill a fixed rate determined by the cost thereof including sales tax already paid, cost of establishment and so on. The question of profit does not enter into the question of supply.

Can such a supply by a Club to a member be in law regarded as a sale. At first blush the explanation to section 2 (*b*) of the Madras General Sales Tax appears to have been expressly designed to bring within the scope of sales tax levy

"a Co-operative Society, a Club or firm or any association, which sells goods to its members"

as a dealer. Section 2 (*b*) however defines dealer as any person, who carries on the business of buying or selling goods. The emphasis in both the sections and the explanation is on the word "sale" and indeed this cannot be otherwise, the tax leviable being one on sales. Nor has the Legislature sought to give any unusual meaning to the word 'sale.' It is defined in section 2 (*h*) as follows:

"Sale with all its grammatical variations and cognate expressions means every transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration."

A sale therefore must in the first place be a transfer of property in goods. I hold that the supply of refreshments in a members' Club such as this registered under section 26 of the Companies Act, purchased out of Club funds, composed of members' subscription is not a transfer of property from the Club as such to a member.

The second and more important and also as it appears to me, a mandatory requirement of the definition is that the transfer of property must be in the course of trade or business. A members' Club, such as the petitioning Club, does not do any trade or business in purchasing from outside the requirements of members and supplying it to them at a fixed charge. On these two grounds, the levy of sales tax on such supplies of refreshments by clubs to members must be held to be illegal.

Mr. Jayarama Aiyar has referred me to some English case-law, all drawn from the domain of public house licensing. Though the analogy is not perhaps very happy in this State which is now committed to prohibition they strongly reinforce the view I have taken. The oldest decision is *Graff* v. *Evans*[1], one of the year 1882 in which the manager of a *bona fide* members' Club was prosecuted for selling by retail intoxicating liquors without a licence under the Licensing Act of 1872. Holding that the transaction was not a sale, some interesting reasons were given both by Field, J., and Huddleston, B. Field, J., was of the opinion that Foster, to whom the manager Graff supplied the liquor, was an owner of the property together with all the other members of the Club and was entitled to obtain the goods on payment of the fixed price. He also held that a sale involved an element of bargain and that Graff could not have in any event sued Foster for the price as the price of goods sold and delivered. Huddleston, B., took the view that there was no transfer of the general or absolute property in the goods to Foster but a transfer of a special interest. This decision was followed in *Metford and others* v. *Edwards*[2] and applied to a working Men's Club which was not a *bona fide* Club and liable to be struck off the register. The criterion applied by Lush, J., was summed up in the following sentence:

"If there was a club whose members owned the liquors consumed there was distribution as opposed to sale of those liquors no matter how the club was conducted."

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1. (1882) 8 Q.B.D. 373. 2. (1915) 1 K.B. 172.

The decision in *Graff* v. *Evans*[1] was also followed in a more recent case *Trebanog Working Men's Club and Institute, Ltd.* v. *Macdonald*[2]. That was an interesting case in which two member Clubs were incorporated under the Industrial and Provident Fund Societies Act respectively, the shareholders and the members being in each case identical. They purchased intoxicating liquor and supplied it from time to time to individual members for payment as in an ordinary club. It was held that the two clubs were a legal entity as distinct from the members and could therefore act as their agents or trustees, the real interest being in the members so that the societies did not require to be licensed. All these cases arose out of convictions for violation of the Licensing Act or for sale of liquor without a licence. Underlying them all, there is the basic legal principle that a purely members' Club which makes purchases through a secretary or manager and supplies requirements to members at a fixed rate does not in law sell these goods to members but merely distributes them, all the essential elements of a sale in the transaction being wanting.

It is not necessary for me to go outside the scope of the present petition and speculate as to the intention of the Legislature in enacting the Explanation to section 2 of the Sales Tax Act. All that I can say is that it can only apply to a Co-operative Society, Club, Firm or any Association, which *sells* goods to its members. This will depend upon the constitution of the society or club as the case may be and other incidents of the alleged transactions. I have no hesitation in holding that in the case of a members' Club, it does not sell goods to its members when it supplies them with refreshments and other requirements purchased out of club funds to which the members have contributed and in which they have a joint legal interest and that a sales tax levy on such turnover is illegal. C.M.P. No. 3414 of 1951 for the issue of a writ of *certiorari* or other appropriate writ to quash G.O. Ms. No. 2472, dated 21st September, 1949, is dismissed as not pressed, and C.M.P. No. 3415 of 1951 which seeks by way of a writ of *mandamus* to direct the respondents to forbear from levying and collecting sales tax on the value of the refreshments supplied to the members by the Club is allowed and a writ in these terms will issue. The parties will bear their own costs.

This is in some respects an unusual petition, the unusual feature attaching to the case being that Government have perfectly *bona fide* collected this tax on this and similar Clubs for more than 10 years without any demur, protest or challenge as to legality. The finding that this tax is illegal, which I have had under law to give, may raise some hopes in the petitioning Club and also other Clubs of claiming a refund of some of the tax paid in the past from Government. I would like to express the view that no such claim would, in the circumstances, be really equitable, the collection of this tax having been acquiesced in all these years. Nor can I of course grant any such relief on this petition. The petitioning Club which is given on this petition the relief it seeks, can well rest content with it and the freedom this decision gives them from any future levy of the tax, regarding the past tax they have paid as an *ex gratia* contribution to the State treasury.

K.S. ——— *Writ of mandamus issued.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

M. Malayandi Thevar and others .. *Petitioners*.*

Madras Foodgrains (Intensive Procurement) Order (1950), *clause* 3 (2) *and Essential Supplies (Temporary Powers) Act* (*XXIV of* 1946), *section* 7 (1)—*Notification by Collector for surrender of surplus food grains to the Government—Validity—Contravention—Offence.*

Section 3 (1) of Act XXIV of 1946 lays down that the Central Government so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity

1. (1882) 8 Q.B.D. 373. 2. (1940) 1 K.B. 576.

* Crl. R. Cs. Nos. 989 to 991 and 1092 of 1951. (Crl. R. Ps. Nos. 971 to 973 and 1070 of 1951). 5th December, 1951.

or for securing their equitable distribution and availability at fair prices may by notified order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein. Sub-clause (2) provides that without prejudice to the generality of the powers conferred by sub-section (1) an order made thereunder may provide: "...... (*f*) for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or class of persons or in such circumstances, as may be specified in the order." Section 4 provides that the Central Government may by notified order direct that the power to make orders under section 7 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the directive, be exercised by (*a*) such officer or authority subordinate to the Central Government, or (*b*) such Provincial Government as may be specified in the direction. Section 2 (*d*) of the same Act defines a "notified order" to mean an order notified in the Official Gazette. The term Official Gazette has been construed in relation to Madras as the Madras Fort St. George Gazette. In exercise of the powers under section 3 of the Essential Supplies (Temporary Powers) Act, 1946, read with the notification of 21st October, 1946, by the Government of India, G.O. No. 1269, Food and Agriculture, dated 30th June, 1950, was published in the Fort St. George Gazette, by the Governor of Madras with the concurrence of Government of India, following Madras Foodgrains (Intensive Procurement) Order, 1950. The State Government has in fact in exercise of its delegated powers passed various orders like the Foodgrains (Intensive Procurement) Order, 1948, 1950, etc., comprehensively laying down the principles on which the categories of persons to whom these orders apply, the grounds on which the surplus should be determined, the mode of taking delivery and the payment against delivery and providing for removal of difficulties in the way of getting at undisclosed stocks, etc. The State Government has not empowered the Collectors of Districts to lay down the principle regulating or controlling but only to carry out the working of the principles and find out what the surplus is. The notification by a District Collector for surrender of surplus food grains to the Government cannot be said to be one in the exercise of a delegation of a delegated power. Accordingly such a notification by the District Collector is valid and contravention of it would be an offence.

Petitions under sections 435 and 439 and 561-A, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Tuticorin, dated 30th August, 1951, in S.C. No. 289 of 1951, etc.

T. R. Srinivasa Aiyar and *S. Krishnaswami* for Petitioners.

The Assistant Public Prosecutor (*A. C. Muthanna*) for the State.

The Court made the following

ORDER.—These are four criminal revision cases filed against the orders of the Sub-Divisional Magistrate, Tuticorin, in summary cases Nos. 289, 292, 290 and 176 of 1951, holding that the prosecutions launched against the criminal revision petitioners were competent and maintainable.

There can be no dispute on the limited records before us at this stage concerning the facts, namely, that these petitioners did not comply with clause 3 (2) of the Madras Foodgrains (Intensive Procurement) Order, 1950, and the Collector's notification, dated 15th July, 1950, for surrender of surplus food grains to the Government, and for which the petitioners have been charged under the Madras Foodgrains (Intensive Procurement) Order, 1950, read with section 7 (1) of the Essential Supplies (Temporary Powers) Act (XXIV of 1946).

The point taken by them in the lower Court and here is set out by the criminal revision petitioners as follows: The Collector has no power by a District Notification to call upon the accused to surrender the surplus food grains and that the violation of such an order is not an offence. The powers of the Central Government for regulating or prohibiting the production, supply and distribution of trade and commerce in essential commodities under section 3 of the Essential Supplies (Temporary Powers) Act, 1946, are delegated to the State Government. The State Government cannot further delegate such powers to its subordinate officers. In support of this the decision of our learned brothers Govinda Menon and Basheer Ahmad Sayeed, JJ., in Crl. M. P. No. 518 of 1950, *Mohamed Sahib, In re*[1], has been relied upon. Therein it was held that the fixation of prices of sugar must be done by the State Government by notified order as required under sections 3 and 4 of Act XXIV of 1946 and the order of the State Government authorising the Collector to fix the price was illegal and not operative and that therefore the price fixation and the notification in the District Gazette were invalid. It is stated that

1. (1950) 2 M.L.J. (N.R.C.) 20.

the same principle applied to this case and that the Collector's demand on the accused is not valid.

The learned Sub-divisional Magistrate rejected this contention and hence these criminal revision petitions. I am also of the same opinion as the learned Sub-Divisional Magistrate and here are my reasons.

Section 3 (1) of Act XXIV of 1946 lays down that the Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by notified order provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce therein. Sub-clause (2) provides that without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide . . . . . . (*f*) for requiring any person holding stock of an essential commodity to sell the whole or a specified part of the stock at such prices and to such persons or class of persons or in such circumstances, as may be specified in the order. Section 4 provides that the Central Government may by notified order direct that the power to make orders under section 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercised by (*a*) such officer or authority subordinate to the Central Government, or (*b*) such Provincial Government as may be specified in the direction. Section 2 (*d*) of the same Act defines a "notified order" to mean an order notified in the official Gazette. The term "official Gazette" has been construed in relation to Madras as the Madras Fort St. George Gazette.

On 1st July, 1950, in the Fort St. George Gazette the following Madras Foodgrains (Intensive Procurement) Order, 1950 (G.O. Ms. No. 1269, Food and Agriculture, 30th June, 1950) has been published. The preamble states that this notification was in exercise of the powers conferred by section 3 of the Essential Supplies (Temporary Powers) Act, 1946, read with the notification of the Government of India, Department of Food, No. PY. 603 (2)-1, dated the 21st October, 1946, and with the concurrence of the Government of India, by His Excellency the Governor of Madras.

I must briefly summarise the eleven paragraphs of this notification relating to paddy (rice in the husk), rice (paddy husked), cholam, cumbu, ragi, korra, samai, varagu and varigalu. Paragraph 1 gives the title of the order and paragraph 2 defines the extent and defines foodgrains, purchase and sale. Paragraph 3 defines the categories of persons to whom this Notification is applicable and the categories of persons who can call upon the aforesaid persons to do the various things specified within the purposes set out above. Then sub-paragraph (3) of paragraph 3 proceeds to meticulously set out the rules for determining the surplus which has got to be surrendered on demand. Paragraph 4 provides for advance demands being made if it appears necessary for maintaining supplies of food grains even before the determination of the surplus. Paragraph 5 provides for the mode of delivery and the payment of prices. Paragraph 6 relates to special conditions in regard to certain specified districts. Paragraph 7 deals with the powers invested by the Government in District Collectors and persons authorised by him on this behalf for declaration of stock of food grains in specified circumstances and areas. Paragraph 8 deals with inspection of stocks and confers necessary facilities for the officers for doing the same. Paragraph 9 deals with sequestration of stocks in certain specified events. Paragraph 10 is the immunity clause in regard to officers carrying out the operations under this order and forfeiture in defined circumstances. The order finally winds up by stating that

"all proceedings commenced or deemed to have been commenced and all action taken or deemed to have been taken and all appointments made or deemed to have been made under the Madras Foodgrains (Intensive Procurement) Order, 1948, as subsequently amended shall be deemed to have been taken or made under the corresponding provision, if any of this order, and shall, so far as may be continued accordingly."

This procurement order is applicable during fasli 1360 or future faslis.

In this case there is no dispute that the Central Government had powers to delegate its authority to the State Government and the only point in dispute is that the State Government is not entitled to delegate their powers so got in favour of its subordinate officers, namely, the District Collectors.

This contention is undoubtedly due to a confusion of thought as has been pertinently pointed out by the learned Sub-Divisional Magistrate. In this case the State Government has not delegated its powers to the Collectors and has in fact in exercise of its delegated powers passed various orders like the Foodgrains (Intensive Procurement) Order, 1948, 1950, etc., comprehensively laying down the principles on which the categories of persons to whom these orders apply, the grounds on which the surplus should be determined, the mode of taking delivery and the payment as against delivery and providing for removal of difficulties in the way of getting at undisclosed stocks, etc., which have all been summarised purposely above. In short, the Collector is not empowered to lay down the principle for regulating or controlling but only to carry out the working of the principles and find out what the surplus is. Therefore, this is not a case of a delegation of delegated powers or a case of abdication or effacement of the State Government in the matter of carrying out the powers delegated to them by the Central Government but a mode of exercising these powers through their subordinates retaining full control of the powers vested in them. Therefore, this is not a case of the State Government abandoning its functions in favour of an outside agency but only a case of employing the machinery of Government for the purpose of enabling the State Government to discharge its duties properly and effectively. The responsibility entrusted to the State Government under this delegation remains intact and there is no abdication of its own delegated powers.

It follows from the above considerations that the contention based upon the maxim *delegatus non potest delegare* is not applicable to this case and that these revision cases must fail.

These revision cases are accordingly dismissed. The trial of the cases so unnecessarily held up should be proceeded with expeditiously.

K.S. *Petitions dismissed.*

[THE SUPREME COURT OF INDIA.]

(Criminal Appellate Jurisdiction.)

PRESENT:—S. FAZL ALI AND VIVIAN BOSE, JJ.

Bejoy Chand Patra .. *Appellant**

v.

The State of West Bengal .. *Respondent.*

Criminal Procedure Code (V of 1898), section 237—Applicability—Charge under section 307, Penal Code and conviction under section 326, Penal Code—Legality—Criminal Procedure Code, section 342—Plea of want of proper examination under—Facts to be shown.

Where an accused charged under section 307, Penal Code, is convicted under section 326, Penal Code, if on the facts it was open to the Sessions Judge to charge the accused alternatively under sections 307 and 326 of the Penal Code, the case falls under section 237, Criminal Procedure Code and the conviction of the accused under section 326 of the Penal Code would be proper even in the absence of a charge under that section.

To sustain a contention that the examination of the accused under section 342 of the Criminal Procedure Code was not proper or adequate, it is not sufficient for the accused merely to show that he has not been fully examined as required by the section, but he must also show that such examination has materially prejudiced him.

(On appeal from the Judgment and Order, dated the 15th June, 1950, of the High Court of Judicature at Calcutta (Harries, C.J. and Lahiri, J.) in Criminal Appeal No. 71 of 1950 and Revision No. 295 of 1950.)

S. N. Mukherjee, Advocate, for Appellant.

B. Sen, Advocate, for Respondent.

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*Criminal Appeal No. 30 of 1951. 14th December, 1951.

The Judgment of the Court was delivered by

Fazl Ali, J.—This is an appeal against the judgment of the High Court at Calcutta upholding the order of the Sessions Judge of Midnapore convicting the appellant under section 326 of the Indian Penal Code and sentencing him to 3 years' rigorous imprisonment.

The prosecution case against the appellant may be shortly stated as follows:—The appellant and the injured person, Kumad Patra, are first cousins, and they live in a village called Andaria, their houses being only 3 or 4 cubits apart from each other. They had a dispute about a pathway adjoining their houses, which led to a tank, and they quarrelled about it on the 11th July, 1949. Two days later, on the 13th July, when Kumad Patra was washing his hands at the brink of the village tank, the appellant came from behind and inflicted on him 17 injuries, with the result that two of his fingers had to be amputated and a piece of bone had to be extracted from his left thumb. The police being informed, started investigation and submitted a charge-sheet against the appellant who was finally committed to the court of Sessions and tried by the Sessions Judge and a jury. He was charged under section 307 of the Indian Penal Code, but the jury returned a verdict of guilty against him under section 326 of the Penal Code, and the learned Sessions Judge accepting the verdict convicted him under that section as aforesaid. When the matter came up in appeal to the High Court, a rule was issued on the appellant calling upon him to show cause why his sentence should not be enhanced, but, at the final hearing the rule was discharged, his appeal was dismissed, and his conviction and the original sentence were upheld.

The first point urged on behalf of the appellant before us is that, inasmuch as there was no charge under section 326 of the Penal Code and the offence under that section was not a minor offence with reference to an offence under section 307 of the Code, he could not have been convicted under the former section. This argument however overlooks the provisions of section 237 of the Criminal Procedure Code. That section, after referring to section 236 which provides that alternative charges may be drawn up against an accused person where it is doubtful which of several offences the facts which can be proved will constitute, states as follows:—

> "If..........the accused is charged with one offence, and it appears in evidence that he committed, a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

There can be no doubt that on the facts of this case, it was open to the Sessions Judge to charge the appellant alternatively under sections 307 and 326 of the Penal Code. The case therefore clearly falls under section 237 of the Criminal Procedure Code, and the appellant's conviction under section 326 of the Penal Code was proper even in the absence of a charge.

In *Begu* v. *The King-Emperor*,[1] the Privy Council had to deal with a case where certain persons were charged under section 302 of the Penal Code, but were convicted under section 201 for causing the disappearance of evidence. Their Lordships upheld the conviction, and while referring to section 237 of the Criminal Procedure Code, they observed:—

> "A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made

1. (1925) 48 M.L.J. 643: L.R. 52 I.A. 191: I.L.R. 6 Lah. 226 (P.C.).

..........Their Lordships entertain no doubt that the procedure was a proper procedure and one warranted by the Code of Criminal Procedure."

The second point urged on behalf of the appellant is that the High Court having issued a rule for the enhancement of the sentence, he should have been allowed to argue the merits of the case which he was not allowed to do. The learned Counsel for the appellant was not, however, able to show that even if it was open to him to argue on the merits of the case the decision would have been otherwise. Only 3 contentions were put forward by him, these being:—

(1) that several material witnesses were not examined;

(2) that the appellant's case was not placed before the jury in a fair manner; and

(3) that there was no proper examination of the appellant under section 342 of the Criminal Procedure Code.

We have examined these contentions and find that they are entirely without merit. In urging his first contention, the learned counsel stated that though it was admitted that several persons have got houses to the east, north and north-west of the tank where the occurrence is alleged to have taken place, they have not been examined by the prosecution. He further argued that one Sarat Chandra Ghose, who was present at the house of the accused when it was searched, has also not been examined. These arguments, however, have very little force, since there is no evidence to show that those persons had seen the occurrence, and they also do not take note of the fact that such evidence as has been adduced by the prosecution, if believed, was sufficient to support the conviction of the appellant. The Sessions Judge in his charge to the jury referred specifically to the very argument urged before us, and he told the jurors that if they thought it fit it was open to them to draw an inference against the prosecution. There can be no doubt that the jurors were properly directed on the point and they evidently thought that the evidence before them was sufficient for convicting the appellant.

The second contention urged on behalf of the appellant relates to his defence, which, briefly stated, was that Kumad Patra, the injured man, entered his house during his temporary absence, went to the bedroom of his wife, who was a young lady, and committed indecent assault on her and was assaulted in these circumstances. This story was not supported by any evidence but was merely suggested in cross-examination, and the Sessions Judge while referring to it in his charge to the jury, observed:—

"If I were left alone, I would not have believed the defence version. But you are not bound to accept my opinion, nor you should be influenced by it. It is for you to decide whether you will accept the defence suggestion in favour of which there is no such positive evidence."

The Sessions Judge undoubtedly expressed himself somewhat strongly with regard to the defence suggestion, but he coupled his observations, which we think he was entitled to make, with an adequate warning to the jurors that they were not bound to accept his opinion and should not be influenced by it. The defence version was rejected by the jury, and there can be no doubt that on the materials on the record it would have been rejected by any Court of fact.

The last contention put forward by the learned counsel for the appellant was that he was not examined as required by law under section 342 of the Criminal Procedure Code. It appears that three questions were put to the appellant by the Sessions Judge after the conclusion of the prosecution evidence. In the first question, the Sessions Judge asked the appellant what his defence was as to the evidence adduced against him, in the second question, the Judge referred to the dispute about the pathway and asked the appellant whether he had inflicted injuries on Kumad Patra; and in the third question, the appellant was asked whether he would adduce any evidence. The facts of the case being free from any complications and the points in issue being simple, we find it difficult to hold that the examination of the appellant in this particular case was not adequate. To sustain such an argument as has been put forward, it is not sufficient for the accused merely to show that he has not been fully examined as required by section 342 of the Criminal Procedure Code, but he must also show that such examination has materially prejudiced him. In the present case, it appears that the point urged here was not raised in the grounds of appeal to the High Court, nor does it find a place in the grounds of appeal or in the statement of case filed in this Court. It has nowhere been stated that the accused was in any way prejudiced, and there are no materials before us to hold that he was or might have been prejudiced. We have read the Sessions Judge's charge to the jury, which is a very fair and full charge, and nothing has been shown to us to justify the conclusion that the verdict of the jury should not have been accepted.

The appeal accordingly fails and is dismissed.

Agent for Appellant: *P. K. Chatterjee.*

Agent for Respondent: *P. K. Bose.*

G.R.|V.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT:—M. PATANJALI SASTRI, *Chief Justice*, B. K. MUKHERJEA, S. R. DAS AND VIVIAN BOSE, JJ.

Annagouda Nathgouda Patil and another .. *Appellants**

v.

The Court of Wards, Satara, by its Manager, The Collector of Satara and another .. *Respondents.*

Hindu Law of Inheritance (Amendment) Act (II of 1929)—Scope and applicability—Stridhan heirs of maiden—Ascertainment—Act if can operate.

The scope of the Hindu Law of Inheritance (Amendment) Act, 1929, is limited. It governs succession only to the separate property of a Hindu male who dies intestate. It does not alter the law as regards the devolution of any other kind of property owned by a Hindu male and does not purport to regulate succession to the property of a Hindu female at all. The Act does not make the four new relations statutory heirs under the Mitakshara Law in all circumstances and for all purposes; it makes them heirs only when the propositus is a male and the property in respect to which it is sought to be applied is his separate property. The language of the Act makes a distinction between a male and a female propositus expressly.

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*Civil Appeal No. 115 of 1950. 17th December, 1951.

View expressed in *Manda Mahalakshmamma* v. *Mantravadi*, (1946) 1 M.L.J. 196 : I.L.R. (1947) Mad. 23; *Shakuntalabai* v. *Court of Wards*, I.L.R. (1942) Nag. 629; *Taluk Raj Kuer* v. *Bachu Kuer*, I.L.R. 26 Pat. 150 and *Kuppuswami* v. *Manickasari*, (1949) 2 M.L.J. 126, approved in preference to the view expressed in *Sham Rao* v. *Raghunandan*, I.L.R. (1939) Bom. 228; *Mt. Charjo* v. *Dinanath*, A.I.R. 1937 Lah. 196; *Kehar Singh* v. *Attar Singh*, A.I.R. 1944 Lah. 442 and *Indra Pal* v. *Hemlangi Debi*, I.L.R. (1949) All. 816.

Hence, the Stridhan heirs of a Hindu maiden have to be ascertained with reference to the general provisions of the Hindu Law of inheritance ignoring the statutory heirs who have been introduced by the Act. It is true that the Court has to ascertain in such a case who the heirs of the father are at the date when the daughter dies, but the enquiry is for the purpose of finding out who the successor to the estate of the daughter is. This being the subject of the enquiry the operation of the Hindu Law of Inheritance (Amendment) Act of 1929 is excluded by its express terms and for that purpose the Act is to be treated as non-existent.

It was held that the maiden's father's paternal uncle's son and not the father's sister's son is the nearer heir after her death.

On appeal from the Judgment and Decree, dated the 14th March, 1945 of the High Court of Judicature at Bombay (Macklin and Rajadhyaksha, JJ.) in First Appeal No. 274 of 1941 arising out of Decree, dated the 15th March, 1941, of the First Class Sub-Judge, Satara, in Civil Suit No. 890 of 1938.

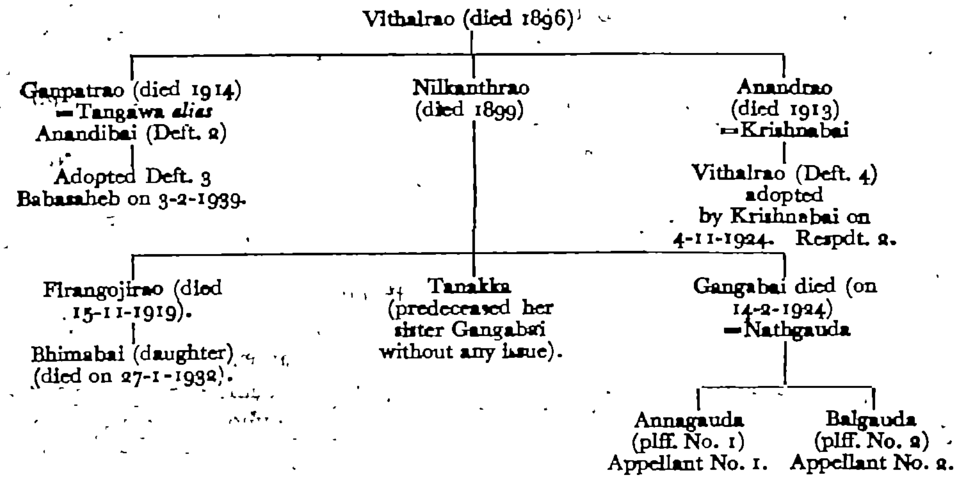
G. R. Madbhavi, Senior Advocate (*K. R. Bengeri*, Advocate, with him), for Appellants.

H. J. Umrigar, Advocate, for Respondent No. 1.

M. C. Setalvad, Attorney-General for India (*K. G. Datar*, Advocate, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal is directed against a judgment and decree of a Division Bench of the Bombay High Court, dated the 14th of March, 1945, which affirmed, on appeal, the decision of the First Class Subordinate Judge, Satara passed in Civil Suit No. 890 of 1938. The appellants before us filed the suit, as plaintiffs, in the original Court for establishment of their title to the property in dispute which is known as Chikurde Estate, on the allegation that they were under the Hindu Law, the nearest heirs of one Bhimabai, who was admittedly the last holder of the estate. The suit was brought initially against one defendant, namely, the Court of Wards, Satara, and admittedly the Court of Wards took possession of the property of Bhimabai, while she was alive, and is continuing in possession of the same even now after her death. Later on, defendants 2, 3 and 4, who put forward rival claims of succession to the estate, were allowed to intervene in the suit and were added as parties defendants. The Court of Wards, which now figures as defendant No. 1, took up, all through, a neutral attitude and expressed its willingness to hand over the estate to any person who would be declared to be rightfully entitled to it by the Court. The Courts below have negatived the claims of defendants 2 and 3 and they have not come up to press their claims in the appeal before us. The two rival claimants, who are now on the scene, are the plaintiffs on one side and defendant No. 4 on the other, and the whole controversy in this appeal centres round the point as to who amongst them have the preferential right to succeed to the disputed estate after the death of Bhimabai. To appreciate the material facts of the case and the contentions that have been raised by the parties, it will be convenient to refer to the following genealogy which is not disputed by either side.



It is the case of both the parties that Vithalrao, whose name appears at the top of the pedigree table, and who was the common ancestor of the parties, held the disputed property as watan property appertaining to the hereditary office of Deshmukhi service. Vithalrao was the recipient of a Sanad dated 28th November, 1892, under what was called the Gordon Settlement, the object of which was to commute services of certain watandars in that part of the country and relieve them from liability to perform the services attached to their office on certain terms and conditions which were agreed upon between the Government on one hand and the watandars on the other. The terms of the settlement were generally embodied in Sanads and one such Sanad was granted to Vithalrao in 1892. It is not disputed that after this settlement Vithalrao continued to be watandar as defined by Bombay Act III of 1874, and that the watan in dispute was an impartible estate governed by the rule of primogeniture. In 1896 Vithalrao died and he was succeeded by his eldest son Ganpatrao under the law of primogeniture. Ganpatrao died childless in 1914, leaving behind him his two widows Anandibai and Indirabai, of whom the senior widow Anandibai is defendant No. 2 in the present suit. Both the two brothers of Ganpatrao, namely, Nilakanthrao and Anandrao had predeceased him. Nilakanthrao left behind him one son named Firangojirao and two daughters, while Anandrao died childless, leaving him surviving his widow Krishnabai, who later on adopted Vithalrao, who is defendant No. 4 in the suit. Ganpatrao had left a will bequeathing all his watan and non-watan properties to Firangojirao and the latter succeeded to the estate both under the will as well as under the law of lineal primogeniture, he being the only male member of the family at that time. Firangojirao died in 1919, leaving Bhimabai, his only daughter, who was a minor at that time. On 23rd September, 1921, the name of Bhimabai was entered in the village records as watandar in place of Firangojirao and in the year following, the Court of Wards, Satara, assumed superintendance of Bhimabai's estate. On 11th October, 1923, the Government of Bombay by their Resolution No. A-471 declared the Chikurde Deshmukh watan as lapsed to Government, presumably on the ground that there was no male heir in the watan family after the death of Firangojirao. A new entry was then made in the village register which recorded Bhimabai not as watandar, but as heir of Firangojirao and the lands were described as being converted into ryotava lands after forefeiture by

Government and subjected to full assessment. On 4th of November, 1924, Krishnabai, the widow of Anandrao, adopted defendant No. 4 as a son to her husband. On 27th January, 1932, Bhimabai died unmarried and her estate continued under the management of the Court of Wards. The appellants before us, who are the sisters' sons of Firangojirao, brought this suit on 5th of August, 1938, and their case, in substance, is that after the Resolution of the Government passed on 11th October, 1923, the Chickurde Estate ceased to be a watan property and the succession to such estate was governed by the ordinary rules of Hindu Law and not by the provisions of Act V of 1886 which postpone relations claiming through a female to a male member of the watan family. It was urged that the property being the absolute property of Bhimabai and she having died while still a maiden, the plaintiffs, being the nearest heirs of her father, were entitled to succeed under the general rules of Hindu Law. As said already, the defendant No. 4, who is respondent No. 2 in this appeal, was added as a party defendant some time after the suit was filed and the contention raised on his behalf was that by reason of his having been duly adopted to Anandrao on 4th of November, 1924, he was the nearest heir to the property in suit which was a watan property and prayed that a declaration in his favour might be made by the Court. The defendant No. 3 claimed to have been adopted as a son to her husband Ganpatrao by Anandibai, the defendant No. 2, some time in February, 1939.

The trial Court on a consideration of the evidence came to the conclusion that the Chikurde Estate was an impartible property governed by the rules of primogeniture. It was held that, it being an impartible joint estate, the rule of survivorship still applied and consequently on the death of Ganpatrao, without leaving any son, the estate passed by survivorship to the next senior branch which was that of Firangojirao. The view taken by the Subordinate Judge is that after Firangojirao's death Bhimabai took only a provisional interest in the property which was liable to be divested by the emergence of a male member by adoption in the family and in fact she was legally divested of her interest in the property when defendant No. 4 was adopted by Anandrao's widow. In the opinion of the Subordinate Judge the resolution of the Government treating the Chikurde Estate as lapsed was premature and could not be made legally so long as there were widows living, who were capable of adopting sons. The trial Judge held further that even if Bhimabai was taken to have held the property as watan till her death, the next heir to succeed under the Bombay Act V of 1886, would be defendant No. 4 and not the plaintiffs. The result was that the plaintiffs' suit was dismissed. The plaintiffs then took an appeal to the High Court of Bombay and this appeal was heard by a Division Bench consisting of Macklin and Rajadhyaksha, JJ. The learned Judges dismissed the appeal and confirmed the decision of the trial Court, though the reasons given by them are not the same as those of the trial Judge. It was held by the High Court, on a construction of the Sanad granted to Vithalrao in 1892, that the order of lapse or forfeiture of the watan estate passed by the Government in the year 1923, on the ground of failure of male heirs was not a valid and legal order and although under the relevant clause of the Sanad Government could, in the absence of male heirs, resume the watan in the sense that they could make the property liable to full assessment, the other incidents of the watan estate still continued. Consequently, Act V of 1886, would still govern succession to such property and

defendant No. 4 had preferential rights over the plaintiffs under section 2 of that Act. It is against this decision that the plaintiffs have come up on appeal to this Court.

The learned Counsel appearing on behalf of the plaintiffs appellants has raised a two-fold contention in support of the appeal. It has been contended in the first place that the High Court was in error in holding that the Chickurde Estate retained its watan character even after it was resumed by the Government by its Resolution of 11th October, 1923; and if it was non-watan, the plaintiffs would be nearer heirs to Bhimabai than defendant No. 4. The other contention raised is that even if the property remained watan in the hands of Bhimabai, the latter would have to be regarded as a watandar in the true sense of the word and would be a fresh stock of descent. In that view the plaintiffs would come within the family of watandar as defined in Bombay Act V of 1886, whereas the defendant No. 4 would be outside the family.

The points undoubtedly are interesting, but having regard to the view which we have decided to take, it would not be necessary to investigate the merits of either of them. It may be pointed out that learned Judges of the High Court proceeded throughout on the assumption that the plaintiffs would have preferential rights of succession if the property was regarded as non-watan in the hands of Bhimabai. It is only if the property was watan that the Bombay Act of 1886, will apply and the plaintiffs, who were descended through females, would be postponed to defendant No. 4 who by adoption became a male member of the family. Mr. Setalvad, appearing for defendant No. 4 who is respondent No. 2 in this appeal, contended before us that this assumption is wrong, and that even if the property was regarded as non-watan property and belonging absolutely to Bhimabai as her Stridhanam, still as heir of Bhimabai's absolute property the defendant No. 4 would have higher rights than the plaintiffs. As this point was not touched upon in the judgments of either of the Courts below, we heard the learned Counsel on both sides at great length upon it and the conclusion that we have reached is that the contention of the learned Attorney-General is well-founded and must prevail.

For the purpose of this argument we would assume that the property in suit was non-watan stridhan property of Bhimabai and the only question is, as to who amongst the rival claimants would be the nearer heir after her death according to the Hindu Law of Inheritance? It is admitted that Bhimabai died while she was a maiden and that a maiden's property under the Hindu Law goes in the first place to her uterine brothers, in default of them to the mother and then to the father. This is according to the text of Baudhayana[1] which is accepted by all the commentators. Viramitrodaya adds to this that "on failure of mother and father it goes to their nearest relations"[2]. It has been held in a large number of cases that the expression "nearest relations of the parents" means and refers to the sapindas of the father and in their default the sapindas of the mother both in order of propinquity[3]. In the case before us both the plaintiffs and defendant No. 4 are sapindas of Firangojirao, the plaintiffs being the sister's sons of Firangojirao, while the latter is his paternal uncle's son. It is not disputed that apart from the changes introduced by the Hindu Law of

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1. *See* Mitakshara, Chap. II, Sec. XI, para. 30.
2. *See* Viramitrodaya, Chap. V, Part II, Sec. 9.
3. *Vide* Mayne's Hindu Law, 11th edition, Art. 621, page 741.

Inheritance (Amendment) Act, (Act II of 1929), the place of the paternal uncle's son in the line of heirs under the Mitakshara Law of Succession is much higher than that of the sister's son, and the Mayukha Law, which prevails in the State of Bombay, does not make any difference in this respect. Under the Mitakshara Law, the paternal uncle comes just after the paternal grand father and his son follows immediately. By Act II of 1929, however, four other relations have been introduced between the grandfather and the paternal uncle and they are the son's daughter, daughter's daughter, sister and sister's son and the paternal uncle and his son are thus postponed to these four relations by the Hindu Law of Inheritance Act of 1929. The question is, whether the provisions of this Act can at all be invoked to determine the heirs of a Hindu female in respect of her stridhan property. The object of the Act as stated in the preamble is to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; and section 1 (2) expressly lays down that

> "the Act applies only to persons who but for the passing of this Act would have been subject to the Law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will".

Thus the scope of the Act is limited. It governs succession only to the separate property of a Hindu male who dies intestate. It does not alter the law as regards the devolution of any other kind of property owned by a Hindu male and does not purport to regulate succession to the property of a Hindu female at all. It is to be noted that the Act does not make these four relations statutory heirs under the Mitakshara Law in all circumstances and for all purposes; it makes them heirs only when the propositus is a male and the property in respect to which it is sought to be applied is his separate property. Whether this distinction between male and female propositus is at all reasonable is another matter, but the language of the Act makes this distinction expressly and so long as the language is clear and unambiguous, no other consideration is at all relevant. This is the view which has been taken, and in our opinion quite rightly, in a number of cases of the Madras, Patna and Nagpur High Courts[1]. We are not unmindful of the fact that a contrary view has been expressed in certain decisions of the Bombay, Lahore and Allahabad High Courts[2]. The line of reasoning that is adopted in most of the decisions where the contrary view is taken can be thus stated in the language of Mr. Justice Somjee[3]:

> "The Act is not sought to be applied to determine the succession to the stridhan of a Hindu maiden but is sought to be used by the petitioner to ascertain the fourth class of heirs to the stridhan of a Hindu maiden mentioned at page 139 of Mulla's Hindu Law..........The heirs of the father at the time of her death have to be ascertained in accordance with the Hindu Law as it existed at the time of the death of Bai Champubai. Thus the Act comes into operation for ascertaining the order in which the heirs of her father would be entitled to succeed to his estate, because the heirs of the father in the order of propinquity who would be entitled to succeed to him if he died on 3rd August, 1937, would be the heirs of Bai Champubai in the absence of the uterine brother, the mother and the father."

1. Vide *Mahalakshmamma* v. *Mantravadi Suryanarayana Sastry*, (1946) 1 M. L. J. 196: I. L. R. (1947) Mad. 23; *Shakuntalabai* v. *Court of Wards*, I. L.R. (1942) Nag. 629; *Talukraj Kuer* v. *Bacha Kuer*, (1947) I.L.R. 26 Pat. 150; *Kuppusami* v. *Manickasari*, (1949) 2 M. L.J. 126.

2. *Shamrao* v. *Raghunandan*, I.L.R. (1939) Bom. 228; *Mst. Charjo* v. *Dinanath*, A.I.R. 1937 Lah. 196; *Kehar Singh* v. *Attar Singh*, A.I.R. 1944 Lah. 442; *Indra Pal* v. *Humangi Debi*, I.L.R. (1949) All. 816.

3. Vide *Shamrao* v. *Raghunandan*, I. L.R. (1939) Bom. 228 at 230.

It is true that we have got to ascertain who the heirs of the father are at the date when the daughter dies, but the enquiry is for the purpose of finding out who the successor to the estate of the daughter is. This being the subject of the enquiry, the operation of Act II of 1929 is excluded by its express terms and for that purpose the Act is to be treated as non-existent. In other words, the stridhan heirs are to be ascertained with reference to the general provisions of the Hindu Law of Inheritance ignoring the statutory heirs who have been introduced by the Act. The fallacy in the line of approach adopted in these cases seems to be that they treat the Inheritance Act of 1929 as amending or altering the Mitakshara Law of Succession in all cases and for all purposes, whereas the Act has absolutely no operation when succession to the separate property of a male is not the subject-matter of investigation. The result is that in our opinion the plaintiffs are not the nearest heirs of Bhimabai even assuming that the property was non-watan and belonged to her absolutely. The appeal will thus stand dismissed. We make no order as to costs in this appeal except that defendant No. 1, the Court of Wards, would have its costs as between Attorney and client out of the estate. The order for costs made by the Courts below will stand.

Agent for Appellants: *M. S. K. Sastri.*

Agent for Respondent No. 1: *P. A. Mehta.*

Agent for Respondent No. 2: *K. J. Kale.*

G.R.|V.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT:—S. FAZL ALI, MEHRCHAND MAHAJAN AND N. CHANDRASEKHARA AIYAR, JJ.

Bhagat Singh .. *Appellant**

v.

The State .. *Respondent.*

Gurdev Singh .. *Caveator (Complainant).*

Criminal Procedure Code (V of 1898), section 234 (1)—Charge in respect of a single act of firing a bullet at two persons—If a charge in respect of two offences.

A charge which relates to the accused firing at two persons is not a charge with respect to two offences but is a charge with respect to one offence only. There is nothing wrong in law to regard a single act of firing by the accused as one offence only. It would be taking an extremely narrow and artificial view to split it into two offences. By this it should not be understood that in no case can a single act constitute more than one offence.

On appeal from the Judgment and Order, dated the 5th October, 1950, of the High Court of Judicature for the Patiala and East Punjab States Union, Patiala (Teja Singh, C.J. and Gurnam Singh, J.) in Criminal Appeal No. 28 of 1950 arising out of the Order, dated the 30th May, 1950, of the Sessions Judge, Sangrur.

Gopal Singh and *Kartar Singh,* Advocates, for Appellant.

Narinder Singh, Advocate-General P. E. P. S. U. (*Jindra Lal,* Advocate, with him), for Respondent.

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*Criminal Appeal No. 38 of 1951. 19th December, 1951.

Jai Gopal Sethi, Senior Advocate (*R. L. Kohli*, Advocate, with him) for Caveator.

The Judgment of the Court was delivered by

Fazl Ali, J.—This is an appeal against the judgment of the High Court at Patiala upholding the conviction and sentence of the appellant, who was tried by the Sessions Judge of Sangrur for the offence of murder and sentenced to death.

The prosecution story is a somewhat long and complicated one, but ignoring unnecessary details, the material facts may be shortly stated as follows:—

On the 5th October, 1949, there was a quarrel between the appellant and one Darbara Singh, in the course of which the appellant attacked the latter with a *phawra* (a cutting instrument). About that time, Gurmail Singh, the deceased person, returned to his house, which was close to the house of Darbara Singh, from his cotton field, where he had been working, in order to take tea for his companions who were still working in his field. The appellant asked Gurmail Singh to lend him a spear to enable him to kill Darbara Singh, but since the latter refused to do so, there ensued a quarrel between him and the appellant, in the course of which they exchanged abuses and grappled with each other, and the fight was stopped only by the intervention of certain persons present at the place. It appears that the appellant was greatly affected by this quarrel, and thereafter he is said to have armed himself with a rifle and attacked 3 persons in the vicinity of Gurmail Singh's cotton field. He fired firstly at Kartar Singh, son of Sarwan Singh, while the latter was returning to his house from the field of Gurmail Singh, but he was not hurt. Soon after that, while Gurmail Singh was returning to his field after attending to his buffaloes in a garden which was nearby, the appellant chased him and fired at him thereby causing his instantaneous death. Lastly, he is said to have fired at Kartar Singh, son of Bishan Singh and one Jangir Singh, while they were raising an alarm, but the bullet missed them. Upon these allegations, the following three charges were framed against him:—

"(1) That you.........fired a shot at Gurmail Singh deceased with rifle P.I. with the intention of killing him and caused his death and thereby committed an offence punishable under section 302...........

(2) That you........fired a shot at Kartar Singh and Jangir Singh with rifle P.I. with the intention of causing death and made an attempt to cause their death...... and thereby committed an offence punishable under section 307........

(3) That you...........fired a gun-shot at Kartar Singh son of Sarwan Singh ....with the intention of killing him and made an attempt to cause his death and thereby committed an offence punishable under section 307........"

It appears that the appellant was an Instructor in the Home Guards, and the rifle which he is said to have used had been given to him by his superior officer with 20 rounds of ammunition.

To support their version of the occurrence, the prosecution examined three eye-witnesses whose evidence has been accepted by both the Courts below after careful scrutiny. The learned Sessions Judge acquitted the appellant of the second and third charges under section 307 of the Indian Penal Code, holding that there was no convincing evidence that the appellant intended to murder Jangir Singh and the other two persons. He however convicted him of the first charge under section 302 of the Indian Penal Code and sentenced him to death, which sentence was later confirmed by the High Court.

The learned counsel for the appellant had very little to argue on the merits of the case, but he seriously contended that there had been a misjoinder of

charges which could not be tried together under the law, and the illegality so committed had vitiated the whole trial of the appellant. It appears that in the High Court, the line of argument on this point was somewhat different from the line adopted in this Court. What was stressed in that Court seems to have been that the three incidents in respect of which the appellant charged not having happened in the course of the same transaction, they could not have been properly made the subject of one trial, and for this contention reliance was placed mainly on section 235 (1) of the Criminal Procedure Code, which provides that

"If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence."

It should be noted that that section is only one of the exceptions to the general rule laid down in section 233 of the Code that for every distinct offence, there shall be a separate charge and every such charge shall be tried separately. In this Court, no reference was made to section 235, but the argument was confined to the question as to whether the present case falls within another exception of section 233, which is contained in section 234 (1), which runs as follows:—

"When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respcet of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three."

It was argued before us that even though only 3 charges have been framed against the appellant, he has in fact been tried for 4 offences and not 3. The 4 offences are said to be those:—

(1) Committing the murder of Gurmail Singh;

(2) Attempting to murder Kartar Singh, son of Sarwan Singh;

(3) Attempting to murder Jangir Singh; and

(4) Attempting to murder Kartar Singh, son of Bishan Singh.

The learned counsel contended that the fact that the appellant has been acquitted of the last 3 offences and convicted only of the first offence was immaterial to the point raised by him, and we have only to see whether all the offences mentioned above could be properly tried together. In our opinion, the short reply to this contention is that the second charge which relates to the appellant firing at Kartar Singh and Jangir Singh is not a charge with respect to 2 offences but is a charge with respect to one offence only. The evidence adduced by the prosecution shows that the appellant fired only one bullet. The word "offence" has been defined in the Criminal Procedure Code as meaning "any act or omission made punishable by any law for the time being in force". There seems to be nothing wrong in law to regard the single act of firing by the appellant as one offence only. On the other hand, we think that it would be taking an extremely narrow and artificial view to split it into two offences. There are several reported cases in which a similar view has been taken, and in our opinion they have not been incorrectly decided. In 1881 A.W.N. 154, where a person stole several bullocks from the same herdsman at the same time, it was held that only one offence had been committed. In *Promotha Nath Ray* v. *King-Emperor*[1], it was held that misappropriation in regard to several account books constituted only one offence. In *Johan Subarna* v. *King-Emperor*[2], it as held that when an attempt to cheat a number of men by speaking to them in a body had been com-

1. (1912) 17 C.W.N. 479. 2. (1905) 10 C.W.N. 520.

mitted, one joint charge was valid. In *Poonit Singh* v. *Madho Bhot*[1], it was held that only one offence had been committed by a person who gave false information in one statement to the police against 2 persons. In *Sudheendrakumar Ray* v. *Emperor*[2], a person who was chased by two constables had fired at them several times, but it seems to have been rightly assumed that the firing did not constitute more than one offence, though the point was not specifically raised or decided. In our opinion, there is no substance in the point raised, though we should not be understood as laying down the wide proposition that in no case can a single act constitute more than one offence.

The other points urged on behalf of the appellant before us were somewhat unsubstantial points relating to the merits of the case, which it is not usual for this Court to allow to be raised in appeals by special leave.

In our opinion, this appeal is without merit, and it is accordingly dismissed.

Agent for Appellant: *R. S. Narula*.

Agent for Respondent: *P. A. Mehta*.

Agent for Caveator: *Vidya Sagar*.

G.R.|V.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Original Jurisdiction.]

PRESENT:—M. PATANJALI SASTRI, *Chief Justice*, MEHRCHAND MAHAJAN, B. K. MUKHERJEA, S. R. DAS AND N. CHANDRASEKHARA AIYAR, JJ.

P. D. Shamdasani .. *Petitioner**

v.

The Central Bank of India, Ltd. .. *Respondent*.

Constitution of India (1950), *Articles* 19 (1) (f) *and* 31 (1)—*Scope*—*Prevention of wrongful individual acts or protection against private conduct*—*Remedy under Articles* 19 (1) (f) *and* 31 (1)—*Availability*.

Neither Article 19 (1) (*f*) nor Article 31 (1) of the Constitution on its true construction was intended to prevent wrongful individual acts or to provide protection against merely private conduct. The language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the Article was intended to protect the fundamental freedoms assured to the citizen by clause (1) against State action other than the legitimate exercise of its powers to regulate private rights in the public interest. Violations of rights of property by individuals is not within the purview of the Article. Articles 19 (1) (*f*) and 31 (1) are great constitutional safeguards against State aggression on private property and are not directed against infringement by private individuals for which remedies should be sought in the ordinary law.

Petition under Article 32 of the Constitution of India for the issue of writs in the nature of *certiorari*, prohibition and *mandamus*.

The Petitioner in person.

C. K. Daphtary, Senior Advocate (*J. B. Dadachanji*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, C.J.—This is a petition under Article 32 of the Constitution for the enforcement of the petitioner's fundamental rights under Article 19 (1)

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1. (1886) I.L.R. 13 Cal. 270. 2. (1932) I.L.R. 60 Cal. 643.

*Petition No. 328 of 1951. 21st December, 1951.

(*f*) and Article 31 (1) alleged to have been violated by the Central Bank of India Ltd., a company incorporated under the Indian Companies Act, 1882, and having its registered office at Bombay, (hereinafter referred to as "the Bank").

It appears that the petitioner held five shares in the share capital of the Bank which sold those shares to a third party in purported exercise of its right of lien for recovery of a debt due to it from the petitioner, and the transfer was registered in the books of the Bank in the year 1937. The petitioner thereupon instituted a series of proceedings in the High Court at Bombay on its original and appellate jurisdiction challenging the validity of the said sale and transfer. The latest of these proceedings was a suit filed against the Bank in 1951 wherein the plaint was rejected on 2nd March, 1951 under Order 7, Rule 11 (*d*) of the Code of Civil Procedure as barred by limitation. The petitioner now prays that all the adverse orders made in the previous proceedings be quashed and the said High Court be directed to have

"the above suit set down to be heard as undefended and pronounce judgment against the respondent or to make such orders as it thinks fit in relation to the said suit".

It may be mentioned here that though the aforesaid order rejecting the petitioner's plaint was appealable, the petitioner did not prefer an appeal on the somewhat extraordinary ground that

"the appeal if filed could not be heard by the Judges of the said Court as all of them were disqualified from hearing such appeal"

either because of their interest in the Bank or because of their prejudice against him.

We are of opinion that the petitioner has misconceived his remedy and the petition must fail on a preliminary ground. Neither Article 19 (1) (f) nor Article 31 (1) on its true construction was intended to prevent wrongful individual acts or to provide protection against merely private conduct. Article 19 deals with the "right to freedom" and by clause (1) assures to the citizen certain fundamental freedoms including the freedom "to acquire, hold and dispose of property" subject to the power of the State to impose restrictions on the exercise of such rights to the extent and on the grounds mentioned in clauses (2) to (6). The language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the Article was intended to protect those freedoms of against State action other than in the legitimate exercise of its power to regulate private rights in the public interest. Violation of rights of property by individuals is not within the purview of the Article.

The position is no better under Article 31 (1). The petitioner has urged that clause (1) should be construed apart from and independently of the rest of the Article and, if so construed, its language is wide enough to cover infringements of rights of property by private individuals. He laid emphasis on the omission of the word "State" in clause (1) while it was used in clause (2) of the same Article as well as in many other Articles in Part III. Referring to Entry No. 33 of the Union List, Entry No. 36 of the State List and Entry No. 42 of the Concurrent List of the Seventh Schedule to the Constitution, he also argued that, while these entries read with Article 246 empowered Parliament and the State Legislatures to make laws regarding acquisition or requisitioning of property for the purposes of the Union or the State as the case may be, no power was conferred to make laws regarding "deprivation of property" by the State, so that the "deprivation" contemplated in clause (1) could only be deprivation by indi-

viduals. Sub-section (1) of section 299 of the Government of India Act, 1935, corresponding to clause (1) of Article 31, was, it was pointed out, omitted in the draft Article 19 (later numbered as Article 31) which retained in a modified form only the provision contained in sub-section (2) of that section relating to compulsory acquisition of property for public purposes. But, clause (1) was subsequently restored and Article 31 was enacted in its present form as recommended in Drafting Committee's Report and this, it was claimed, showed that clause (1) was intended to operate as a distinct provision apart from clause (2). We see no force in any of these arguments.

In support of the argument that clause (1) should be construed in isolation from the rest of the Article, the petitioner relied on certain observations of our learned brother Das, J., in *Chiranjit Lal* v. *The Union of India*[1], where the view was expressed that clause (1) enunicated the general principle that no person should be deprived of his property except by authority of law and laid down no condition for payment of compensation, while clause (2) dealt with deprivation of property brought about by acquisition or taking possession of it and required payment of compensation. In other words, deprivation referred to in clause (1) must be taken to cover deprivation otherwise than by acquisition or requisitioning of property dealt with in clause (2). We consider it unnecessary for the purpose of the present petition to go into that question. Even assuming that clause (1) has to be read and construed apart from clause (2), it is clear that it is a declaration of fundamental right of private property in the same negative form in which Article 21 declares the fundamental right to life and liberty. There is no express reference to the State in Article 21. But could it be suggested on that account that that Article was intended to afford protection to life and personal liberty against violation by private individuals? The words "except by procedure established by law" plainly exclude such a suggestion. Similarly, the words "save by authority of law" in clause (1) of Article 31 show that it is a prohibition of unauthorised governmental action against private property, as there can be no question of one private individual being authorised by law to deprive another of his property.

The argument based on the Entries in the Lists is fallacious. It is not correct to suggest that, merely because there is no Entry in the Lists of Seventh Schedule relating to "deprivation of property" as such, it is not within the competence of the Legislatures in the country to enact a law authorising deprivation of property. Such a law could be made, for instance, under Entry No. 1 of List 1, Entry No. 1 of List 2 or Entry No. 1 of List 3. Article 31 (1) itself contemplates a law being passed authorising deprivation of the properties, and it is futile to deny the existence of the requisite legislative power.

Nor does the legislative history of the Article lend any support to the petitioner's contention. Section 299 (1) of the Government of India Act, 1935, was never interpreted as prohibiting deprivation of property by private individuals. Its restoration, therefore, in the same form in Article 31, after omission in the original draft Article 19, could lead to no inference in support of the petitioner's contention, which indeed proceeds on the fundamental misconception that Article 19 (1) (*f*) and Article 31 (1) which are great constitutional safe-

1. 1950 S.C.R. 869.

guards against State aggression on private property, are directed against infringement by private individuals for which remedies should be sought in the ordinary law.

In this view it is unnecessary to deal with certain other objections to the maintainability of the petition raised by the Solicitor-General on behalf of the Bank. The petition is dismissed. We make no order as to costs.

Agent for Respondent: *Rajinder Narain.*

G.R.|V.S. *Petition dismissed.*

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT:—S. FAZL ALI AND VIVIAN BOSE, JJ.

Surajpal Singh and others .. *Appellants**

v.

The State .. *Respondents.*

Criminal Procedure Code (V of 1898), section 417—Appeal against acquittal—Scope and powers of High Court.

It is well established that in an appeal under section 417, Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well-settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court, and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.

It was held that in the case before the Court there were no good reasons for the High Court interfering with the acquittal by the Sessions Judge.

On appeal by Special Leave from the Judgment and Order dated the 8th May, 1947, of the High Court of Judicature at Allahabad (Shankar Saran and Akbar Hussain, JJ.) in Criminal Appeal No. 480 of 1946 arising out of Order dated the 26th February, 1946, of the Sessions Judge, Aligarh, in Criminal Nos. 46 and 56 of 1945.

S. P. Sinha, Senior Advocate (*G. C. Mathur,* Advocate, with him) for Appellants Nos. 2, 3 and 4.

K. B. Asthana, Advocate, for Respondent.

The Judgment of the Court was delivered by

Fazl Ali, J.—This is an appeal against a Judgment of the High Court of Judicature at Allahabad reversing the decision of the Sessions Judge of Aligarh in a criminal case. The appellants were tried by the Sessions Judge on charges under section 302 read with section 149, section 148, sections 325 and 326, read with section 149, and section 201 of the Indian Penal Code, but were acquitted. On appeal by the State Government, the High Court reversed the Sessions Judge's decision, and convicted the appellants and sentenced them to transportation for life under section 302 read with section 149, to five years' rigorous imprisonment under sections 325 and 326 read with section 149, and to two years' rigorous imprisonment under section 147 of the Indian Penal Code, all the sentences being made to run concurrently. The appellants thereafter applied to the Privy Council for special leave, which was granted on the 28th October, 1947.

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*Criminal Appeal No. 16 of 1950. 20th December, 1951.

The facts which were put before the Court on behalf of the prosecution may be briefly stated as follows: There is a plot No. 518 in Nagaria Patti Chaharum, village Shahgarh in the district of Aligarh which is about 30 bighas in area and is known as the "teesa" field. This plot was the "*sir*" land of several landlords including Mst. Bhagwati Kuer and Ratan Singh and had been let out to certain tenants. In 1944, Mst. Bhagwati Kuer, Ratan Singh and their co-sharers filed a suit for the ejectment of the tenants, and the suit was decreed. On the 7th June, 1945, possession over the plot was delivered by the Amin to Surajpal Singh, the first appellant, who was the mukhtar-i-am of Mst. Bhagwati Kuer. It was contended on behalf of Surajpal Singh that he took possession on behalf of all the co-sharers, but certain statements made by Ratan Singh in his evidence do not support this contention. However that may be, it appears that on the 17th June, 1945, Ratan Singh reported to the police that he had sent his labourers to irrigate the "teesa" field, and while they were irrigating it, Surajpal Singh and certain other persons came and tried to stop the irrigation and damaged the ploughs of Ratan Singh. On the 18th June, at about 7 A.M., the occurrence which is the subject-matter of the present trial took place. The prosecution version of the occurrence was that while Ratan Singh's labourers were working in the field under the supervision of one Behari Singh, the appellants with many other persons came armed with guns, spears and lathis, and some the members of the appellants' party entered the field, cut off the nose-strings of the bullocks and abused and assaulted the labourers, most of whom ran away. Thereupon, Deva Sukh, who was there to supply water to the labourers, protested and was beaten with lathis. At that point of time Behari Singh and 10 to 15 persons came and a fight took place between the parties. During the fight, one of the accused persons, Rajendra Singh, a young lad, fired his gun twice in the air, and thereafter Surajpal Singh took the gun from him and fired two shots hitting Nawab Mewati, who died instantaneously, and Behari Singh, who died later in the day. Three other persons, Zorawar, Rajpal and Lakhan also received gunshot injuries. Sometime later, Surajpal Singh along with the other three appellants came to the spot and removed the dead body of Nawab in a cart. The body was thrown into a river and was recovered on the 20th June, 1945. After investigations, 25 persons including the appellants were sent up for trial.

After hearing the evidence in the case, the Sessions Judge delivered judgment on the 20th February, 1946. He held that the "teesa" field was in the possession of Surajpal Singh, that Behari Singh and Ratan Singh's men were aggressors and wished to take forcible possession of the field, that when resisted they had attacked the appellant's party, that the person who fired the gun had done so in self-defence and not with a view to killing Behari Singh and Nawab Mewati, and that the evidence adduced by the prosecution was so unsatisfactory that it was unsafe to convict the accused upon it. As to the charge of concealing evidence of the offence of murder by the removal of the dead body of Nawab, the Sessions Judge expressed the opinion that in order to convict a person on that charge it must be proved that the offence, the evidence of which the accused is alleged to have caused to disappear, had actually been committed, but since in the present case the charge of murder was not proved the accused could not be convicted for having caused disappearance of evidence connected with it. The Judge also held that the evidence being unreliable the charge under section 201 of the Indian Penal Code had not been established beyond reasonable doubt.

The High Court delivered its judgment on the 8th May, 1947, allowing the appeal of the State Government. Shortly stated, the conclusion arrived at by the High Court was that Ratan Singh had as much right to the possession of the field as Bhagwati Kuer, that both parties were trying to take exclusive possession of the field, that both parties were prepared for all contingencies to vindicate and enforce their rights, and hence the question of possession was wholly immaterial and no right of private defence could be successfully pleaded by the appellants.

A perusal of the two judgments before us shows that while the Sessions Judge took great pains to discuss all the important aspects of the case and to record his opinion on every material point, the learned Judges of the High Court have reversed his decision without displacing the very substantial reasons given by him in support of his conclusion. The difference in the treatment of the case by the two Courts below is particularly noticeable in the manner in which they have dealt with the prosecution evidence. We find that while the Sessions Judge took up the evidence of each witness and recorded his finding with regard to his credibility after discussing the minutest details of the evidence, all that the learned judges of the High Court have to say about the prosecution evidence as a whole is as follows:—

"In Prag Dat's case their Lordships observed:

'As usual in cases of this kind the police have found it difficult to secure independent testimony of what did take place. Those of the villagers who were present and looking on would probably by sympathy and bias be so attached to one or other of the disputing parties that it would be hopeless to get disinterested and reliable evidence from them.'

This difficulty the police find in most riot cases and this case is not free from it. But as in Prag Dat's case in this case there are four witnesses, viz., Deo Sukh, Rori Singh, Ram Singh and Ratan Singh, who could be characterised as independent witnesses and they support the case for the prosecution, in the main. In our judgment their testimony is on the whole worthy of credence and sufficient to justify the conviction of the respondents."

In view of the summary treatment of the evidence by the High Court, we had to read the evidence adduced in the case with great care, and what we find is that the four witnesses, whose evidence has been accepted by the High Court, are just the persons against whom very serious criticism was offered by the Sessions Judge. Of these witnesses, Ratan Singh not being an eye-witness may be ruled out. As to the remaining witnesses, we are on the whole inclined to agree with the view expressed by the Sessions Judge. According to the Sessions Judge, the manner in which Deva Sukh was brought into the picture and the circumstances attendant on his evidence, furnish strong reasons for rejecting the prosecution version. What has been held is that the whole case of the prosecution that Deva Sukh had received injuries in the course of the alleged occurrence was false and his injuries "were made up so as to create evidence of private defence" to be utilized by the prosecution to meet the charge of having caused injuries to the members of the appellants' party. It has been established that at least four persons on the side of the accused had received injuries. Mahindrapal had received no less than 16 injuries, and his condition was serious for some time. Karan Singh had 12 injuries, one of which was grievous. Hari Singh had received 7 injuries including a grievous injury, and Nikka Singh also was injured, his injury having been noticed by the investigating sub-Inspector.

In the prosecution evidence, it was stated that many of the accused persons were armed with lathis and had used them, and it would be strange if it was not proved that any of the persons on their side had any injuries attributable to lathis. It has been established that the four injured persons of Ratan Singh's party, *viz.*, Rajpal Singh, Lakhan Singh, Behari Singh and Zorawar Singh had only gun-shot wounds. A serious question which arises in this case is at what stage the gun was used, and whether it was used in self-defence after the members of the appellants' party were assaulted with lathis or it was used before they were assaulted.

The prosecution witnesses had to admit that at first a gun was fired twice in the air and then the actual firing took place. This version of the firing lends support to the defence story that the gun was fired in self-defence when Ratan Singh's men attacked members of the accused's party. The Sessions Judge has expressed the view that in order to meet the defence case the prosecution introduced the story of Deva Sukh having been assaulted with a lathi in the first instance so as to make the appellants' party the aggressors, it being the prosecution case that Behari Singh and his men had used lathis in order to defend themselves. In order to resolve the conflict in the cases of the parties and to get at the true picture, the Sessions Judge went very minutely into the question as to whether there was trustworthy evidence about Deva Sukh having received any injury at all in the occurrence. It seems to us that there is a formidable array of circumstances to support the conclusion ultimately reached by the Sessions Judge. It appears that in the first information report there is no reference to Deva Sukh or to the injuries said to have been received by him. The Sessions Judge has pointed out that there was a considerable interval of time between the occurrence and the lodging of the first information report, and therefore it is surprising that the most important incident of the occurrence and the name of the most important witness was omitted in the report. Again, no reference was made to Deva Sukh or to his injuries in the dying declaration of Behari Singh which was recorded by one Dr. Shankar Deo, and also in that of Lakhan Singh. The Sessions Judge has further pointed out that the prosecution witnesses, Chokha, Prempal, Cheta and Gangola Singh, who were examined by the investigating officer on the 18th June, did not also refer to Deva Sukh. The investigating sub-Inspector was informed of the injuries on Deva Sukh and his presence at the time of the occurrence for the first time on the 19th June, 1945, and Deva Sukh's explanation for not appearing before him at the earliest opportunity was that he was frightened and had concealed himself in his house for about two days and had directed his relations not to inform the police of his presence. He also stated that on his arrival in his house after the occurrence he did not inform his relations of what had happened. Some of these matters might have been overlooked if there had been convincing evidence about his having actually received injuries, but we are satisfied that such evidence as is before us is extremely unsatisfactory and suspicious, and we entertain grave doubts as to whether Deva Sukh received any injuries at all.

Dr. Shanker Deo, who examined Deva Sukh, is a retired Sub-Assistant Surgeon practising in Kauiraganj, which is not far from village Shahgarh. He admits that he had known Ratan Singh since his childhood, and when he was a child he used to be taught at the house of Ratan Singh by a teacher employed by

Ratan Singh's uncle. He has stated Deva Sukh had two bruises across the back of the middle of the left forearm, and one of them was grievous since the left ulna was fractured. He further says that at the time of examination he did charge fees from Deva Sukh, that he was brought to him three days after the other injured persons, that when the latter group of persons came to him none of them told him that there was one more injured person to be examined, and that Deva Sukh was brought to him by Ratan Singh's servant. There are unsatisfactory features in the evidence of this doctor relating to other matters which need not be referred to, but what is somewhat remarkable is that though there is a District Board Hospital at Jalali about four miles from Kauirganj, Deva Sukh did not obtain an injury certificate from the doctor in charge of that hospital. Deva Sukh says that he did go to that hospital to have his injuries attended to, but there is no evidence to corroborate this. These facts as well as a number of other facts relied upon by the Sessions Judge do go to support his theory, and once it is held that the prosecution has to rely on fabricated evidence, it throws doubts on the entire case.

From the record, it appears that Surajpal Singh was the person who had been taking an active interest in the ejectment suit, and he was admittedly spending money. Ratan Singh says that he had also paid money to Surajpal Singh towards the expenditure, but this is not probable because he and Surajpal had been on bad terms. It is admitted that Surajpal is the person to whom the Amin gave possession of the land, but in spite of this fact, Ratan Singh's men started operations on the land ignoring Bhagwati Kuer, which Ratan Singh had no right to do, even assuming that the land was joint property. If Behari Singh and the other men sent by Ratan Singh were trying to take exclusive possession of the land and had started operations thereon, Surajpal Singh had every right to protest, and if his men were beaten first, of which there are strong indications in the case, he was entitled to repel the attack in exercise of the right of private defence. That Ratan Singh had made ample preparations through Behari Singh is quite clear. Admittedly, there were a number of persons armed with lathis present at the scene on his behalf including outsiders like Nawab Mewati, who is said to have been a well-known fighter, Zorawar and others.

As regarding the remaining two witnesses, to whom the High Court has made reference, *viz.*, Rori Singh and Pransukh, it seems to us that the High Court has overlooked the comments made by the Sessions Judge upon their evidence, some of which are of considerable force. What has impressed us is that they were not independent witnesses and were not mentioned in the first information report as witnesses to the occurrence, and they were examined by the sub-Inspector as late as the 20th and 21st June, 1945. After reading the two judgments, we see no reason why the opinion of the Sessions Judge regarding these witnesses should not receive the weight which should normally be attached to that of the trial Court.

It is well-established that in an appeal under section 417 of the Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well-settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court, and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.

On the whole, we are inclined to hold that the Sessions Judge had taken a reasonable view of the facts of the case, and in our opinion there were no good reasons for reversing that view. The assessors with whose aid the trial was held, were unanimously of the opinion that the accused were not guilty, and though 25 persons were placed on trial on identical evidence, the State Government preferred an appeal only against 5 of them on the sole ground that the acquittal was against the weight of evidence on the record.

In the result, we allow the appeal, set aside the conviction and sentences of the appellants and acquit them of all the charges.

Agent for Appellants Nos. 2, 3 and 4: *Rajinder Narain.*

Agent for Respondent: *P. A. Mehta.*

G.R.|V.S. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT:—S. FAZL ALI AND VIVIAN BOSE, JJ.

Kedar Lal Seal and another .. *Appellants**

v.

Hari Lal Seal .. *Respondent.*

Contribution—Suit by a son of a mortgagor against the co-mortgagors—Law applicable—Transfer of Property Act (IV of 1882), sections 82 and 92 and Contract Act (IX of 1872), section 43—Relative applicability—Pleadings—Technicalities—Claim not to be thrown out on.

Both section 43 of the Contract Act and section 82 of the Transfer of Property Act deal with the question of contribution. Section 43 is a provision of the Contract Act dealing with contracts generally. Section 82 of the Transfer of Property Act applies to mortgages. Where the right to contribution arises out of a mortgage, section 82 of the Transfer of Property Act must exclude section 43 of the Contract Act because when there is a general law and a special law dealing with a particular matter, the special excludes the general. The whole law of mortgages in India, including the law of contribution arising out of a transaction of a mortgage is now statutory and is embodied in the Transfer of Property Act read with the Civil Procedure Code. The Court cannot travel beyond these statutory provisions and have recourse to equitable principles however fair they may appear to be at first sight.

Where on the facts set out by a plaintiff it is clear that he is entitled to contribution, the method of computation being a matter of law, it is for the Judges to apply the law to the facts stated and give the plaintiff such relief as is appropriate to the case even though the specific provisions of Transfer of Property Act have not been relied on in the plaint. The Court should be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded.

On appeal by the special leave from the Judgment and Decree dated the 20th September, 1949 of the High Court of Judicature at Calcutta (Harries C.J. and Chatterjee, J.) in Appeal No. 46 of 1949 arising out of Decree dated the 31st August, 1948 of the Hon'ble S. B. Sinha, J., of the Calcutta High Court in suit No. 343 of 1943 instituted under the Original Jurisdiction of the High Court.

M. C. Setalvad, Attorney-General for India (*B. Sen,* Advocate with him), for Appellants.

S. C. Isaac, Senior Advocate (*B. Bannerjee,* Advocate with him), for Respondent.

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*Civil Appeal No. 101 of 1950. 18th December, 1951.

The Court delivered the following

JUDGMENTS: *Bose, J.*—This is a defendant's appeal in a suit for contribution brought by son of a mortgagor against the co-mortgagors.

The parties are related as below:

Balai Lall Seal (died 1917)
= Meghamala Dasi (died 1945)

Bejoy Lall (D. 23-5-33)	Biswa Lall	Tarak Lall (D. Nov. 1936)	Kedar Lall Deft. 1 (Born 22-11-07)	Naku Lall Deft. 2 (Born 7-2-10)
Jugal Lall		Hari Lall (Plff.)		

The mortgagors were the plaintiff's father Tarak Lall and Tarak's two brothers Kedar and Naku. The mortgage was executed on the 12th June, 1936 in favour of one Mst. Gyarsi for a consideration of Rs. 80,000. For convenience I will call this the suit mortgage though this is not a suit on the mortgage.

The mortgagee sued in the year 1938 and obtained a preliminary decree for sale on the 17th of February, 1939, for a sum of Rs. 89,485-12-9 plus costs. The decree was made final on the 22nd of December, 1939.

In execution the mortgagee proceeded against the property of the plaintiff alone (as Tarak's son) and, during the pendency of the execution, assigned her rights in the decree to the Hooghly Flour Mills. The Mills continued the execution and on the 11th of March, 1943, the claim was satisfied in this way.

An order of the Court was obtained sanctioning sale of a part of the mortgaged property, 20, Round Tank Lane (which belonged exclusively to the plaintiff), to the decree-holder for a sum of Rs. 1,50,000. It was directed that the consideration should first be applied in payment of the claim and costs and that the decree-holder should execute a reconveyance of the rest of the mortgaged properties in favour of the mortgagors. The sanction of the Court was necessary because the judgment-debtor Hari Lall (present plaintiff) was a minor.

This was done and 20, Round Tank Lane, was conveyed by the present plaintiff to the Hooghly Flour Mills on the 18th of March, 1943. Out of the consideration a sum of Rs. 97,116-11-0 was paid to the Mills in full satisfaction of the claim and costs then outstanding. The Mills executed a reconveyance of the rest of the properties to the mortgagors in release of the mortgage on the same day.

In addition to this Rs. 97,116-11-0, further sums of Rs. 14,400 and Rs. 8,100 had also been paid before the dates of these transactions. These sums were paid by a Receiver who had been appointed by the Court *pendente lite*. These sums came out of the rents which the Receiver obtained from the plaintiff's property, 20, Round Tank Lane.

The plaintiff says that in this way he paid a total of Rs. 1,19,116-11-0 in satisfaction of the mortgage. His one-third share in this comes to Rs. 39,872-3-8. He claims that he is entitled to receive the balance of Rs. 79,744-7-4 from the two defendants and that each of them is liable for a half of that sum, namely, Rs. 39,872-3-8.

In addition to this the plaintiff had incurred costs amounting to Rs. 1,144-8-6 in resisting Mst. Gyarsi's claim and in connection with the reconveyance. He

also claims one-third of this sum, namely, Rs. 381-8-2, from each of the defendants. The total claim against each defendant accordingly comes to Rs. 40,253-11-10.

In addition to this the plaintiff asked for—

(1) "a declaration that the properties mentioned in Schedule 'A'........belonging to the defendants stand charged with the repayment of the sum of Rs. 80,507-7-8 being the aggregate amount due and payable by the two defendants," and

(2) "Decree under Order XXXIV of the Civil Procedure Code in proper form."

Schedule A contains a list of the rest of the mortgaged properties, which belong exclusively to the defendants.

It will be seen that the plaintiff claims on the basis that each of the three mortgagors is liable to contribute in equal shares towards payment of the mortgage debt.

The defendants did not deny their liability to contribute. They only challenged the basis on which it was to be computed. They pleaded a special agreement between Tarak Lal and themselves under which their liabilities were to be calculated in the following way. According to them, the bulk of the Rs. 80,000 was borrowed on what I have called the suit mortgage to pay off previous debts which had been incurred by the parties on earlier mortgages. The amount which went towards satisfaction of the defendants' portion of these earlier liabilities was only Rs. 13,259-2-4. Therefore, the only benefit they got out of this Rs. 80,000 was to that extent. The plaintiff's father Tarak on the other hand benefitted to the extent of Rs. 53,481-11-4. They therefore agreed at the date of the suit mortgage that their respective liabilities as between themselves should be proportionate to the benefit derived by each as above.

Sinha, J., who tried the suit on the original side of the Calcutta High Court, held that the agreement was proved. On appeal the learned Chief Justice of the High Court and Chatterjee, J., disagreed and held that it was not. As I agree with the learned appellate Judges for reasons which I shall give hereafter, it will be necessary to set out the further facts. But I need not do so in any detail as they are given in full in the two judgments of the High Courts. We are only concerned here with the question of principle, so it will be more convenient to reduce the problem to its simplest terms.

We are concerned here with four items of property which I shall term Chittaranjan Avenue, Strand Road, No. 16, Round Tank Lane and 20, Round Tank Lane. These properties were originally joint family properties, but in the year 1932 there was a partition which was compelled by reason of a suit filed by Tarak against his brothers and mother. The upshot was that the properties were divided as follows:

(1) Bejoy, Kedar, Naku and the mother Meghamala obtained Chittaranjan Avenue.

(2) Tarak (Plaintiff's father) obtained 16, Round Tank Lane and 20, Round Tank Lane.

(3) Kedar, Naku and Biswa Lal obtained Strand Road.

Before this partition there were three mortgages. The first of these was executed on the 16th of June, 1925. All five brothers joined in it and they mort-

gaged the Strand Road property for Rs. 10,000. This was in favour of Bhuvan Chandra Bhur.

The second was on the 11th of October, 1926. In this Bejoy and Tarak mortgaged their 2|5 share in Chittaranjan, Strand, Dum Dum and 20, Round Tank Lane, for Rs. 5,000. The mortgagee was Binode Behari Sen.

The third was on the 28th January, 1927. In this Bejoy and Tarak again mortgaged their 2|5 share in the same items of property for Rs. 7,000 to Binode Behari Sen and Kunja Behari Sen.

All three sets of mortgagees, or their representatives, instituted suits on their respective mortgages and obtained final decrees.

Bejoy died on the 23rd of May, 1933 leaving a son Jugal.

On the 12th of June, 1936 came what I have called the suit mortgage executed by the three brothers, Tarak, Kedar and Naku, for Rs. 80,000. The properties mortgaged were—

(1) the shares of Kedar and Naku in Chittaranjan Avenue and 16, Round Tank Lane.

(2) 20, Round Tank Lane, which had been allotted to Tarak.

(3) the reversionary interest of all three in the share allotted to the mother.

The consideration of Rs. 80,000 was expended as follows: Rs. 29,667-10-0 was paid by Tarak, Kedar and Naku in satisfaction of the first mortgage and the later decretal charge; Rs. 11,519-11-0 in satisfaction of the second and Rs. 13,502-14-0 in satisfaction of the third. The balance of Rs. 25,310 is alleged by the appellants to have been retained by Tarak. I have taken these figures from the judgments of the High Court. I understand some of the details are disputed, so I make it clear that I am not setting out the decision of this Court regarding the details but only giving an overall picture.

Shorn of overburdening detail the problem, reduced to its simplest terms, comes to this. Three persons *A, B* and *C* separately own properties of unequal value, Blackacre, Whiteacre and Greenacre. Let us assume that their values at the material date are Rs. 30,000, Rs. 20,000 and Rs. 10,000 respectively.

A, B and *C* acting in various combinations from time to time, incur debts. It matters not for present purposes whether those debts are secured on these properties or not because a time must come when their separate liabilities as amongst themselves have to be ascertained and apportioned. Let us assume that when that is done, *A*'s responsibility extends to Rs. 2,000, *B*'s to Rs. 3,000 and *C*'s to Rs. 5,000.

In order to clear off these debts, *A, B* and *C* jointly mortgage their three estates for Rs. 10,000, the total aggregate sum due at the date of the mortgage from the three of them. There is no contract between them, either in the mortgage deed or otherwise, regarding their respective shares of responsibility in the Rs. 10,000.

At the date of redemption the mortgage debt has swollen to Rs. 15,000. *A* alone redeems by selling Blackacre, which is his separate estate, to the mortgagee for Rs. 35,000 that being the value of Blackacre at the date of redemption. Rs. 15,000 of this is applied in satisfaction of the mortgage-debt and the balance of Rs. 20,000 is retained by *A*. What are *A*'s rights as against *B* and *C*?

Three solutions readily suggest themselves. One is that the three contribute equally. In that event *B* would pay *A* Rs. 5,000 and *C* would pay Rs. 5,000.

A second solution is that they pay in proportion to the extent of the benefits derived. In that event *B*'s share would be 3|10 of Rs. 15,000, that is to say, Rs. 4,500, and *C*'s would be 5|10 of Rs. 15,000, that is, Rs. 7,500.

A third solution is that they pay proportionately to the values of the properties mortgaged. In that event *B* would have to pay 2|6 of Rs. 15,000, that is, Rs. 5,000 and *C* 1|6 of Rs. 15,000 which comes to Rs. 2,500.

The problem is to know which of these three solutions to apply. In the absence of other considerations, the most equitable solution is obviously the second. But, the matter is not as simple as that. There are certain statutory provisions which must first be examined.

The learned counsel for the plaintiff-respondent contended that section 43 of the Contract Act applied. He relied on the following provision:

> "Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.
>
> If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares."

The argument is that unless a contrary intention appears from "*the* contract" the loss must be borne equally. It was contended, and with that I agree, that the words "*the* contract" can only refer to the main contract between the promisors on the one side and the promisee on the other. That contract in this case is the suit mortgage. There is no contract to the contrary in the document, therefore, it was contended, the section must apply. That of course would be the clear, logical and simple conclusion if there were no other provision of law to consider. But we are dealing here with a mortgage and so we have also to look to the provisions of the Transfer of Property Act.

Incidentally, if this argument is pushed to its logical conclusion it would exclude any collateral or subsequent agreement between the promisors *inter se* which does not appear in the main contract. But we need not enter into that here.

The sections of the Transfer of Property Act which concern us are 82 and 92. The first confers a right of contribution. The second a right of suborgation. I will consider section 82 first. It runs:—

> "Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage...."

That is the position here.

Next I turn to section 92. That runs—

> "....any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor......"

That also applies.

Now these provisions at once raise a competition between sections 82 and 92 of the Transfer of Property Act, section 43 of the Contract Act and what I

might term the principle of beneficial, as opposed to proportionate or equal distribution of liability.

I am of opinion that the second solution adumbrated earlier in this judgment, based on equities, must be ruled out at once. These matters have been dealt with by statute and we are now only concerned with statutory rights and cannot in the face of the statutory provisions have recourse to equitable principles however fair they may appear to be at first sight.

The Privy Council pointed out in *Rani Chhatra Kumari* v. *Mohan Bikram*[1] that the doctrine of the equitable estate has no application in India. So also referring to the right of redemption their Lordships held in *Mahammad Sher Khan* v. *Seth Swami Dayal*[2], that the right is now governed by statute, namely, section 60, Transfer of Property Act. Sulaiman, C. J., (later a Judge of the Federal Court) ruled out equitable considerations in the Allahabad High Court in matters of subrogation under sections 91, 92, 101 and 105, Transfer of Property Act, in *Hira Singh* v. *Jai Singh*[3] and so did Stone, C.J., and I in the Nagpur High Court in *Taibai* v. *Wasudeorao*[4]. In the case of section 82 the Privy Council held in *Ganesh Lal* v. *Charan Singh*[5] that that section prescribes the conditions in which contribution is payable and that it is not proper to introduce into the matter any extrinsic principle to modify the statutory provisions. So both on authority and principle the decision must rest solely on whatever section is held to apply.

So far as section 43 is concerned, I am not prepared to apply it unless sections 82 and 92 can be excluded. Both sections 43 and 82 deal with the question of contribution. Section 43 is a provision of the Contract Act dealing with contracts generally. Section 82 applies to mortgages. As the right to contribution here arises out of a mortgage, I am clear that section 82 must exclude section 43 because when there is a general law and a special law dealing with a particular matter, the special excludes the general. In my opinion, the whole law of mortgage in India, including the law of contribution arising out of a transaction of mortgage, is now statutory and is embodied in the Transfer of Property Act read with the Civil Procedure Code. I am clear we cannot travel beyond these statutory provisions.

Now when parties enter into a mortgage they know, or must be taken to know, that the law of mortgage provides for this very question of contribution. It confers rights on the mortgagor who redeems and directs that, in the absence of a contract to the contrary, he shall be reimbursed in a particular way out of particular properties. The parties are at liberty to vary these rights and liabilities by special contract to the contrary but if they do not do so, I can see no reason why these provisions should be abrogated in favour of a section in the Contract Act which does not deal with mortgages. Slightly to vary the language of the Judicial Committee it is the terms and nature of the transaction viewed in the light of the law of mortgage in India which exclude the personal liability and therefore section 43, except where there is a contract to the contrary.

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1. (1931) I.L.R. 10 Pat. 851 at 869.
2. (1921) 42 M.L.J. 584: L.R. 49 I.A. 60 at 65: I.L.R. 44 All. 185 (P.C.).
3. A.I.R. 1937 All. 588 at 594.
4. I.L.R. (1938) Nag. 206 at 216.
5. (1930) 59 M.L.J. 177: L.R. 57 I.A. 189: I.L.R. 52 All. 358.

It was suggested that the rule is inequitable and will operate harshly in cases like the present. But the remedy lies in the parties' own hands. It is open to them to make a contract to the contrary. If they do not, then the law steps in and makes statutory rules to which effect must be given. It is not for Judges to consider whether that is the best possible solution but the rule at any rate obviates the necessity of roving enquiries into the objects of a borrowing and the application of the funds. On an overall basis it is perhaps as good as any other. But that hardly matters. The rule is there and full effect must be given to it.

The learned counsel for the plaintiff-respondent urged that the defendants are shut out from relying on section 82 because that was not their case and the question was never raised by them in the High Court. Such reference as there is to the section was with reference to an argument urged on behalf of the plaintiff. I am not impressed with this objection. On the facts set out by the plaintiff it is evident that he is entitled to constribution. The method of computation is a matter of law and it is for the Judges to apply the law to the facts stated and give the plaintiff such relief as is appropriate to the case.

I turn now to the question of fact, the special agreement pleaded by the defendants. The only evidence in support of it is that of the first defendant Kedar. According to him, the agreement was an oral one though the parties contemplated writing and registration. His explanation for lack of any writing is this. He was asked whether anything was put down in writing and he replied:

> "No, nothing was done then, but there was an understanding that it would be done but Tarak went away to Darjeeling and when he came back he died soon after he came back and nothing could be done in writing."

Later, he was asked—

> "Therefore, you contemplated that there would be a document which would have to be registered in connection with the adjustment?"

and he replied "Yes". He also tells us that the parties regarded the matter as confidential and so only three persons were present, Tarak, Naku and himself. It is to be observed that Naku, who is the second defendant, has not entered the box.

Stopping there. It is evident that we have to rely on the memory of a very interested person speaking nearly thirteen years after the event about a transaction affecting some Rs. 80,000. Nor is it the memory of some simple event which might well have fixed itself in his mind. The question whether and at what stage parties reach finality when writing is in contemplation is a difficult and complex one involving delicate considerations of much nicety even when the preliminaries are all in writing. The turn of a phrase here, the use of a word there, may make a world of difference. The law regarding this was examined by me at some length in the Nagpur High Court in *Shamjibhai* v. *Jagoo Hemchand Shah*[1]. How much greater are the difficulties when we do not know the exact words the parties used and have to delve into the mind of a dead man (Tarak) through the impressions of an interested witness given some thirteen years after the event.

I find it difficult to accept this version and consider it would be dangerous to do so, particularly when the witness is a hesitant and reluctant one, as his exami-

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1. I.L.R. (1949) Nag. 581 at 586-588 and at 598.

nation discloses, and even evasive on some points; also when the defendants have deliberately withheld from the Court assistance which it was in their power to render—I refer to the absence of Naku, the only other person present, from the box. I am unable to accept this testimony.

Nor is this the only point. Despite the insistence of the witness that the parties were on good terms and trusted each other, the fact remains that Tarak found it necessary to institute a suit for partition against his brothers and fight it to a finish. They were not able to arrange matters amicably. It was suggested in argument that that was probably because of creditors who could not be persuaded to agree and it was pointed out that creditors were joined in the suit, but that is not wholly convincing particularly when it is admitted that Tarak was insisting on writing and registration. It is evident that he at any rate, was not prepared to leave matters as they were and trust to the good faith of his brothers.

Now we know that Tarak was in Calcutta about three months after the date of the alleged agreement. We also know that Kedar was most anxious to have such an agreement, for he tells us so. He tells us further that there was before them a rough draft of the terms. That document was produced in Court. But the draft was neither signed nor initialled. The only inference I can draw from these facts is that Tarak either refused to agree or had not made up his mind. The figures put forward by the defendants were contested on behalf of the plaintiff and we were given an alternative set of figures which in turn were contested by the other side, but they were enough to show that the matter is not as straightforward or as simple as the defendants would have us believe. Therefore, Tarak's inaction during the three months and the omission of either side to initial the draft point clearly, at the lowest, to hesitancy on Tarak's part. It may be he wanted his lawyers to examine his position or it may be he refused to have anything to do with it. It is just possible that there were negotiations, but on those broad facts I am not prepared to believe the witness when he tells us, or rather suggests, that the parties reached finality. It would in any event be dangerous to believe a witness in circumstances like this. But, when the defendants deliberately withheld from the Court that assistance which is its due, I can only conclude that their case was too shaky to stand further probing. On these broad grounds alone I would hold that the agreement is not proved.

Much was made in argument about the rule regarding the weight to be given to the estimate of the Judge who saw and heard a witness. I do not doubt the soundness of the rule but it can be pushed too far as their Lordships of the Judicial Committee pointed out in *Virappa* v. *Periakaruppan*[1]. In the present case, the learned Judge who tried the case believed Kedar not because of his demeanour but because the learned Judge considered that his story was inherently probable. That, however, is a matter which the learned appellate Judges were in as good a position to appreciate as the learned trial Judge. If probability is to be the test, then the conduct of Tarak suggests that it is very improbable that he could have agreed.

That leaves at large the nature of the relief to which the plaintiff is entitled. In the view I take, there being no contract to the contrary, the plaintiff's only

1. (1945) 1 M.L.J. 136: A.I.R. 1945 P.C. 35 at 37.

remedy is under section 92 of the Transfer of Property Act read with section 82. The question is, has his suit been so framed?

The plaintiff has claimed separate personal reliefs against the defendants. As there is no personal covenant as between the mortgagors or any "contract to the contrary", that relief cannot be granted.

The plaintiff has also asked for a declaration of charge and for a decree under Order 34, Civil Procedure Code. The declaration of charge standing by itself is superfluous although Order 34, rule 2 (1), does require the decree in a mortgage suit "declare the amount so due" at the date of the decree. But reading the two reliefs together, I am of opinion that though the claim is inartistically worded the plaintiff has in substance asked for a mortgage decree up to a limit of Rs. 40,253—11—10 with interest against each defendant. No other kind of decree could be given under Order 34. Therefore, though he has not used the word "subrogation" he has asked in substance for the relief to which a subrogee would be entitled under the Transfer of Property Act.

I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a court to give a plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs.

In the circumstances, in the absence of agreement between the parties as to the figures, I would remand this case to the High Court for (1) an enquiry regarding the sum paid by the plaintiff's father for satisfaction of the mortgage dated the 12th June, 1936, (2) for the interest due on that sum at the contract rate in the mortgage from the date of payment to the date of decree, (3) for the values of the various properties mortgaged at the date of the mortgage.

When the figures are ascertained, I would direct that the liability of each defendant be ascertained separately in the manner prescribed by section 82, Transfer of Property Act.

In the event of this liability exceeding Rs. 40,253—11—10 with interest against either defendant, I would direct that his liability be reduced to Rs. 40,253—11—10 plus interest.

When these figures are ascertained, I would direct that a mortgage decree for sale be drawn up in the usual way affording either defendant the right to redeem the whole of the balance of the property (excluding the plaintiff's) for the aggregate sum due as above and, in default of payment, limiting the liabilities of each item of property to the sum rateably due on it under section 82.

On the question of costs. The plaintiff repudiated section 82 in the course of the arguments before us and rested his case on section 43 of the Contract Act, nor did he clearly and unmistakably plead a case of subrogation in his plaint even in the alternative. The defendants, on the other hand, set up a case which has failed on the facts. I would, therefore, direct each side to bear its own costs in this appeal.

As regards the costs incurred in the Courts below and any costs which may be necessitated by a further enquiry, they will be determined according to the final result of the litigation and with due regard to all matters bearing on the question of costs.

Fazl Ali, J.— I agree.

Agent for Appellants: *M. S. K. Sastri.*

Agent for Respondent: *Ganpat Rai.*

V. S. *Case remanded.*

[THE SUPREME COURT OF INDIA.]

(Criminal Appellate Jurisdiction.)

PRESENT:—S. FAZL ALI AND VIVIAN BOSE, JJ.

Rameshwar, son of Kalyan Singh .. *Appellant**

v.

The State of Rajasthan .. *Respondent.*

Oaths Act (X of 1873), sections 5, proviso and 13—Child witness—Oath not administered—Failure to certify that the child understood the duty of speaking the truth—If affects admissibility of the child witness—Evidence Act (I of 1872), sections 114 (b), 118, 133, and 157—Evidence of complainant in the case of an offence of rape—Corroboration—Necessity—Proper rule as to—Previous statement of such complainant—If admissible as corroboration.

An Assistant Sessions Judge who recorded the testimony of a girl stated to be seven or eight years of age who was the victim of an alleged rape certified that she did not understand the sanctity of an oath and accordingly did not administer one to her. But he did not certify that the child understood the duty of speaking the truth. On a question as to the admissibility of such evidence,

Held, section 5 of the Oaths Act is the main provision regarding the administration of oaths. The proviso to the section only sets out the cases in which the oath is not administered. As according to section 13 of the Oaths Act, even an omission to take the oath does not affect the admissibility of the evidence, it follows that an irregularity arising out of the proviso to section 5, namely, failure to certify that the child understood the duty to speak the truth, cannot affect the admissibility either.

It is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or the Judge really was of that opinion can be gathered from the circumstances when there is no formal certificate.

On a question as to the necessity for corroboration of the complainant's evidence in the case of an offence of rape,

Held, the Evidence Act nowhere says that corroboration in such cases is necessary. A woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage. If she consented there is no offence unless she is a married woman, in which case questions of adultery may arise. In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences. A large volume of case law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence and the position now reached is that the rule of prudence that such evidence should be corroborated has hardened into one of law. But the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the Judge. In a jury case he must tell the jury of it and in a non-jury case he must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the jury or where there is no jury, he himself, is satisfied that it is safe to do so. The rule is not that corroboration is essential before there can be a conviction, but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury

*Criminal Appeal No. 2 of 1951. 20th December, 1951.

cases, must find a place in the charge before a conviction without corroboration. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

The nature and extent of the corroboration required when it is not considered safe to dispense with it must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But the general rules are :

(1) It is not necessary that there should be independent confirmation of every material circumstance.

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

(4) The corroboration need not be direct evidence that the accused committed the crime.

On the question whether a previous statement of an accomplice or complainant can be accepted as corroboration,

Held, section 157 of the Evidence Act dealing with corroboration makes no exceptions and therefore provided the condition prescribed therein, that is to say "made at or about the same time, etc." are fulfilled, there can be no doubt that such a statement is legally admissible in India *as corroboration*. The weight to be attached to it is of course, another matter, but in view of section 118 of the Evidence Act, its legal admissibility as corroboration canot be questioned.

Appeal under Article 134 (1) (c) of the Constitution of India from the Judgment and order dated the 16th October, 1950, of the High Court of Judicature for the State of Rajasthan at Jaipur (Naval Kishore, C.J. and Mehta, J.) in Criminal Appeal No. 63 of Samwat 2005, arising out of Judgment dated the 30th April, 1948, of the Sessions Judge, Sawai Jaipur and Gangapur at Jaipur in Criminal Appeal Case No. 200 of Samwat 2004.

K. N. Aggarwala, Advocate for Appellant.

G. C. Mathur, Advocate for Respondent.

The Court delivered the following

JUDGMENTS: *Bose J.*—The appellant Rameshwar was charged with committing rape on a young girl Mst. Purni, 8 years of age. He was committed to Sessions and was convicted by the Assistant Sessions Judge, Sawai Jaipur, and sentenced to one year's rigorous imprisonment and a fine of Rs. 250.

An appeal was made to the Sessions Judge at Jaipur, that being the appropriate appellate tribunal in that area. The learned Sessions Judge held that the evidence was sufficient for moral conviction but fell short of legal proof because, in his opinion, the law requires corroboration of the story of the prosecution in such cases as a matter of precaution and the corroborative evidence, in so far as it sought to connect the appellant with the crime, was legally insufficient though morally enough. He was satisfied however that the girl had been raped by somebody. Accordingly. he acquitted the accused giving him the benefit of the doubt.

The State of Sawai Jaipur and Gangapur appealed against the acquittal to the High Court at Jaipur. The learned High Court Judges held that the law requires corroboration in such cases but held that the girl's statement made to her mother was legally admissible as corroboration and considering that sufficient they set aside the acquittal and restored the conviction and sentence.

The High Court later granted leave to appeal under Article 134 (1) (c) of the Constitution as the case involved questions of law of general importance.

The first point taken before us related to the admissibility of the evidence of the girl herself. Her age was stated to be seven or eight years at the time of the examination by the learned Assistant Sessions Judge who recorded her testimony. He certified that she did not understand the sanctity of an oath and accordingly did not administer one to her. He did not certify that the child understood the duty of speaking the truth.

The proviso to section 5 of the Indian Oaths Act, 1873, prescribes that—

"Provided that where the witness is a child under twelve years of age, and the Court or person having authority to examine such witness is of opinion that, though he understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 6 shall not apply to such witness, but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth."

The question is whether the opinion referred to must be formally recorded or whether it can be inferred from the circumstances in which the deposition was taken.

The proviso quoted above must be read along with section 118 of the Evidence Act and section 13 of the Oaths Act. In my opinion, an omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. The question of competency is dealt with in section 118. Every witness is competent unless the Court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It will be observed that there is always competency in fact *unless the Court considers otherwise*. No other ground of incompetency is given, therefore, unless the Oaths Act adds additional grounds of incompetency it is evident that section 118 must prevail.

Now the Oaths Act does not deal with competency. Its main object is to render persons who give false evidence liable to prosecution. It is true a subsidiary object is to bring home to the witness the solemnity of the occasion and to impress upon him the duty of speaking the truth, but in view of section 118 these matters only touch credibility and not admissibility. In my opinion, section 13 of the Oaths Act places this beyond doubt. It states—

"No omission to take any oath or make any affirmation..............and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever.........."

Section 5 is the main provision regarding the administration of oaths. The proviso only sets out the cases in which the oath is not to be administered. If, therefore, an omission to take the oath does not affect the admissibility of the evidence, it follows that an irregularity of the kind we are considering which arises out of the proviso cannot affect the admissibility either. Section 118 remains and *unless the Judge considers otherwise* the witness is competent.

I do not think it will be useful to consider English authorities on the point because we are governed here by the terms of the various sections I have referred to. But a decision of the Judicial Committee of the Privy Council is in point.

Their Lordships stated in *Mohamed Sugal Esa* v. *The King*[1]—

> "Section 13, Oaths Act, is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs *per incuriam*. If that had been the intention of the Legislature, it would have been simple to insert words in the section to that effect.............It may be observed that this question can no longer arise in India because in 1939 the Legislature passed the Oaths (Amendment) Act (XXXIX of 1939) which settles the law in accordance with the Bengal and Oudh decisions referred to above."

The decisions to which their Lordships refer are *R.* v. *Sewa Bhogta*[2] and *Ram Samujh* v. *Emperor*[3]. The decisions there were that the section being unqualified in terms did apply to a case where the Court accepted the evidence of a child to whom the oath was not administered on the ground that the witness did not understand its nature. The principle of the decisions applies here because, as their Lordships observe, the section is unqualified in its terms.

I would add however that it is desirable that Judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the magistrate or Judge really was of that opinion can, I think be gathered from the circumstances when there is no formal certificate. In the present case, it is plain that the learned Judge had the proviso in mind because he certified that the witness does not understand the nature of an oath and so did not administer one but despite that went on to take her evidence. It is also an important fact that the accused, who was represented by counsel did not object. Had he raised the point the Judge would doubtless have made good the omission. I am of opinion that Mst. Purni was a competent witness and that her evidence is admissible. In the Privy Council case which I have just cited, their Lordships said—

> "It is not to be supposed that any Judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness."

That is the very point here. One can presume that the learned Judge had that in mind from the fact that he examined the child after referring to a fact which arises out of the proviso.

As regards her credibility, the learned trial Judge, who recorded her evidence and saw her in the box, has believed her, so has the High Court; and it is important to note that the learned Sessions Judge who acquitted the accused has not disbelieved her. On the contrary he says he is morally convinced. All he says is that in the absence of corroboration it will be unsafe to convict because the Privy Council and other cases advise corroboration as a matter of prudence.

We were taken carefully through the evidence, as elaborately as in a Court of first appeal. I am of opinion that the learned High Court Judges were fully justified in accepting the evidence of Purni and in believing her mother Mst. Ghisi. I consider it unnecessary to recapitulate their reasons. After the careful analysis given by three Courts it is sufficient to say that I agree with the learned High Court Judges. We are left therefore with the questions of law.

The first question is whether the law requires corroboration in these cases. Now the Evidence Act nowhere says so. On the other hand, when dealing with

1. (1945) 2 M.L.J. 493: A.I.R. 1946 P.C. 3 at 5.
2. (1874) 14 Beng.L.R. 294 (F.N.)
3. (1907) 10 O.C. 337.

the testimoney of an accomplice, though it says in section 114 (*b*) that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars, it makes it clear in section 133 that—

"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

Now a woman who has been raped is not an accomplice. If she was ravished she is the victim of an outrage. If she consented there is no offence unless she is a married woman, in which case questions of adultery may arise. But adultery presupposes consent and so is not on the same footing as rape. In the case of a girl who is below the age of consent, her consent will not matter so far as the offence of rape is concerned, but if she consented her testimony will naturally be as suspect as that of an accomplice. So also in the case of unnatural offences. But in all these cases a large volume of case law has grown up which treats the evidence of the complainant somewhat along the same lines as accomplice evidence though often for widely differing reasons and the position now reached is that the rule about corroboration has hardened into one of law. But it is important to understand exactly what the rule is and what the expression "hardened into a rule of law" means.

In my judgment, this branch of the law is the same as in England and I am of opinion that the lucid exposition of it given by Lord Reading, the Lord Chief Justice of England, in *The King* v. *Baskerville*[1] cannot be bettered.

In that case, Baskerville had been convicted of having committed acts of gross indecency with two boys. (There the boys were accomplices because they were freely consenting parties and there was no use of force.) The learned Chief Justice says at page 663:

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law..........But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the Judge; to advise them not to convict upon such evidence; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence........

This rule of practice has become virtually equivalent to a rule of law, and since the Court of Criminal Appeal came into operation this Court has held that, in the absence of such a warning by the Judge, the conviction must be quashed...........If after the proper caution by the Judge the jury nevertheless convict the prisoner, this Court will not quash the conviction merely upon the ground that the accomplice's testimony was uncorroborated."

That, in my opinion, is exactly the law in India so far as accomplices are concerned and it is certainly not any higher in the case of sexual offences. The only clarification necessary for purposes of this country is where this class of offence is sometimes tried by a Judge without the aid of a jury. In these cases it is necessary that the Judge should give some indication in his judgment that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers safe to convict without corroboration in that particular case. I am of opinion that the learned High Court Judges were wrong in thinking that they could not, as a matter of law, convict without corroboration.

1. (1916) 2 K. B. 658.

There is a class of cases which considers that though corroboration should ordinarily be required in the case of a grown up woman it is unnecessary in the case of a child of tender years. *Bishram* v. *Emperor*[1], is typical of that point of view. On the other hand, the Privy Council had said in *Mohamed Sugal Esa* v. *The King*[2] that as matter of prudence a conviction should not ordinarily be based on the uncorroborated evidence of a child witness. In my opinion, the true rule is that in every case of this type the rule about the advisability of corroboration should be present to the mind of the Judge. In a jury case he must tell the jury of it and in a non-jury case he must show that it is present to his mind by indicating that in his judgment. But he should also point out that corroboration can be dispensed with if, in the particular circumstances of the case before him, either the jury, or, when there is no jury, he himself; is satisfied that it is safe to do so. The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, *coupled with other circumstances appearing in the case,* such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the Judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.

I turn next to the nature and extent of the corroboration required when it is not considered safe to dispense with it. Here again, the rules are lucidly expounded by Lord Reading in *Baskerville's case*[3] at pages 664 to 669. It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear.

First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. As Lord Reading says—

> "Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would be merely confirmatory of other and independent testimony."

All that is required is that there must be

> "some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it."

Secondly, the independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend

1. A.I.R. 1944 Nag. 363.
2. (1945) 2 M.L.J. 493; A.I.R. 1946 P.C. 3 at 5.
3. (1916) 2 K.B. 658.

to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness' story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that—

> "a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all.... It would not at all tend to show that the party accused participated in it."

Thirdly, the corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration and in those special circumstances a conviction so based would not be illegal. I say this because it was contended that the mother in this case was not an independent source.

Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise,

> "many crimes which are usually committed between accomplices in secret, such as incest, offences with females" (or unnatural offences) "could never be brought to justice."

Next, I turn to another aspect of the case. The learned High Court Judges have used Mst. Purni's statement to her mother as corroboration of her statement. The question arises, can the previous statement of an accomplice, or a complainant, be accepted as corroboration?

That the evidence is legally admissible as evidence of conduct is indisputable because of Illustration (*j*) to section 8 of the Evidence Act which is in these terms:

> "The question is, whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made are relevant."

But that is not the whole problem, for we are concerned here not only with its legal admissibility and relevancy as to conduct but as to its admissibility for a particular purpose, namely *corroboration*. The answer to that is to be found in section 157 of the Evidence Act which lays down the law for India.

Section 157 states that—

> "In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

The section makes no exceptions, therefore, provided the condition prescribed, that is to say, "at or about the time, etc." are fulfilled there can be no doubt that such a statement is legally admissible in India *as corroboration*. The weight to be attached to it is, of course, another matter and it may be that in some cases the evidentiary value of two statements emanating from the same tainted source

may not be high, but in view of section 118 its legal admissibility *as corroboration* cannot be questioned. To state this is, however, no more than to emphasise that there is no rule of thumb in these cases. When corroborative evidence is produced it also has to be weighed and in a given case, as with other evidence, even though it is legally admissible for the purpose on hand its weight may be nil. On the other hand, seeing that corroboration is not essential to a conviction, conduct of this kind may be more than enough in itself to justify acceptance of the complainant's story. It all depends on the facts of the case.

In the present case, Mst. Purni told her mother about the incident about four hours after it occurred. The reason for the delay was that her mother was not at home when she went there. She says that when she went home she lay down and went to sleep and that when her mother returned she asked for why she was sleeping and then she told her mother what had happened. Her mother tells much the same story. She says she had gone out to her field in the morning and did not return till about 4 P.M. When she reached home she found her daughter lying there weeping. She has been believed by the learned trial Judge as also by the High Court and has not been disbelieved by the learned Sessions Judge. All he says is that she is not an "independent" witness and is therefore not sufficient for corroboration.

The first question is whether this delay fulfills the "at or about" condition. In my opinion, here also there can be no hard and fast rule. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction. It was suggested that the child could have complained to some women who were working in the neighbourhood, but that would not be natural in a child. She would be frightened and her first instinct would be to run home to her mother. The High Court was satisfied on these points and so am I. Consequently, the matter does fall within the ambit of section 157 read with section 8, Illustration (*j*).

The next question is whether the mother can be regarded as an "independent" witness. So far as this case is concerned, I have no doubt on that score. It may be that all mothers may not be sufficiently independent to fulfill the requirements of the corroboration rule but there is no legal bar to exclude them from its operation merely on the ground of their relationship. Independent merely means independent of source which are likely to be tainted. In the absence of enmity against the accused there is no reason why she should implicate him falsely. It is true the accused suggested that they were on bad terms but that has not been believed by anyone.

The third question is whether there is independent corroboration connecting the accused with the crime. The only corroboration relied on for that is the previous statement of the child to her mother. That might not always be enough but this rule can be waived in a given case just as much as the necessity for any corroboration at all. In the present case, the learned High Court Judges would have acted on the uncorroborated testimony of the girl had they not felt pressed by the corroboration rule. Viewing all the circumstances I am satisfied that the High Court was right. I am satisfied that *in this case,* considering the conduct

of the girl and her mother from start to finish, no corroboration beyond the statement of the child to her mother was necessary. I am satisfied that the High Court was right in holding that that was enough to make it safe to act on her testimony.

I would dismiss the appeal and direct the appellant to surrender to his bail in accordance with the terms of bond, serve out his sentence and pay the fine.

Fazl Ali, J.—I agree.

Agent for Appellant: *P. C. Aggarwal.*

Agent for Respondent: *P. A. Mehta.*

G.R.|V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE CHANDRA REDDI.

C. Chenchanna Naidu .. *Petitioner**

v.

The Praja Seva Transports, Ltd., Cuddappah and another .. *Respondent.*

Constitution of India (1950), *Article* 226—*Order on application for issue of writ of* certiorari—*If subject to review for error apparent on the face of the record—Civil Procedure Code* (*V of* 1908), *Order* 47, rule 1—*Applicability.*

Where the civil jurisdiction of the High Court is invoked under Article 226 of the Constitution, the Code of Civil Procedure is applicable to the proceeding and if there is an error apparent on the face of the record in the order quashing proceedings under the Motor Vehicles Act, it can be set right under the powers of review.

Where while passing the order, the Court did not consider the question whether the Government acted without jurisdiction in exercising its powers under section 64-A of the Motor Vehicles Act or whether the order of the Central Road Traffic Board, was one which could be called either illegal or irregular or improper to enable the State Government to interfere with that order, and the scope of section 64-A of the Motor Vehicles Act, such omission would constitute an error apparent on the face of the record so as to warrant a review of the order.

Order in C.M.P. No. 605 of 1951, dated 9th January, 1951, set aside and writ *nisi* issued.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in G. O. Ms. No. 5424 M., Home Department, Government of Madras, dated 27th December, 1950, and the records relating to the grant of two pucca stage carriage permits for Cuddappah, Madanapalle *via* Kurubola Kota route and quash the said Government Order, etc.

K. Rajah Aiyar and *A. Bhujanga* Rao for Petitioner.

Vepa P. Sarathi for the State Counsel (*John and Row*) *C. A. Vaithialingam* and *C. Kondiah* for Respondents.

The Court made the following

ORDER.—This is a petition for review of our order in C. M. P. No. 605 of 1951, dated 9th January, 1951, declining to issue a writ of *certiorari* calling for records in G. O. Ms. No. 5424 M., Home Department, Government of Madras, dated 27th

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* C.M.P. Nos. 1097 and 1098 of 1951. 26th October 1951.

December, 1950, and to quash the said Government Order. The circumstances that necessitated the filing of that petition are the following:

The petitioner along with the first respondent herein and some others applied to the Regional Transport Authority, Cuddappah, for pucca permits for running three stage carriages on Cuddappah Madanapalle route *via* Kurubola Kota. The Regional Transport Authority rejected the application of the petitioner while that of first respondent was allowed.

Against this order an appeal was filed to the Central Road Traffic Board, Madras, by the petitioner. The Appellate Tribunal cancelled the permit granted to the first respondent and directed the issue of one to the petitioner herein.

Thereupon the first respondent preferred a revision to the Government of Madras against the order of the Central Board Traffic Board. The Government in its G.O. Ms. No. 5424 M., Home Department, referred to above allowed the revision petition filed by the first respondent and set aside the order of the Central Road Traffic Board in so far as it related to the granting of a permit to the petitioner.

This led the petitioner to invoke the jurisdiction of this Court under Article 226 of the Constitution of India in the manner and for the relief mentioned above. The main ground upon which that petition was based was that the order of the Government disclosed no reason for interfering with that of the Appellate Authority and therefore was one passed arbitrarily.

When this petition came before us on 9th January, we rejected it observing that we saw no reason to hold that the State Government has exercised jurisdiction vested in it under section 64-A of the Madras Motor Vehicles Act, illegally or with material irregularity and that there were no grounds for interference.

A day or two after the disposal of the petition, the jurisdiction of the State Government to exercise the revisional powers under section 64-A of the Motor Vehicles Act without finding whether the order sought to be revised was illegal, irregular or improper as required by the provisions of the section was questioned in another application for the issue of a writ of *certiorari* to quash the order of the State Government in similar circumstances filed by an aggrieved party. We issued notice on that petition which ultimately resulted in pronouncement *inter alia* that the order *ex facie* should show that the Government applied its mind to a consideration of the question whether the order under revision was one under one or the other of the three categories mentioned in that section 64-A.

As a result of the issue of notice in that application the petitioner has come forward with C. M. P. No. 1098 of 1951 for a review of our order dated 9th January, 1951.

The first point that arises for consideration in this petition is whether we have jurisdiction to review the order in C. M. P. No. 605 of 1951 and whether this petition is competent.

This petition is resisted on behalf of the first respondent that we have no inherent powers to review the order passed under Article 226 of the Constitution. In support of this contention Mr. Vaithialingam, the learned counsel for the first respondent, relied on a ruling of a Full Bench of the Bombay High Court in In re *Prahlad Krishna*[1]. But we do not think that that case carries the contention of the respondents very far. What was observed by the Chief Justice Chagla with whom the other two learned Judges agreed was " that the Court has no inherent power of review and that the power of review like that of an appeal should be conferred by a statute ", and that the Criminal Procedure Code did not vest any powers of review in the High Court. It was also remarked that Article 226 of the Constitution did not confer upon the High Court a power of review. It must be remembered that in that case the first application that was rejected by the Division Bench of that Court was under section 491, Criminal Procedure Code. The applications were filed subsequently one for a review of that order and the other

1. A.I.R. 1951 Bom. 25.

for a writ of *habeas corpus* under Article 226 of the Constitution. Both the applications were rejected when they were ultimately heard by the Full Bench.

It is while dealing with these applications that the statement of law referred to above was made by the learned Judges.

Here we have to deal with a case not under the Criminal Procedure Code. The petitioner invoked the civil jurisdiction of this Court to issue a writ under Article 226 of the Constitution. If the application for the issue of a writ is made on the civil side, in dealing with such an application we are governed by the provisions of the Civil Procedure Code. It is indisputable that the procedure applicable to all courts of civil jurisdiction is that contained in the Civil Procedure Code. In *Ryots of Garabandha and etc., villages* v. *Zamindar of Parlakimedi*[1], the view taken by a Bench of this Court consisting of Sir Lionel Leach, C. J., and Madhavan Nair, J., was that an order refusing the issue of a writ of *certiorari* to quash the orders of the Board of Revenue was one passed in the exercise of its original civil jurisdiction within the meaning of section 109 (*b*), Civil Procedure Code and was subject to the right of appeal to the Privy Council from the same. Once it is conceded that the procedure applicable to cases of this kind is that enacted in the Civil Procedure Code, the question of jurisdiction of this Court to review its orders under Article 226 does not present much difficulty. Order 47, rule 1, Civil Procedure Code has invested civil Courts with power to review their own decrees or orders under certain conditions, namely, discovery of new and important matter, or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him seeking review at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The first two conditions are not relevant for the purpose of the present enquiry. Here we are only concerned with the latter condition.

The question for consideration in this case is whether the grounds alleged are sufficient to bring them within the expressions " error apparent on the face of the record or for any other sufficient reason."

In support of his contention that the present case falls under the category of error apparent on the face of the record or for any other sufficient reason within the meaning of Order 47, rule 1, Civil Procedure Code, Mr. Rajah Aiyar, the learned counsel for the petitioner placed before us some decided cases of this Court and other Courts.

In *Brindaban Chandra Ghosh* v. *Damodhar Prosad*,[2] a Bench of the Calcutta Court allowed an appeal relying on a decision of the Judicial Committee. An application for review of a judgment was presented by the aggrieved party within time allowed by the statute and before it could be disposed of there was a pronouncement by the Privy Council construing the earlier judgment in a manner which rendered the judgment of the High Court wrong. A Bench of that Court held that the circumstances of that case attracted the provisions of Order 47, rule 1, Civil Procedure Code and that the expression " error apparent on the face of the record " was wide enough to cover a case like that.

Surendranath Mitra v. *Jatindranath Ghosh*[3], is also a case where the applicability of the expression " error apparent on the face of the record " in Order 47, rule 1, Civil Procedure Code was considered. The learned Judges, Mukherji and Jack, JJ., before whom the matter came up for consideration took the view that the failure of the lower Court to deal with the merits of an application to restore a petition dismissed for default which was in itself an application for the restoration of the suit dismissed for default on an erroneous view of section 151, Civil Procedure Code, amounted to an error apparent on the face of the record.

What was decided in *Sarat Krishna Bose* v. *Biswashwar Mitra*[4], was where an application under Order 9, rule 9, Civil Procedure Code was dismissed for default,

1. (1938) 2 M.L.J. 154 : I.L.R. (1938) Mad. 816.
2. (1924) 29 C.W.N. 148.
3. A.I.R. 1929 Cal. 17.
4. A.I.R. 1927 Cal. 534.

the second application for restoring that application is not competent under Order 9, rule 9, but that the second application could be treated as an application for the restoration of the suit itself dismissed for default if the second application was made within time to restore the suit and if such an application was not within time the inherent jurisdiction of the Court under section 151, Civil Procedure Code, could be invoked in proper cases to restore the suit. The reason of the rule is stated by the learned Judges thus :

> " To meet cases such as this, section 151 of the Code was enacted and where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provision of section 151 may and should be resorted to."

Coming to our own High Court in *Govinda Chettiar* v. *Varadappa Chettiar*[1], Patanjali Sastri, J., laid down that the misapprehension owing to which respondent's counsel did not urge all his argument in support of the finding recorded in favour of his clients by the first Court and the consequent erroneous decision on the part of the Subordinate Judge that the counsel had no arguments to urge to meet the points raised by the appellant's counsel are analogous to errors apparent on the face of the record so as to be sufficient reason for review under Order 47, rule 1, Civil Procedure Code. Reference was made to two decisions in support of the learned Judge's finding reported in *Kyone Hoe Tsee* v. *Kyon Soon Sun*[2] and *Nagabhushanam* v. *Jagannaikulu*[3].

In *Natesa Naicker* v. *Sambanda Chettiar*[4], another Judge of this Court took the view that where the legal position is clearly established by a well-known authority and by some unfortunate oversight, the Judge has gone wrong by the omission of those concerned to draw his attention to the authority, it may in a proper case be a ground for review in the light of the decision in *Murari Rao* v. *Balvanthdikshit*[5] as coming within the category of an error apparent on the face of the record.

It was the opinion of the learned Judge that *Murari Rao* v. *Balvanthdikshit*[5] which recognised the power of the Court to review its order when it overlooked the leading authority on a clear matter of law, was still good law evidently meaning that its authority has not in any way been shaken by the pronouncement of the Judicial Committee in *Chhaju Ram* v. *Neki*[6].

In the light of the observations contained in the decided cases cited to us we are inclined to hold that the instant case is governed by the clause " an error apparent on the face of the record " contained in Order 47, rule 1, Civil Procedure Code. At the time when we passed the order the question whether the Government acted without jurisdiction in exercising its powers under section 64-A or whether the order of the Central Road Traffic Board, was one which could be called either illegal or irregular or improper, to enable the State Government to interfere with that order was not considered by us. A plain reading of section 64-A shows that it is only when the Government reaches a conclusion that the order sought to be revised was one falling under either of the three categories mentioned in section 64-A that it can exercise its revisional powers under that section. We have held in C. M. P. No. 625 of 1951 that the Government order should *ex facie* show that it applied its mind to the question of the legality, irregularity or propriety of the order of the Appellate Tribunal and that in the absence thereof the Government's order was liable to be quashed. No doubt our omission to consider that point was due to the counsel not putting forward before us that aspect of the case (that application has not been grounded on the arbitrary exercise by the Government of the power conferred on it under section 64-A of the Act). But whoever might be responsible for it, if the most important point arising in the petition was not considered by us we think such an omission would constitute "an error apparent on the face of the record" within the meaning of the expression

1. (1939) 2 M.L.J. 809.
2. (1925) I.L.R. 3 Rang. 261 at 267.
3. (1925) 49 M.L.J. 671.
4. (1941) 2 M.L.J. 390.
5. (1923) 45 M.L.J. 309 : I.L.R. 46 Mad. 955.
6. (1922) 43 M.L.J. 332 : L.R. 49 I.A. 144 : I.L.R. 3 Lah. 127 (P.C.).

occurring in Order 47, rule 1, Civil Procedure Code, so as to warrant a review of our order, dated 9th January, 1951.

It follows that our order dismissing the application for the issue of a writ of *certiorari* is discharged. A writ *nisi* will issue in this case and the records in G.O.Ms. No. 5424 M. Home Department, dated 27th December, 1950, will be called for within two weeks. The petitioner will pay the respondent's costs (first respondent). Advocate's fee. Rs. 100 (one hundred only).

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Pudusseri Vadakkethil Vikraman *alias* Kunhikuttan Nair .. *Petitioner**

v.

V. Krishnan Nair .. *Respondent.*

Oaths Act (*X of* 1873), *sections* 9 *to* 11—*Scope*—*Agreement that if defendant took an oath at a particular temple on an appointed day the suit was to be dismissed with costs and in default there should be a decree*—*Defendant receiving from plaintiff the costs of taking oath*—*Oath not taken as temple was not kept open*—*Decree if can be passed straightaway*—*Agreement to take oath*—*If compromise or adjustment of suit under Order* 23, *rule* 3, *Civil Procedure Code* (*V of* 1908).

When the point for determination was set down as to whether the plaint claim was true and binding both the plaintiff and defendant entered into an agreement which was endorsed on the reverse of the plaint. Plaintiff agreed that if the defendant would take an oath in a particular temple at a specified time on a particular day that he did not receive the amount sought to be recovered by the suit, the suit should be dismissed with costs and in default there should be a decree. The defendant received a sum of Rs. 12-8-0 towards the costs of taking the oath. But when the parties went to the temple the temple was closed and the person to whom the fee for taking oaths in the temple was to be paid was not available and so it was not possible to take the oath at the appointed time. The Small Cause Judge then passed a decree saying that under Order 23, rule 3, Civil Procedure Code, he had no option but to give effect to the agreement. On revision,

Held : (i) A mere agreement to take an oath on the challenge made by one of the parties and accepted by the other party cannot amount to an adjustment or compromise which could be incorporated in the form of a decree without any further inquiry or investigation and without a decision as to whether the case has been proved or not.

(ii) In the circumstances of this case the trial Court should be directed to appoint a particular day for the taking of the oath by the defendant and direct the defendant to do so in the form already agreed to, appoint a commissioner in whose presence it should be done and also direct the plaintiff to be present on the occasion of the oath-taking.

Case-law discussed.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree and judgment, dated 28th February, 1950, Small Causes Court, Coimbatore, in S.C.S. No. 372 of 1949.

B. Pocker for Petitioner.

P. K. Janakiram for Respondent.

The Court delivered the following

JUDGMENT.—The defendant who is the petitioner in this Civil Revision Petition seeks to revise the order of the Small Cause Judge who gave a decree in favour of the plaintiff under the circumstances set out in the said judgment.

The suit was filed by the plaintiff for recovery of a sum of Rs. 250 lent in cash and interest thereon towards an agreement to sell a piece of land to the plaintiff. The defendant-petitioner contended that the alleged agreement was false, that he never received any money and that the suit was filed out of spite.

When the point for determination was set down as to whether the plaint claim was true and binding on the 1st of February, 1950, both the plaintiff and the defendant entered into an agreement which was endorsed on the reverse of the plaint.

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*C.R.P. No. 1283 of 1950. 14th November, 1951.

The agreement consists of two parts. The first part is signed by the plaintiff and his counsel and that part is to the effect that if the defendant would take an oath in Parambathukkudu Bagavathi Amman temple at Vendalore that he did not receive the sum of Rs. 250 for the Kolankora lands the suit should be dismissed with costs; and in default there should be a decree. The second part of the agreement is signed by the defendant which says that the defendant agrees to take the oath as aforesaid and for that purpose he received a sum of Rs. 12-8-0 towards the cost of taking the oath. This agreement clearly sets out that the challenge was made by the plaintiff and that it was accepted by the defendant.

But unfortunately for the parties, when the defendant went to the temple, the temple was closed and the poojari of the temple who was met by the defendant informed the defendant that the money payable for taking the oath should be deposited as a condition precedent with the uralan who was residing at some distance off and so it was not possible to deposit the amount on that day and take the oath at the appointed time. It may be mentioned that the oath was to be taken on the 19th of February at 10 A.M. for which purpose an amin of the Tirur Court was also sent to be present on the occasion of taking the oath. Consequent upon this failure on the part of the defendant to take the oath, obviously for reasons beyond his control, the suit was decreed by the learned Small Cause Judge. The decree appears to have been passed on the representation of the plaintiff's counsel that the agreement of the parties according to the endorsement on the plaint should be given effect to and a decree should be passed. The learned Small Cause Judge says in his judgment that under Order 23, r. 3, Civil Procedure Code, he had no option but to give effect to the agreement and therefore decreed the suit with costs. Against this judgment and decree, the defendant has preferred this revision petition.

The main point taken by Mr. B. Pocker appearing for the petitioner is that the agreement to take the oath is not an adjustment or a compromise within the meaning of rule 3 of Order 23 of the Civil Procedure Code. The agreement or adjustment or compromise contemplated under rule 3 of Order 23, Civil Procedure Code, should be one which could be capable of being incorporated in a decree and that an agreement of the kind where two parties have agreed merely to take oath cannot be said to be an adjustment or a compromise capable of being entered in a decree. An agreement of this kind merely provides for a decree being passed on the happening of certain contingencies. It cannot therefore be said to be an adjustment of the suit by itself. In the absence of there being any possibility of an agreement of this nature being incorporated in the form of a decree, the learned Small Cause Judge was not correct in having observed that he had no option but to pass a decree in terms of the agreement. The further contention of the learned counsel for the petitioner is that the failure to take the oath cannot entitle the plaintiff to a decree straightaway but that such failure can only be a circumstance which could be taken into account or consideration in deciding the case by the Small Cause Judge. By no means could the failure to take the oath should be taken as evidence in order to base a decree in favour of the plaintiff or the defendant as the case may be. When parties do not comply with the terms of the agreement in the matter of taking the oath the learned counsel argues there should be evidence taken in order that the case might be decided one way or the other. Therefore the finding of the learned Small Cause Judge that he had no option but to give effect to the agreement under rule 3, Order 23, Civil Procedure Code, is not sustainable.

There is considerable force in these contentions of the learned counsel for the petitioner and I am inclined to agree with him.

In support of this contention the learned counsel for the petitioner has invited my attention to a series of decisions. The first is *Vasudeva Shanbog* v. *Naraina Pai*[1]. That decision discusses at length the old law and the law as amended later by the Oaths Act (Act X of 1873) and the discussion is very instructive. The substance

1. (1879) I.L.R. 2 Mad. 356.

of that decision is that if an agreement to take oath is broken, it can never be a proper ground for an adverse decision against the party responsible for the failure to take the oath though it may serve as corroborative evidence, if there is other evidence enabling the Court to pass a decree. This decision follows an earlier decision reported in *K. U. Haje* v. *P. M. Ramen Nambiar*[1], which is to the same effect, *viz*., that the failure to take the oath cannot be a sufficient ground to pass a decree immediately. The next decision relied upon by the learned counsel for the petitioner is *Majan* v. *Pathukutti*[2], which follows *Vasudeva Shanbog* v. *Naraina Pai*[3]. *Okkilikkara Siddayya* v. *Ambu Nair*[4], which is also relied upon by the learned counsel for the petitioner which in turn follows *Thukki Goundan* v. *Kuppandu Goundan*[5] is also to the effect that the failure to take oath can only be considered to be a circumstance which the Court can take into consideration and it can never be construed as an adjustment enabling the Court to proceed under rule 3 of Order 23, Civil Procedure Code. The latest decision on the point is the one reported in *Shah Nawaz* v. *Ghulam Mohammad*[6], which reviews the earlier decisions and agrees with the decision in *Vasudeva Shanbog* v. *Naraina Pai*[3] and *Majan* v. *Pathukutti*[2]. All these decisions represent one view of the matter.

But the learned counsel for the respondent has invited my attention to another series of decisions which represent a second view. The first of these decisions referred to by the learned counsel for the respondent is the one in *Ayyakannu Nadar* v. *Muthiah Nadar*[7]. In this case the party who agreed to be bound by the oath in a certain form by his own conduct prevented the oath being taken in that form. The oath was not taken although the other party was ready and willing to take it in the form which had been agreed to. The decision went on the basis that the agreement to be bound by an oath of this kind was in effect an agreement to treat the evidence given under the oath as the evidence in the case, and to dispense with other evidence and that if the party who had agreed to be bound prevented the oath being taken, the other party was in the opinion of the learned Judges entitled to a decree, at any rate in a case like the one before them, where it was the plaintiff who agreed to be bound and the result of his refusal to allow the oath to be taken in the form agreed upon was that there was no evidence in support of his case. I do not think that the principle of this decision would apply to the facts of the present case. In the present case, the challenger was the plaintiff and the person who accepted to take the oath was the defendant and the taking of the oath was not prevented by any conduct either on the part of the challenger or of the party who accepted to take the oath. On the other hand the record goes to show that the defendant could not take the oath though he was willing for the reason that the temple was not kept open and by the time any attempt could be made to get the temple opened the uralan who was in charge of the temple and who was to receive the fee for the purpose was not available. Only the poojari was available and therefore for reasons for which the defendant was not responsible the oath could not be taken. In those circumstances, it could not be said that there was any conduct on the part of either of the parties to the suit by which the taking of the oath was prevented. The second case relied upon by the learned counsel for the respondent is *Thayi Ammal* v. *Subbaraya Mudali*[8]. In this case, the defendant in the suit before its trial filed a petition under section 9 of the Oaths Act of 1873 that if the plaintiff should take an oath according to law regarding certain facts this defendant should forfeit his right of contesting the suit. He subsequently desired to withdraw the petition on insufficient grounds but the plaintiff took the oath and on the strength thereof all the issues were decided and a decree passed in plaintiff's favour. The suit was however remanded on appeal for disposal after recording evidence on both sides. On appeal by the plaintiff against the order of remand a Bench of this Court held that there was nothing in sections 9 to 11 of the Indian Oaths Act which allowed a party who had agreed to the administration of an oath under those sections to retract after the plaintiff

1. (1869) 4 Mad. H.C.R. 422.
2. (1907) 17 M.L.J. 545 : I.L.R. 31 Mad. 1.
3. (1879) I.L.R. 2 Mad. 356.
4. (1925) 49 M.L.J. 379.
5. 17 I.C. 339.
6. A.I.R. 1946 Lah. 78.
7. (1906) 17 M.L.J. 99.
8. (1899) I.L.R. 22 Mad. 234.

had accepted the proposal; that the Act gives the Court the discretion to administer the oath or not, and that it should not administer it if good grounds be shown for retracting and it was justified in so doing notwithstanding the retraction if the grounds were frivolous. Here again the facts of the case are not on all fours with the present case for, in the case decided by the learned Chief Justice and Benson, J., in *Thoyi Ammal* v. *Subbaraya Mudali*[1] there was a petition for making one of the parties to take an oath according to law regarding certain facts and that the petition was retracted from. But in the present case, as had already been pointed out, there was no retraction. On the other hand, by circumstances which are said to be not brought about by either of the parties, the oath could not be taken. There was neither retraction nor refusal. So then, the reasoning given in this Bench decision does not, in my opinion, avail the respondent. The next case referred to by the learned counsel for the respondent is the one *Bhaghavathi Vannan* v. *Veera Vannan*[2]. In this case Pandrang Row, J., after discussing the various rulings on the point has come to the conclusion that the disposal of the suit at the stage where there was no completion of the process of the taking of the oath was improper and that the proper course for the trial Court was to issue a commission at the cost of the defendant directing the taking of the oath as agreed upon on a day to be fixed and direct the plaintiff to be present on that occasion and that if the plaintiff failed to be present then the trial Court should deal with the case as if section 12 of the Oaths Act applied. I think the decision in this case is a near approach to the facts of the case in this revision petition. If the defendant was prevented from taking the oath as accepted by him, by reason of the fact that the temple was not open and that the uralan was not available to receive the fee and then allow the taking of the oath to be proceeded with, there was no further attempt made by the defendant to complete his agreement to take the oath. He having received the fee to be paid to the uralan for the purpose of making the oath was still bound to avail of another opportunity to make the oath and it would have been very proper and correct for the learned Small Cause Judge to have ordered a fresh opportunity to be made available to the defendant to take the oath. This has not been done and it could not therefore, in the circumstances, be stated that there has been any failure on the part of either of the parties to fulfil the agreement which they entered into in regard to the taking of the oath. In such circumstances, I am inclined to agree with and follow the course adopted by Pandrang Row, J., in having directed that there should be a further opportunity made available to the defendant who seems to be still willing to abide by his original agreement to take the oath. In that case, the proper thing for the learned Small Cause Judge would be to appoint a Commissioner and direct that the defendant do take the oath on a fixed day in the form which had been agreed upon in the presence of the Commissioner as well as of the plaintiff who has challenged the defendant to take the oath. On the completion of this oath, it will be for the learned Small Cause Judge to decide the matter.

There is another Bench decision referred to by the learned counsel for the respondent and which is reported in *Valli Ammal* v. *Arunachala Moopanar*[3]. A Bench of this Court held in that decision that if the oath is not taken in pursuance of an agreement, the case cannot be disposed of on the basis of a default either on behalf of the challenger or by the acceptor. The provisions of section 11 of the Oaths Act can only be attracted if the oath had been taken in accordance with the agreement arrived at between the parties. Various other aspects of the case have been discussed at great length in this Bench decision but I do not think for the purpose of this Civil Revision Petition I need go into a detailed discussion of the points that have been discussed in the said Bench decision. The fundamental fact remains that unless the oath is taken, as agreed to by the parties, there cannot be said to be any evidence on the basis of which the Court can proceed to dispose of the case one way or the other so that it seems to me necessary that the agreement to take the oath must be put into operation before the Court can have any material before

1. (1899) I.L.R. 22 Mad. 234.
2. A.I.R. 1935 Mad. 591.
3. (1938) 1 M.L.J. 368.

it to decide the case on the basis of the agreement. It also seems to be evident from the trend of these decisions that a mere agreement to take an oath on the challenge made by one of the parties and accepted by the other party cannot amount to an adjustment or compromise which could be incorporated in the form of a decree without any further inquiry or investigation and without a decision as to whether the case has been proved or not. In such circumstances, I do not think that it will be safe, in the interests of justice, that the Court should follow any other course of action than what is laid down in the first series of decisions ending with *Okkilikkara Siddayya* v. *Ambu Nair*[1] and *Shah Nawaz* v. *Ghulam Mohammad*[2]. While adhering to the view that a mere agreement to go through the taking of an oath to enable the Court to decide a matter cannot be the same as a compromise or an adjustment of a suit I think, in the circumstances of the present case, it will be in the interests of justice that the course that has been followed in *Bhaghavathi Vannan* v. *Vesta Vannan*[3] should be adopted in this case as well. In view of this I direct that the learned Small Cause Judge should appoint a particular day for the taking of the oath by the defendant and direct him to do so in the form already agreed to, appoint a Commissioner in whose presence it should be done and also direct that the plaintiff be also present on the occasion of the oath-taking. Of course, it follows that for the purpose of taking the oath, the defendant who had already received the fee to be paid to the uralan will make all the necessary arrangements beforehand to keep the temple open so that it may not again be said that the uralan or the poojari of the temple was not available for fulfilling his obligation under the agreement to take the oath. In the circumstances, the suit will be remanded to the lower Court for being disposed of in the manner indicated above. In view of the fact that the judgment of the learned Small Cause Judge has not discussed all the relevant issues that arose in a matter like this, I think it is a proper direction in the circumstances of the case that each party should bear his costs.

K.S. — *Suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

A. L. V. R. St. Veerappa Chettiar .. *Petitioner* *

v.

The State of Madras and another .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948)—Constitutional validity.

On account of the passing of the Constitution (First Amendment) Act, 1951, and the recent decision of the Supreme Court in *Shankari Prasad* v. *Union of India*, (1951) S.C.J. 775 : (1951) 2 M.L.J. 683 (S.C.), which held that Act to be valid, it is no longer open to a party to contend that the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, has become void as being inconsistent with, or taking away, or abridging, any of the rights conferred by any of the provisions of Part III of the Constitution of India. Article 31 (6) of the Constitution would prevent the Court from calling into question a law (or Act like the impugned one) coming within the purview of that clause which is liable to be challenged only on the ground covered by that clause, *viz.*, that it contravenes provisions of clause (2) of Article 31 or has contravened section 299 (2) of the Government of India Act, 1935 and which must be held to be valid law because it cannot be called into question on that ground which renders it invalid. The words " any law of the State " mean any Act, Ordinance or Order enacted by the State without any reference to its validity. Opinion of Das, J., in *Sir Kameshwar Singh* v. *State of Bihar*, (1950) I.L.R. 29 Pat. 790, approved and that of Sinha, J., dissented from.

A writ of *certiorari* cannot issue to declare the impugned Act invalid as repugnant to Article 31 clause (2). The impugned Act does relate to compulsory acquisitions of interest in land and therefore falls within Entry 9 of List 2 of Schedule VII of the Government of India Act, 1935.

The declaration in section 3 of the impugned Act only means that the vesting is for the purposes of the Province and there is no inconsistency with section 175 (2) of the Government of India Act, 1935, on account of the Act not saying that the " vesting is to be in His Majesty ".

The Madras Estates (Abolition and Conversion into Ryotwari) Act of 1948 is not invalid on the grounds urged.

1. (1925) 49 M.L.J. 379.
2. A.I.R. 1946 Lah. 78.
3. A.I.R. 1935 Mad. 591.

*C.M.P. Nos. 6914, 13528 of 1950 and 490 of 1951. 13th December, 1951.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of Prohibition forbidding the respondents from continuing the proceedings taken and from taking any further or other proceedings in respect of the petitioners Thevaram Zamin under the Madras Acts XXX of 1947 and XXVI of 1948.

R. Kesava Aiyangar for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) and *V. P. Sarathi* for the Government Pleader (*P. Satyanarayana Raju*) instructed by the State Counsel (*John and Row*) on behalf of the Respondents.

The Order of the Court was made by

The Chief Justice.—In these applications the validity of Madras Act XXVI of 1948 [The Madras Estates (Abolition and Conversion into Ryotwari) Act] is challenged. Of the many grounds on which it was challenged, several have become unavailable to the petitioners on account of the Constitution (First Amendment) Act, 1951, and the recent decision of the Supreme Court which held that Act to be valid (vide *Shankari Prasad* v. *Union of India*[1]). For instance it is no longer open to the petitioners to contend that the Act has become void as being inconsistent with, or taking away, or abridging, any of the rights conferred by any of the provisions of Part III of the Constitution.

But learned counsel for the petitioners contended that the Act is still liable to be challenged on other grounds. The first of such grounds pressed before us was that it contravenes the provisions of sub-section (2) of section 299 of the Government of India Act, 1935. To this ground the answer of the State is that this ground is not open to the petitioners in view of Article 31 (6) of the Constitution which runs as follows:

"Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any Court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935."

It is common ground that there has been a certification by the President in accordance with this clause. But the petitioners' counsel attempted to get out of this difficulty by putting forward two arguments. The first argument was that the President's certification could cure only irregularities and like defects which do not substantially affect the validity of the Act, but where the impugned Act is void *ab initio* the Persident's certificate would not save it. This argument was built upon a construction of the words "any law of the State" as meaning any valid enactment. In support of this argument learned counsel relied upon certain observations of Sinha, J., in *M. D. Sir Kameshwar Singh* v. *State of Bihar*[2]. At page 860 that learned Judge said:

"The opening words of the clause are—'Any law of the State'. They are not 'Any Act passed by the State.' Hence in order to attract the operation of the clause, the first essential condition is that it must be a valid law of the State. In other words, the certification by the President may cure an irregularity or an illegality in some details of the law in a valid piece of legislation but it cannot cure a nullity. If the impugned Act was a nullity, the certification by the President could not give life to something which was void *ab initio* and a law which is void *ab initio* is something which was never in existence—see in this connection the following observations of the Supreme Court of America in the case of *Norton* v. *Shelby County*[3], 'An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed'."

In the same case, Das, J., was apparently of a different view. In his opinion, Article 31 (6) as worded would prevent the Court from calling into question a law coming within the purview of that clause which is liable to be challenged only on the ground covered by that clause and which must be held to be valid law because it cannot be called into question on that ground which renders it invalid.

1. (1951) 2 M.L.J. 683: 1951 S.C.J. 775 (S.C.).
2. (1950) I.L.R. 29 Pat. 790.
3. (1885) 118 U.S. 178, 186.

"Thus there will be no question of reviving something which is dead or validating a nullity. A law passed by a competent Legislature is valid unless it is declared invalid by a competent court of law. If the Court cannot call it into question on a particular ground, that ground cannot be urged for its invalidity either at the inception or at a subsequent stage; for to do so would nullify the provisions of Article 31 (6) of the Constitution."

With great respect I am in entire agreement with the opinion expressed by Das, J., and I must express my respectful dissent from the observations of Sinha, J., on this point. I am clearly of opinion that the words "any law of the State" mean any Act, Ordinance or Order enacted by the State without any reference to its validity.

Of course this does not mean that it is not open to the petitioners to challenge the validity of the Act on other grounds. Article 31 (6) does not say that the Act shall not be called in question on any ground whatever. On the other hand, that clause expressly limits the effect of the certificate to the only ground that it contravenes the provisions of clause (2) of Article 31 or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

There was no attempt to argue, still less to convince us, that the Act is void because the acquisition was not for a public purpose, assuming that that ground is still open to the petitioners.

But for the strenuous way in which the point was pressed on us, I would not have considered it necessary to deal except in a cursory way with the contention of the petitioners' counsel that in spite of Article 31 (6) declaring that the Act shall not be called in question on the particular ground mentioned, it is still open to the Court to issue a writ of *certiorari* or other appropriate writ practically achieving the same result. Reliance was placed on the rule well established in England that though a statute might purport to take away the right of *certiorari* in particular matters, nevertheless the Supreme Court would have power to quash the proceedings of an inferior Court on the ground of excess of jurisdiction and similar grounds. In the well-known case of the *Colonial Bank of Australia* v. *Willan*[1], Sir James Colvile pointed out that a statutory enactment purporting to take away the right of *certiorari* would not have the effect of absolutely depriving the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior Court on the ground either of a manifest defect of jurisdiction in the tribunal that made the order in question or of manifest fraud in the party procuring it. The proposition is thus stated in Halsbury's Laws of England, 2nd Ed., Vol. IX at page 862:

"Although *certiorari* is taken away, it may be granted, even on the application of the defendant, where the inferior Court has acted without or in excess of jurisdiction; for in such a case the Court has not brought itself within the terms of the Statute taking away *certiorari*. Thus *certiorari* will lie although taken away where the subject-matter of the inquiry was beyond the scope of the authority of the inferior Court, either by reason of its nature or by reason of the absence of some essential preliminary; and it will also lie where by reason of interest or prejudice the inferior Court was improperly constituted and was therefore without jurisdiction to entertain the cause."

I fail to see, however, how this rule of law can possibly apply to the present case. Firstly, the power and jurisdiction which this Court is invested with to issue writs in the nature of *certiorari* and prohibition can now be traced to Articles 225 and 226 of the Constitution. When the same Constitution also provides that a particular enactment shall not be called into question on the ground that it contravenes a particular provision, that is to say, on the ground that it is for a particular reason, illegal, it follows that to that extent there is no power or jurisdiction in this Court to declare that the enactment is void on that ground by the issue of a writ of *certiorari* or like writ. Secondly, the power of the superior Court to quash proceedings by *certiorari* can only be exercised against inferior Courts or tribunals but cannot be exercised against the Legislature. The petitioners' counsel is seeking for a wholly unwarranted application of the doctrine which reserves the power of a superior Court to quash orders of inferior Courts or tribunals.

The next ground on which the impugned Act was attacked was that the Provincial Legislature which passed the enactment was not competent to pass it.

1. L.R. 5 P.C. 417.

Entry 9 of List 2 of Schedule VII to the Government of India Act, 1935 is "compulsory acquisition of land" and *prima facie* the Act in question is an Act relating to compulsory acquisition of land. But petitioners' counsel argued that there could not be real acquisition unless there was adequate compensation, and as for several estates the compensation is *nil* or practically *nil*, the Act which leads to that result cannot be deemed to be an Act relating to acquisition of land. Some support was sought to be found in the observations of Das, J., at page 885 of the decision in *M.D. Sir Kameshwar Singh* v. *State of Bihar*[1], that it is only if the requirement of payment of compensation (either by fixing the amount or specifying the principles and the manner in which the compensation is to be determined) is satisfied that a law authorising compulsory acquisition could be made. But surely Das, J., was here referring to the provisions of sub-section (2) of section 299 of the Government of India Act, 1935. The learned Judge was not dealing with the competency of the Legislature to pass the enactment in question in exercise of the power conferred by Entry 9 in List 2 of Schedule VII. In my opinion, there is no question of competency at all in this case. The law does relate to compulsory acquisition of interest in Land, and therefore, clearly falls within Entry 9 of List 2.

The last argument of Mr. Kesava Aiyangar, petitioner's learned counsel, was that the Act was void because the vesting of the property acquired is declared by section 3 (*b*) of the Act to be in the Provincial Government, whereas according to section 175 (2) of the Government of India Act, 1936, the vesting should have been in His Majesty. No doubt, section 3 does say that the entire estate acquired shall stand transferred to the Government and vest in them free of all encumbrances, and "Government" is defined in section 2 (5) as "the Provincial Government." But, is this inconsistent with section 175 (2) of the Government of India Act? That sub-section is in the following terms;

"All property acquired for the purposes of the Federation or of a Province or for the exercise of the functions of the Crown in its relations with Indian States as the case may be, shall vest in His Majesty for those purposes."

Prima facie it looks to me as if this sub-section only concerns property acquired for the purposes of the Federation or of the Province. It cannot be said that the property of the zamindar or inamdar is being acquired under the Act for the purposes of either the Federation or of the Province. Assuming it can be deemed so, the result would be that whatever the Provincial statute might say, the property would vest in His Majesty under section 175 (2). But it would vest for the purposes of the Province. The declaration in section 3 of the impugned Act only means that the vesting is for the purposes of the Province. There is no substance in this highly technical contention.

I hold that Madras Act XXVI of 1948 cannot be held to be invalid on any of the grounds taken by the petitioners. The petitions are therefore dismissed.

Venkatarama Ayyar, J.—I agree.

K.S. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

President of F. 1250 Chowghat Firka P.C.C. Co-operative Society Ltd., A. C. Raman .. *Petitioner**

v.

Muthavally Seydali's son Valiyakath Kaithakkal Kunhi Bara Haji .. *Respondent.*

Transfer of Property Act (IV of 1882), sections 111 and 108 (*m*)—*Tenant terminating the tenancy by a valid notice and tendering key of premises—Landlord refusing to take possession and insisting that the tenant should repair and restore premises to its original condition—Tenant if liable for rent subsequent to the tender of possession.*

Where after terminating the tenancy by a valid notice the tenant went to the extent of offering the key of the premises but it was refused by the landlord on the ground that the building should be

1. (1950) I.L.R. 29 Pat. 790.

* C.R.P. No. 1290 of 1950. 16th November, 1951.

put in complete repair and then only the landlord would take possession, the landlord is not entitled to act as if the tenant is continuing as a tenant under him or that the tenant is in occupation and use of the premises and therefore liable to pay damages for such use and occupation. When once a proper notice has been given and the tenancy has been properly terminated the landlord's right would be not to question the notice or the termination of the tenancy, but to sue for the recovery of damages that has been caused to the property. (*Case-law discussed.*)]

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the District Munsiff's Court, Chowghat in S.C.S. No. 56 of 1949.

N. Sundara Aiyar and *A. R. Srinivasan* for Petitioner.

O. T. Verghese for Respondent.

The Court delivered the following

JUDGMENT.—This civil revision petition is against the decree and judgment of the learned District Munsiff of Chowghat decreeing the suit brought by the plaintiff claiming a sum of Rs. 285 towards rent due in respect of a godown belonging to the plaintiff for the month of February 1949. The defendant is the petitioner. The plaintiff is the manager of a wakf and the suit property forms part of the family wakf created for the benefit of the descendants of the wakif and the ultimate benefit vests in poor orphans. The property is a godown said to have been constructed for the purpose of storing foodgrains. It was taken up by the Government and in the first instance was allowed to be kept by one of the distributors. Subsequently the defendant became the occupier of the premises at the stipulated rent of Rs. 285 per month. By Ex. B-2 dated 6th December, 1948 the defendant-society gave notice to the plaintiff that since the godown was no longer required for the society's use, the plaintiff should take possession of the same on 15th December, 1948. The defendant-society also offered to give the key of the premises. This notice was promptly replied to by the plaintiff on the 14th of December, 1948. The plaintiff in that notice stated that the society was not entitled to surrender the building as it was put up for the purpose of storing foodgrains and on the understanding with the Government that it would be occupied as long as the distribution of grains continued in that Firka, that the notice issued by the society was neither legal nor proper, that on account of the carelessness of the society the building had been damaged and that consequently he was not bound to take possession and that for any loss caused to the plaintiff, the society would be held responsible. On receipt of this notice the defendant society sent another notice, Ex. B-3, dated 27th December, 1948, reiterating that the society was going to surrender the building by the end of 31st January, 1949 after paying the rent till that date and that there will be no liability against them for any subsequent rent. The society also denied that any damage had been caused to the building on account of the society's carelessness. Ex. A-3 dated 28th Januay, 1949, was then sent by the plaintiff to the defendant denying the allegations contained in Ex. B-3 and questioning the attitude of the society in offering to surrender the building without paying for the damages and characterising it as a wrongful attitude and questioring the legality of the notice on that ground and intimating the society that they would be held responsible for the subsequent rent also. Thereafter the plaintiff filed the suit against the defendant for recovery of the rent for the month of February, 1949.

In the plaint the averment seems to be to the effect that in spite of the demands, the defendant-society was wilfully not paying the arrears of rents and that since the society has damaged the property very much, the plaintiff was not bound to take possession, that the lease had consequently not been determined and so the plaintiff was entitled to claim rent, that even if the lease was determined, since the property had not been restored to its original condition, the plaintiff was entitled to damages for use and occupation.

The defendant-society raised various contentions; chief among them being that the lease was determined by sending a valid notice to the plaintiff, that along with it the rent for January, 1949 had also been remitted and which the plaintiff had accepted, that the society had vacated the building from that date and it was

therefore not liable for any subsequent rent or damages and that the other allegations in the plaint that the lease had not been determined were not true, that the defendant-society had not committed any damages to the building and that the plaintiff was not entitled to any amount. The learned District Munsiff held in the course of his judgment that the notice, the original of Ex. B-3 was a proper notice expressing the intention of the defendant to determine the tenancy by the end of the midnight of January 1949. He further held that the validity of the notice was not questioned in the plaint. The only point on which the notice terminating the lease was questioned would appear to be that it was not a valid notice for the reason that it did not express the defendant's willingness to pay for the damages.

Having held that the notice was a proper notice and by reason of the notice the lease determined, the learned District Munsiff proceeded to consider the further question as to whether the building was damaged by the defendant and consequently the plaintiff was not bound to take possession and therefore the tenancy continued. On this question after a very elaborate discussion, the learned District Munsiff came to the conclusion, on a consideration of the evidence on either side, that the building was really damaged when the defendant was in possession and that being so, he held that because the society was bound to repair the building and give it back in the condition in which it was taken up for occupation, the plaintiff was not bound to take possession till then, that the tenancy continued and that it had not been determined and therefore he decreed the suit. It is against this decree that the present civil revision petition has been preferred.

I have been taken through the relevant portions of the judgment and even at the outset, I must state that while the claim of the plaintiff is extraordinary, the finding of the learned District Munsiff is still more extraordinary. The plaintiff, it must be stated, has misconceived his remedy and by no stretch of imagination could it be said that the plaintiff, who has refused to take possession when possession was offered, could hold the defendant liable for any rents after the lease was terminated and after the plaintiff refused to take possession. The grounds alleged for refusing to take possession by the plaintiff were that the building was damaged and that until and unless the building is repaired, the plaintiff is not obliged or bound to take possession. Such a position seems to be wholly untenable. When the lease has been terminated by a valid notice as provided for under section 111 of the Transfer of Property Act and when possession has been offered and the plaintiff had refused to take possession, it cannot be held that the lease would still continue in favour of the plaintiff. No authority has been cited by the learned counsel for the respondent to substantiate this extraordinary position he has taken up. The authorities which have been cited by him seem to be completely without any bearing on the point at issue. The first of them is *Henderson* v. *Squire*[1]. That was a case where a tenant, under a parol agreement, without any stipulation that he should deliver up possession of the premises at the end of the term, was nevertheless bound at law to deliver up complete possession. The facts in that case appear to be that a tenant under such an oral agreement underlet a part of the premises and at the determination of both tenancies the under-tenant held over against the will of the tenant and it was held that the landlord can recover against the tenant as damages the value of the whole premises for the time he was kept out of possession, and the costs of ejecting the under-tenant. The facts in the present case are completely at variance with the facts in the reported decision and I do not think that this renders any assistance to the respondent in this case. The second authority that has been relied upon by the learned counsel is the one reported in *Ethirajulu Naidu* v. *Ranganatham Chetti*[2]. There also the facts are completely different from the facts of the present case. In that case a lease provided, *inter alia*, that

"the lessee shall always and in any event be entitled to be paid the price of the superstructure built (by the lessee) on the said plot of land before he surrenders possession of the land either on the expiry of the lease granted or any other future lease or at any time and that the price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment."

1. (1869) 4 Q.B. 170.
2. (1945) 1 M.L.J. 257 : L.R. 72 I.A. 72 : I.L.R. (1945) Mad. 535 (P.C.).

In such circumstances it was held by the Judicial Committee of the Privy Council that the lessee was entitled to hold over as tenant by virtue of the above clause at the rent reserved by the lease until he was paid the then market price. I do not think that this case has any relevancy to the facts in the present case. The next authority relied upon by the learned counsel for the respondent is the decision in *Judoonath Ghose* v. *Schoene Kilburn and Co.*[1]. Again in this case the facts are of a quite different nature from those of the present case and it is difficult to see how the decision in that case could be made applicable to the present case. A passage found at page 339 of Woodfall's Law of Landlord and Tenant has been relied upon by the learned counsel for the respondent for sustaining the obviously incompetent judgment of the learned District Munsiff. The sentence relied upon in the passage at page 339 is to the following effect:

> "A tenant remains liable for rent, unless he delivers up complete possession of the premises, or the landlord accepts another in his room."

In the persent case it is not a case of any failure on the part of the defendant to deliver up vacant possession of the premises. On the other hand, it is quite patent that after terminating the tenancy the defendant went to the extent of offering the key of the premises and it was refused. And the refusal is on the ground that the building should be put in complete repair and then only the landlord would take possession. Such a position taken up by the landlord is wholly untenable. If the premises has been damaged and damaged to a considerable extent as it transpires from the evidence and the judgment of the learned District Munsiff, the plaintiff has got his remedies by proceeding against the defendant society for damages, and he will be entitled to get every pie of damage which he will prove against the society. But that would not entitle the plaintiff to refuse to take possession of the premises and then act as if the defendant is continuing as a tenant under him or that the tenant is in occupation and use of the premises and therefore liable to pay damages for such use and occupation. The issues have been confused and the remedy has been misconceived. The learned counsel for the respondent would urge that under section 108 of the Transfer of Property Act clause (*m*) he entered upon the premises immediately after the first notice, the ineffective notice given by the tenant, and when he found that the premises had been damaged, he gave notice of the defects and according to the latter part of that clause when such notice has been given by the landlord, the tenant is bound to make it good within three months after such notice has been given. The learned counsel for the respondent would say that such a notice having been given by the plaintiff and the defendant having failed to comply with that notice, the plaintiff would be entitled to recover rents for the subsequent period or damages for use and occupation There is nothing in this section to compel the defendant, who has terminated the tenancy and who has offered to deliver vacant possession and whose offer has been refused more than once, to remain in the premises until the premises, which a recalcitrant tenant might have purposely or otherwise damaged, is put in a state of proper repair. If he fails to comply with any demand, however legitimate it might be, from the plaintiff, the remedy of the plaintiff would be to sue for damages for the neglect or default or other deliberate acts of the defendant. The remedy that the plaintiff has chosen in this case seems to be absolutely without any basis. The correct law, as pointed out by the learned counsel for the petitioner, has been laid down in *Baliaramgiri* v. *Vasudev*[2], and also in *Abdul Qayum* v. *Mohammad Fazal Azim*[3]. When once a proper notice has been given and the tenancy has been properly terminated the plaintiff's right would be not to question the notice or the termination of the tenancy, but to claim damages for any loss caused to the plaintiff by reason of any wilful negligence or default on the part of the tenant. The learned Judges in the decision in *Baliaramgiri* v. *Vasudev*[2], have considered the question as to what is to happen if possession is not given after a valid notice.

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1. (1883) I.L.R. 9 Cal. 671.
2. (1896) I.L.R. 22 Bom. 348.
3. A.I.R. 1937 Lah. 121.

"Does it continue the tenancy indefinitely, or does it give rise to a claim for damages on the part of the landlord? The latter appears to us to be its legal result."

This is what the learned Judges have observed and they relied upon the decision in *Henderson* v. *Squate*[1] and they have observed that the measure of damage would be the extent of the loss of rent, which the landlord sustains during the actual period for which he was kept out of possession and the expenses he was put to in recovering possession of the land. The learned Judges have further observed at page 354 that

"It would be unreasonable to hold cultivators, like the defendants, liable for rent perpetually because the inamdar does not choose to demand or recover possession from the tenants, if he does not desire to treat them as his tenants."

Even so in *Abdul Qayum* v. *Mohammad Fazal Azim*[2], it has been held that the remedy of the landlord is to sue the tenant for damages, the measure of which is the rental value of the premises for the time he is kept out of possession and the costs of the legal proceedings to oust the under-tenant from wrongful possession if the tenant fails to deliver vacant possession after termination of notice. But in the present case the facts are on a much stronger footing. Here the tenant has not merely terminated the tenancy but also offered to deliver vacant possession by giving the key. The plaintiff wilfully would not take possession on the ground that the premises remained damaged and it should be repaired and put in a tenantable condition before the plaintiff could take up possession. The passage quoted by the learned counsel for the petitioner which appears at page 724 of Woodwall's Law of Landlord and Tenant, is more apposite than the passage quoted by the learned counsel for the respondent with regard to the liability of the tenants and the rights of the landlords to recover damages in case the property is not kept in a state of repair and tenantable condition. I do not think it is necessary for me in the view I have taken to multiply the authorities or to refer to those that have been further cited by the learned counsel for the petitioner. I am of opinion that the decision of the learned District Minsiff is wholly wrong and untenable and he ought to have held that the plaintiff was not entitled to recover any rent or any damages for the period for which he laid this suit. On the other hand, the plaintiff should have been directed to seek the proper remedy by taking possession of the property and then to sue the defendant for the recovery of damages that has been caused to the property of the plaintiff. Instead of doing so, the plaintiff has misconceived his remedy and the learned District Munsiff has fallen into the error of accepting that that was the proper remedy for the plaintiff.

In the result, this petition is allowed with costs. The decree of the lower Court is set aside.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

Abdul Azeez .. *Petitioner.**

v.

Pathumma Bi .. *Respondent.*

Civil Procedure Code (V of 1908), Order 32, rule 1 and Indian Majority Act (IX of 1875), section 2 (a)—Suit for dissolution of marriage by Muslim woman who was a minor under Indian Majority Act but major according to personal law—If can be filed without the minor being represented by a next friend—Proper order to pass in suit filed without a next friend.

On a plain reading of sections 2 (a) and 3 of the Indian Majority Act and Order 32, r. 1e 1, Civil Procedure Code, it is clear that a suit by a person who is a minor within the definition contained in section 3 of the Indian Majority Act, cannot be instituted except by a next friend. Section 2 (a) of the Indian Majority Act saves only the capacity of a person to act in certain matters, namely, marriage, dower, divorce and adoption and not to act in suits or legal proceedings relating to them or

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1. (1869) 4 Q.B. 170.
2. A.I.R. 1937 Lah. 121.

*C.R.P. No. 300 of 1951. 15th November, 1951.

of which the subject-matter is one or other of those matters. Hence, a muslim woman who is a major according to her personal law but is a minor according to the provisions of the Indian Majority Act would not be entitled to bring a suit for dissolution of her marriage without being represented by a next friend. When such a suit is filed without a next friend, the proper course is to return the plaint as not having been properly presented and not to dismiss the suit on account of the defect in presentation.

Ithayi Umah v. *Kairhirapokil Manad*, (1881) I.L.R. 3 Mad. 248, Followed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order dated 8th December, 1950 of the Court of the District Munsiff of Ottapalam in I. A.No. 2327 of 1950 (O.S. No. 496 of 1950).

C. S. Swaminatha Ayyar for Petitioner.

B. Pocker and *S. M. Mohideen* for Respondent.

The Order of Reference to a Bench was made by

Basheer Ahmed Sayeed, J.—The point that arises for consideration in this Civil Revision Petition is whether the plaintiff, who is a minor under the Indian Majority Act but who is a major according to her personal law, is entitled to bring a suit for dissolution of her marriage without a next friend. The learned District Munsiff of Ottapalam, who heard the petition of the defendant filed under Order 32, rule 1 of the Civil Procedure Code praying that the suit O.S. No. 496 of 1950 on the file of the said Court should be dismissed on the ground that the plaintiff therein being a minor was not entitled to bring the suit without the next friend, dismissed the same following the decisions in *Ahmad Sulaiman Vohra* v. *Mt. Bai Fatima*[1], *Nakasstan Bibi* v. *Habibar Rahiman Mandal*[2], and holding that the plaintiff was competent to sue for dissolution of her marriage without a next friend and that the suit as framed was maintainable. The defendant has preferred this civil revision petition against the decision of the learned District Munsiff of Ottapalam.

Mr. C. S. Swaminatha Ayyar appearing for the petitioner has invited my attention to the decision in *Ithayi Umah* v. *Kairhirapokil*[3], a Bench decision wherein it has been held that:

"Section 2 of Act IX of 1875 (Indian Majority Act) refers only to the capacity to contract which is limited by section 11 of the Contract Act, and not to the capacity to sue, which is purely a question of procedure and regulated by the Civil Procedure Code, Chapter XXXI".

This decision has been followed in *Abi Dhunimsa Bibi* v. *Mohammad Fathi Uddin*[4]. This again is a Bench decision and in that decision it has been held that:

"A relinquishment of her right to dower by a Muhammadan woman, who is a minor, under the Indian Majority Act, is invalid under the Indian Contract Act (IX of 1872). To relinquish dower is not 'to act in the matter of dower' within section 2 of the Indian Majority Act".

Apart from these two decisions, no other decision of this Court on the point in question has been brought to my notice. In *Usman Ali Khan* v. *Mst. Khatoon Banu*[5], relied upon by the learned counsel for the petitioner it has been held that:

"Section 2 (a) of the Indian Majority Act does not prevent a Muhammadan girl of 15 years of age from bringing a suit for dower through a next friend and the decree obtained in such a suit is not a nullity".

Though in this case objection was taken that the suit brought on behalf of the minor through the next friend was incompetent, still the decision has turned upon the interpretation of the words occurring in section 2 (*a*) of the Indian Majority Act, *viz.*, "to act in the matter of dower." It has been held in that decision after a review of all the cases including *Ithayi Umah* v. *Kairhirapokil*[3], *Abi Dhunimsa Bibi* v. *Mohamad Fathi Uddin*[4], and cases of other High Courts as well, that the words "to act in the matter of dower" in section 2 (*a*) are to be given only a restricted meaning and do not include the bringing of a suit for dower and that that section merely relieves the plaintiff of some of the consequences of her minority, but she remains a minor nonetheless. That being so, it was held, the provisions of Order 32,

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1. A.I.R. 1931 Bom. 76.
2. A.I.R. 1948 Cal. 66.
3. (1881) I.L.R. 3 Mad. 248.
4. (1917) 35 M.L.J. 468 : I.L.R. 41 Mad. 1026.
5. (1941) I.L.R. 17 Luck. 572.

rule 1 of the Code of Civil Procedure, still apply and so in respect of the institution of suits she will have to act through her next friend. In *Najmunnissa Begum* v. *Maulavi Sirajuddin Ahmad Khan*[1] which has also been referred to in the Lucknow Full Bench decision, the decision in *Abi Dhunimsa Bibi* v. *Mohammad Fathiuddin*[2] was followed and it was held that:

"Once a marriage has been performed and the dower is settled, a wife who (although a major according to the personal law of the lady) is still a minor under the Majority Act, 1875, is not competent to relinquish the whole or part of her dower to change its character."

The Bench which decided this case distinguished it from the decisions in *Qasim Hussain Beg* v. *Kaniz Sakina*[3] and *Mozharul Islam* v. *Abdul Gani Ala*[4]. In *Maung Tun Aung* v. *Ma Ekyi*[5], the term "capacity to act in the matter of marriage" came up for consideration and it was held that:

"The expression "capacity to act in the matter of marriage" in section 2 of the Majority Act means the capacity to be a party to a valid marriage, and relates to the act of the parties by which their status is changed; the expression does not refer and is not applicable to a pre-nuptial agreement to contract a marriage in the future".

Though in this case the parties were Burmese, nevertheless the discussion on the terms of section 2 (*a*) of the Indian Majority Act was relevant as the decision turned only upon that issue. This Full Bench also reviewed several of the decisions that had been placed before it such as *Bai Shirinbai* v. *Kharshedji*[6], *Abi Dhunimsa Bibi* v. *Mohammad Fathiuddin*[2] and *Mst. Fatma Khatun* v. *Fazlal Karim Mea*[7] and so forth.

It will thus be seen that all the four High Courts, *viz.*, Madras, Lucknow, Patna and Rangoon are of one opinion, *viz.*, that a suit by a minor under the Indian Majority Act, but who is a major under the personal law governing the party, cannot be filed for any purpose connected with her marriage without a next friend acting on her behalf. As against this, the High Courts of Bombay, Calcutta, and Allahabad take quite a different view and they hold that it is permissible for a minor under the Indian Majority Act but who is a major under her personal law to bring a suit for dissolution of her marriage without the aid of a next friend, and the interpretation put upon the words "to act in the matter of marriage" was that it should not be restricted to the mere right to contract but should extend also to the right to file a suit or otherwise enforce her rights through a Court of law. In *Ahmed Suleman* v. *Bai Fatma*[8], a Bench of two Judges of the Bombay High Court held that:

"Under the Mahamedan law a wife of 16 years of age is entitled to sue for divorce, without a next friend by virtue of section 2 (*a*) of Indian Majority Act. The case of Parsis is different".

They followed the decision in *Bai Shirinbai* v. *Kharshedji*[6], wherein it was said that the Majority Act did not use the expression "capacity to contract" but used only the words "capacity to act" which were said to be of much wider import. In *Mst. Fatma Khatun* v. *Fazlul Karim Mea*[7] and *Naksatan Bibi* v. *Habibar Rahman*[9], it was held by the Calcutta High Court that:

"Section 2, Majority Act does not merely create certain exceptions to section 11, Contract Act, but the words "to act" are wide enough to include in it the institution of a suit. A suit instituted by a Muslim minor girl, who has attained her puberty, for dissolution of marriage is covered by expression "the capacity of any person to act in the matter of marriage, divorce, etc." and is maintainable without a next friend".

The cases in *Mst. Fatma Khatun* v. *Fazlul Karim Mea*[7] and *Ithayi Umah* v. *Kairhirapokil Mamad*[10] was referred to and distinguished. In *Qazim Hussain Beg* v. *Kaniz Sakina*[3], Sulaiman, C.J., and Iqbal Ahmed, J., considered the question of relinquishment of dower by a minor muslim wife *vis-a-vis* section 2 of the Indian Majority Act and held that:

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1. (1937) I.L.R. 17 Pat. 303.
2. (1917) 35 M.L.J. 468: I.L.R. 41 Mad. 1026.
3. (1932) I.L.R. 54 All. 806.
4. A.I.R. 1925 Cal. 322.
5. (1936) I.L.R. 14 Rang. 215.
6. (1896) I.L.R. 22 Bom. 430.
7. (1928) 47 Cal. L.J. 372.
8. (1930) I.L.R. 55 Bom. 160.
9. A.I.R. 1948 Cal. 66.
10. (1881) I.L.R. 3 Mad. 248.

"The settlement of dower or its relinquishment comes within the exception contained in section 2 of the Indian Majority Act. The agreement about the payment of a certain amount of dower is a part of the contract of marriage and a person who is a minor under the Indian Majority Act but a major under the Muhammadan law, is capable of relinquishing the dower as consideration for obtaining *Khula*, which is a form of divorce recognised by the Muhammadan law and comes within the exception mentioned above".

This decision agreed with the opinion expressed by the Calcutta High Court that the settlement of dower or its relinquishment would come within the exception contained in section 2 of the Indian Majority Act.

There is thus a conflict of opinion between the High Courts of Madras, Lucknow, Patna and Rangoon on the one hand and those of Bombay, Calcutta and Allahabad on the other. No cases of any other High Court have been placed before me and no decision of this Court later than *Abi Dhunimsa Bibi* v. *Mohammad Fathiuddin*[1], has been made available on this question. In these circumstances, and in view of the conflict between several High Courts on this question, and this High Court having had no occasion to review the decisions of the other High Courts which have come in the wake of *Abi Dhunimsa Bibi* v. *Mohammad Fathiuddin*[1] and considering the importance of the question, I think it is desirable that the matter should be decided by a Bench of this High Court. I therefore refer this petition for decision to a Bench to be constituted for the purpose by my lord, the learned Chief Justice.

The petition coming on for final hearing in pursuance of the above order of reference the Court delivered the following Judgment :—

The Judgment of the Court was delivered by

The Chief Justice.—The question of law which falls for decision in this case is whether a Muslim woman who is a major according to her personal law but is a minor according to the provisions of the Indian Majority Act, is entitled to bring a suit for dissolution of her marriage without being represented by a next friend. This case originally came up before Basheer Ahmed Sayeed, J., who found a divergence of opinion on the point between several High Courts and having regard to the importance of the question thought it desirable to be decided by a Division Bench.

Order 32, rule 1, Civil Procedure Code lays down that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. There are no exceptions to this general rule of procedure contained in the Code itself. There is no definition of a minor in the Code nor in the General Clauses Act. The Indian Majority Act, IX of 1875 provides that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before. This rule is, however, subject to certain exceptions contained in that Act. We are concerned with the exception embodied in section 2 (*a*) of that Act which runs as follows :—

"Nothing herein contained shall affect—

(*a*) the capacity of any person to act in the following matters (namely) marriage, dower divorce and adoption."

Prima facie, this provision means not that a person ceases to be considered a minor under the Indian Majority Act but that the fact that the person is a minor does not affect the capacity of that person to act in certain matters. The question is whether by reason of this provision an exception can be grafted to Order 32, rule 1 of the Code and it can be held that a minor within the meaning of the Indian Majority Act and therefore within the meaning of the Code of Civil Procedure can institute a suit in respect of the matters specified therein in a Civil Court governed by the Code without being represented by a next friend. Apart from authority, we think he cannot. Section 2 (*a*) saves only the capacity of a person to act in certain matters and not to act in suits or legal proceedings relating to such matters or of which the subject-matter is one or other of the matters therein mentioned. It seems for instance that a person can marry or adopt though he or she is a minor

1. (1917) 35 M.L.J. 468 : I.L.R. 41 Mad. 1026.

within the meaning of the Indian Majority Act. It is one thing to say that a person can act in the matter of adoption and another to say that he can institute a suit to declare the validity of his adoption or to obtain reliefs on the basis of his adoption.

Order 32, rule 1 enacts a rule of procedure. It does not, nor does it purport, to affect the substantive rights of parties. Even though represented by a next friend, the suit instituted in accordance with Order 32, rule 1 is nevertheless a suit by the minor. The rule only insists on a particular procedural condition being fulfilled. But for Order 32, rule 1 there is nothing in the general law of the land which would prevent a minor from instituting legal proceedings without a next friend. A minor can, without being represented by a next friend, institute criminal proceedings. He can even file a suit for the recovery of a sum not exceeding Rs. 500 which is due to him for wages or for piece of work or for work done as a servant in the Presidency Small Causes Court, without a next friend. It is therefore clear that there is nothing in section 2 (*a*) of the Indian Majority Act which override the provision in Order 32, rule 1.

The point is directly covered by the decision of a Division Bench of this Court in *Ithayi Umah* v. *Kairhirapokil Mamad*[1]. The question referred for decision in that case was whether a minor Muhammadan female can in her own name sue her husband in respct of maintenance, dower etc. It was argued in the Court below that the Indian Majority Act had no application because of the provision of section 2 (*a*) of that Act. The lower Court was of opinion that that provisions referred only to the capacity to contract and not to the capacity to sue which was purely a question of procedure and was regulated by Chapter XXXI, Civil Procedure Code. The learned Judges, Sir Charles Turner, C.J., and Tarrant, J., were of opinion that the lower Court had correctly apprehended and expressed the law. A similar view was taken in *Usman Ali Khan* v. *Khatoon Banu*[2] which dealt with a suit for dower. The learned Judges held that the words " to act in the matter of dower " in section 2 (*a*) of the Indian Majority Act should be given a restricted meaning and do not include the bringing of a suit for dower. The learned Judges observed that section 2 (*a*) merely relieves a minor of some of the consequences of minority but she remains a minor nonetheless :

> " That being so the provisions of Order 32, rule 1, Civil Procedure Code, still apply. So in respect of the institution of suits he will have to act through her next friend."

Authority, however, is not wanting for the contrary view. In *Ahmed Suleman* v. *Bai Fatma*[3] one of the points which arose for decision was whether a suit for divorce by a Muhammadan woman of 16 could be instituted without a next friend or guardian. The case was decided by a Division Bench consisting of Madgavkar and Barlee, JJ. Madgavkar, J., answered the question in the affirmative by a reference to the provisions of section 2 (*a*) of the Indian Majority Act and by holding that the wife suing for her divorce acts in the matter of divorce. The other learned Judge, Barlee, J., though he delivered a separate judgment, did not deal with this point. There is no reference in this case to the earlier decision of our Court in *Ithayi Umma* v. *Kairhirapokil Mamad*[1]. Akram, J., sitting alone took the same view in *Naksetan Bibi* v. *Habibar Rahman*[4]. In his opinion the words " to act " in section 2 (*a*) of the Indian Majority Act are wide enough to include the institution of a suit by a minor, who under his or her personal law may have attained majority. The learned Judge followed the decision in *Ahmed Suleman* v. *Bai Fatma*[3]. The attention of the learned Judge was invited to the decision in *Ithayi Umma* v. *Kairhirapokil*[1] but he purported to distinguish that decision by observing that that was a case for recovery of stridhan also and clearly would not be covered by section 2 of the Indian Majority Act. With great respect to the learned Judge we do not think that this is a fair way of distinguishing that decision. Though no doubt it appears from the narration of the facts that the suit was *inter alia* also for recovery of stridhana the reasoning of the learned Judges does not advert to this fact nor is it based on that circumstance.

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1. (1881) I.L.R. 3 Mad. 248.
2. (1941) I.L.R. 17 Luck. 572.
3. (1930) I.L.R. 55 Bom. 160.
4. A.I.R. 1948 Cal. 66.

We have no hesitation in expressing our respectful agreement with the decision of our Court in *Ithayi Umma* v. *Kairhirapokil Mamad*[1]. There is nothing in the reasoning of Madgavkar, J., in *Ahmed Suleman* v. *Bai Fatma*[2] nor of Akram, J., in *Naksetan Bibi* v. *Habibar Rahman*[3] which commends itself to us. On the plain reading of sections 2 (*a*) and 3 of the Indian Majority Act and Order 32, rule 1, Civil Procedure Code, only one conclusion appears to us to be possible, *viz.*, that a suit by a person who is a minor within the definition contained in section 3 of the Indian Majority Act cannot be instituted except by a next friend of the person.

The learned District Munsif was therefore wrong in holding that the suit was properly instituted. The petitioner before us, the defendant in the Court below took out an application praying that the suit may be dismissed on account of this defect in the presentation. We do not think that it is proper to follow this course. We think that the proper course is to return the plaint as not having been properly presented. We direct the learned District Munsif to do so. The Civil Revision Petition is to this extent allowed. There will be no order as to costs here and in the Court below.

V.S. — *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK, AND MR. JUSTICE SOMASUNDARAM.

M. Rajarama Reddi .. *Petitioner.**

Constitution of India (1950), *Article* 228—*Validity of an entire Act questioned—Onus—State Prosecutor on the Criminal side if bound to file affidavit seeking to uphold its validity—Criminal Procedure Code* (*V of* 1898), *section* 432—(*Substituted by Act XXIV of* 1951)—*Plea of* ultra vires *raised before Subordinate Courts—Reference when should be made.*

Where an entire Act is called in question as *ultra vires*, there is no obligation in the State Prosecutor on the Criminal side to file an affidavit at all seeking to uphold its validity and the onus is on the petitioner to satisfy the Court that the Act can for some *prima facie* substantial reasons be challenged in a Court of law.

A Subordinate Court should only make a reference to the High Court when it is satisfied that a case pending before it involves a real or substantial question as to the validity of any Act or Regulation. A mere plea that an Act is *ultra vires* will not suffice. If it is not so satisfied it should go on with the trial, leaving it to the aggrieved accused to move the High Court under Article 228, and to continue the trial until such application is admitted and the trial stayed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to order the transfer to its own file of C.C. No. 302 of 1950 on the file of the Additional First Class Magistrate, Cuddalore and on such transfer to deal with the case in one of the ways specified in Article 228 of the Constitution or in the alternative under any of the ways specified in section 526, Criminal Procedure Code.

V. V. Srinivasa Aiyangar, M. K. Nambiar and *V. Devarajan* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Order of the Court was made by

Mack, J.—This is a petition under Article 228 of the Constitution of India by the petitioner, who has been charged in a criminal case, with an offence under section 3 (2) of the Essential Supplies (Temporary Powers) Act, dated 19th November, 1946, and subsequently renewed, read with the Madras Foodgrains (Intensive Procurement) Order, 1948. This application was admitted in 1950 and referred by one of us (Somasundaram, J.) to a Bench for determination as to the correct procedure to be adopted in such cases.

The first point for determination is, whether the petitioner has satisfied us that a substantial question of law as to the interpretation of the Constitution is raised for determination. There is the broad allegation that the Essential Supplies (Temporary Powers) Act, 1946 is *ultra vires*. This is sought to be founded on a defect in the order of the Taluk Supply Officer passed against the petitioner directing

1. (1881) I.L.R. 3 Mad. 248.
2. (1930) I.L.R. 55 Bom. 160.
3. A.I.R. 1948 Cal. 66.

* Crl. M.P. No. 2321 of 1950. 4th February, 1952.

him to supply at a fixed rate to the Government 239 bags of paddy. He is prosecuted for failure to comply. It is urged that this order has not been notified, as it should have been under section 3 of the Essential Supplies (Temporary Powers) Act. We are unable to find any decision to support the view that such an order served on an individual requires any notification. Other types of orders under the Essential Supplies (Temporary Powers) Act involving the regulation of prices and so on are required to be notified in section 3, though the language used there did not specifically differentiate and particularise orders to be notified. This has in view of some judicial decisions been now clarified by Act LXXII of 1950, section 2 (1-A) which specifically says :

"An order made under sub-section (1) shall (*a*) in the case of an order of a general nature or affecting a class of persons, be notified in the official gazette ; and (*b*) in the case of an order affecting an individual person, be served, on such person by delivering or tendering it to that person."

We do not think that any Court would have, if the matter came up for determination prior to this amendment, held that an individual order of procurement was one which had, under section 3 (1) of the Essential Supplies (Temporary Powers) Act to be notified. We find, therefore no substance as regards this point taken to undermine the validity of either the Procurement Order or of the Essential Supplies (Temporary Powers) Act itself.

A preliminary point has been raised in this application on which, we think unnecessary time has been taken, *viz.*, that the Government have not filed an affidavit in reply to this petition and that failure to do so makes it difficult for elaborate arguments to be addressed on the Constitutional issues involved. Our attention has been drawn to *Khudu Prosad Bhakat* v. *State of West Bengal*[1], as authority for the ruling that in a petition under Article 226 of the Constitution, the State as the respondent, must comply with the normal procedure of filing proper affidavits, particularly where the petitioner alleges *mala fides* against Government, and raises serious questions of fact, which it would be impossible to deal with unless the State is represented in the proceedings. With great respect, we are in complete agreement with that decision which contemplates petitions under Article 226. We are here dealing with Article 228, which is entirely different and makes a specific provision for cases, in which in a Subordinate Court a substantial question of law as to the interpretation of the Constitution is raised. We have no hesitation in saying that where an entire Act is called in question as *ultra vires*, there is no obligation on the State Prosecutor on the Criminal side to file an affidavit at all seeking to uphold its validity and the onus is on the petitioner to satisfy us under Article 228 that there is a substantial question of law as to the interpretation of the Constitution, in other words, that the Act can for some *prima facie* substantial reasons be challenged in a Court of law.

So far as the validity of these Acts is concerned, our attention has been drawn to a recent decision in Crl. R.C. Nos. 989 to 991 and 1052 of 1951 by Ramaswami, J., sitting on the admission side—*Malayandi Thevar*, In re[2], with which we are in agreement in which he considered a similar objection to the validity of clause 3 of the Essential Supplies (Temporary Powers) Act and found a notification by the Collector under it to be valid. So far as the procedure to be followed is concerned matters have been clarified by Act XXIV of 1951, dated 1st May, 1951, which substitutes a new section, section 432 for the old one. The legal position now is that a Subordinate Court should only make a reference to the High Court, when it is satisfied that a case pending before it involves a real or substantial question as to the validity of any Act or regulation. A mere plea that an Act is *ultra vires* will not suffice. If it is not so satisfied it should go on with the trial, leaving it to the aggrieved accused to move the High Court under Article 228, and to continue the trial until such an application is admitted and the trial stayed. We find no substance in this petition, which we dismiss with a direction to the Magistrate to give this case as expeditious a disposal as possible.

V.S. — *Petition dismissed.*

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1. (1951) 55 C.W.N. 45.
2. (1952) 1 M.L.J. 408.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

S. Gopal .. *Petitioner.**

Penal Code (XLV of 1860), section 504—Essentials of—Abuse of woman by accused—Absence of any breach of peace—Relevancy.

Section 504 of the Penal Code requires two essentials. There must be intentional insult of a person and thereby due provocation to him or to her and secondly the person insulting must intend or know it to be likely that such a provocation would cause prejudice to public peace. The offence may be committed under the section without the person likely to commit the breach not being provoked. The mere forbearance of the person insulted is not sufficient to protect the offender. In a case where the petitioner lost his temper and abused the complainant, a woman, in grossly abusive and deliberately insulting language,

Held, that the essentials required by section 504 were fulfilled in the case and the fact that the woman in the position of complainant had not committed a breach of peace would not be material.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Sixth Presidency Magistrate, Court of Presidency Magistrates, Egmore, Madras, in C.C. No. 4520 of 1950, dated 8th February, 1951.

M. C. Sreedharan for the Petitioner.

Narayanan Nair for State Prosecutor (*S. Govind Swaminathan*) for the State.

The Court made the following

ORDER.—The Criminal Revision Petitioner lost his temper and abused the complainant a woman in grossly abusive and deliberately insulting language, and the argument put forward on his behalf is that the essentials of the section have not been made out. I regret my inability to accept this contention. Section 504, Indian Penal Code, requires two essentials. There must be intentional insult of a person and thereby due provocation to him or to her and secondly the person insulting must intend or know it to be likely that such provocation would cause prejudice to the public peace. But it has been laid down by a long line of decisions that the offence may be committed under the section without the person likely to commit the breach of peace being not provoked. In order to sustain the conviction under this section it is sufficient for the complainant to prove that the abusive language was such as would ordinarily provoke the man or woman of his or her position to commit a breach of the peace.

The mere forbearance of the person insulted being provoked is not sufficient to protect the offender. The only two points necessary are that the person insulted must be present and such insult must give provocation to the person so insulted then or soon after to comit a breach of the peace. In this case these requirements have been completely fulfilled and the fact that the woman in the position of the complainant has not committed a breach of the peace is certainly not material.

Finally it was pointed out that there is no finding of the Magistrate in regard to the elements of the offence committed. But it can be gathered from the concluding portion of the judgment of the learned Magistrate that in this case the prosecution evidence has proved the elements of the offence and he has convicted the accused accordingly. I do not say that it would not have been better if the learned Magistrate has been a little more explicit. But this is far from saying that the learned Magistrate on the fundamental issue did not come to the right conclusion that the offence has been made out.

I therefore dismiss this petition.

K.C. *Petition dismissed.*

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* Crl. R. C. No. 299 of 1951. (Crl. R. P. No. 298 of 1951). 14th November, 1951.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, AND MR. JUSTICE VENKATARAMA AYYAR.

Nalluri Subbaiah .. *Petitioner*.*

v.

Nalluri Raghavulu and others .. *Respondents.*

Constitution of India (1950), *Article* 226—*Scope of jurisdiction of High Court—Interference with executive direction by Magistrate to police to take action under section* 107, *Criminal Procedure Code.*

The High Court cannot be called upon to exercise its jurisdiction under Article 226 of the Constitution simply on an executive direction by a Sub-Magistrate to the police to take a particular action under section 107, Criminal Procedure Code.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to M.P. No. 18 of 1951, Stationary Sub-Magistrate's Court, Ongole and quash the directions issued to the Circle Inspector and also direct by a writ of *mandamus* the issue of a restraint order against the respondents herein, the respondents in the said M.P. No. 18 of 1951 so as not to interfere with the exercise of the petitioner's rights of worship and procession on the occasion of individual Kolupulu which he intends to perform.

D. Munikanniah and *R. D. Indrasenan* for Petitioner.

A. Raghavaiah for Respondents.

The Court made the following

ORDER.—This application is thoroughly misconceived. The petitioner himself filed an application before the Stationary Sub-Magistrate, Ongole, for an order under section 144 of the Code of Criminal Procedure, basing it on an alleged right in him to perform a certain festival. The Magistrate considered that the petitioner had not shown any *bona fide* right on his part and therefore rejected his application. After he had disposed of that application, he directed a copy of his order to be sent to the Circle Inspector of Police who was requested to institute proceedings under section 107 of the Code of Criminal Procedure against the petitioner, if he intended to exercise the right which was claimed by him.

We do not understand how we can interfer at this stage under Article 226 of the Constitution. If and when proceedings under section 107 of the Code of Criminal Procedure are instituted against the petitioner, he will have the right to defend himself, and if, as the learned counsel for the petitioner says, he has clear authority for the position that section 107 would not be applicable to the case, then he might be successful in the proceedings. We certainly cannot be called upon to exercise our jurisdiction under Article 226 of the Constitution, simply on an executive direction by the Stationary Sub-Magistrate to the police to take a particular action under section 107, Criminal Procedure Code. The order of the Magistrate does not certainly purport to decide finally the right of the petitioner. That will be a matter to be ultimately decided by a Civil Court. The application is dismissed with costs. Advocate's fee is Rs. 50 (fifty).

V.S. *Application dismissed.*

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*Writ Petition No. 343 of 1951. 28th November, 1951.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Matlapudi Janardana Rao .. *Petitioner.**

v.

Yanduri Venkata Subba Rao and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 4—*Fair rent fixed on application by tenant—Second application by tenant—Maintainability.*

Under the provisions of the Madras Buildings (Lease and Rent Control) Act, a tenant who had filed an application for fixing fair rent on which a fair rent had been fixed cannot file another application for the same relief for fixing the fair rent a second time.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in C.M.A. No. 58 of 1950, Court of the Second Additional Subordinate Judge, Vijayawada, against H.R.C. No. 419 of 1949, on the file of the Rent Controller, Bezwada and to quash the order of the said Court of the Second Additional Subordinate Judge, Vijayawada.

N. V. B. Sankara Rao for Petitioner.

A. Sambasiva Rao and *P. Raja Rao* for Respondents.

The Court made the following

ORDER.—This is an application for issuing a writ of *certiorari* to quash the order of the learned Subordinate Judge of Vijayawada made in appeal against the order of the Rent Controller. The petitioner had been a tenant of the respondents since 1940. He filed an application before the Rent Controller, H.R.C. No. 153 of 1947 in 1947 for fixation of a fair rent. That application was disposed of by an order, dated 14th November, 1947 and the Rent Controller held that the rent of Rs. 20 per month was a fair rent. He preferred an appeal against the said order in Mis. A. S. No. 216 of 1947. But that appeal was not pressed as the matter was settled between the parties. In the present application he asked the Rent Controller to fix a fair rent of about Rs. 4 or Rs. 5 per month on the ground that the rent paid by him was very excessive. When that application came up for disposal before the Rent Controller, the landlord did not appear and he was declared *ex parte.* After taking the evidence of the petitioner, the Rent Controller fixed the fair rent at a sum of Rs. 20 per month. The petitioner preferred an appeal to the learned Subordinate Judge of Vijayawada. The learned Subordinate Judge held that as the fair rent was fixed in the previous application, the present application was not maintainable. In case the application was maintainable, he thought that a sum, not more than Rs. 6 per month would be the fair rent. The petitioner filed this writ to quash that order. Mr. Sankara Rao raised before me two points, (1) that the appellate Court had no jurisdiction to admit fresh evidence in the appeal and (2) that the second application was not maintainable. A perusal of the judgment discloses that in the appeal, the respondent filed Exhibits B-1 and B-2. Exhibit B-1 is the order made by the Rent Controller and Exhibit B-2 is the certified copy of the memorandum of appeal against that order. In the affidavit filed before me, the petitioner stated that the appellate Court had no jurisdiction to admit additional evidence at the appellate stage and that no notice of the application was given to him. A perusal of the judgment does not show that either of these two objections were raised before the learned Subordinate Judge; nor does the affidavit state that such objections were raised but the learned Subordinate Judge disallowed them. In the absence of such allegation in the affidavit and in the absence of any such contention having been raised before the learned Subordinate Judge I do not feel I am justified in allowing the petitioner to raise this question for the first time in a writ of *certiorari.*

The next question is whether, when the Rent Controller fixed a fair rent on an application filed by the tenant, the tenant can file another application for the

* C. M. P. No. 7405 of 1951. 3rd September, 1951.

same relief. Section 4 of the Madras Buildings (Lease and Rent Control) Act of 1949 prescribes the procedure for fixing the fair rent. It also narrates the considerations, to which the Rent Controller will have due regard in fixing the fair rent. The Act gives an appeal to the Small Cause Judge against that order. It makes a provision for the increase of rent under certain contingencies, *viz.*, if the landlord made an addition, improvement or alteration to the building. Section 5 also provides an enquiry in case there is a dispute between the landlord and the tenant in respect of the reasonableness of enhancement ; but no provision has been made either for filing a second application for fixing a fair rent or for reducing the rent already fixed by the Rent Controller. The Legislature realising this lacuna in the Act has added sub-section (2) to section 5 which reads :

> " Where after a fair rent of a building has been fixed under this Act there is a decrease or diminution in the accommodation or amenities provided the tenant may claim a reduction in the fair rent as so fixed."

This sub-section obviously cannot apply to an application that was made prior to the introduction of the amendment. Further the present application was not filed on the basis that there was a decrease or diminution in the accommodation or amenities provided by the landlord. This application was filed ignoring the previous application for the same relief, I am therefore of opinion on a fair reading of the provisions of the Act that under the Act a tenant cannot file another application for the same relief for fixing the fair rent. The order of the lower Coutr is correct. This application is therefore dismissed with costs—advocate's fee Rs. 50.

V.S. — *Application dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Paramasivam Pillai .. *Petitioner**

v.

Adilakshmi Ammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 10 (2)—Suit for partition of joint family properties—Stranger claiming some items as belonging to him—If can be added as a party.

The construction of the language of rule 10 (2) of Order 1, Civil Procedure Code, should be as liberal and as wide as possible and should not be restricted merely to the parties involved in the suit but the attempt should be always to make parties all persons who may be necessary in order that there might be a final and complete adjudication of the points involved in the suit.

Where in a suit for partition of joint family property a stranger claims some of the items in dispute in his own absolute right he can be added as a party because the Court has to come to a decision whether those properties would be available or not for partition and for that purpose the stranger would have to be before the Court.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Vellore, dated 7th March, 1951, in I.A. No. 80 of 1951 in O.S. No. 60 of 1949.

K. V. Ramachandra Aiyar for Petitioner.

G. R. Jagadisan for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition against the order of the learned Subordinate Judge, Vellore, impleading a third party who wanted to come on record as the real owner of some of the properties involved in the suit.

The suit was for partition of the joint family properties. Among the suit properties items 9 to 18 are said to be properties owned in his absolute right by the sixth defendant, the son-in-law of the joint family. These properties are claimed by the third party who wanted to be impleaded as a party-defendant as belonging to her. The learned Subordinate Judge held that it was necessary under Order 1, rule 10, Civil Procedure Code, to completely and effectively adjudicate the questions involved in the suit that the third party should be added as a party-defendant. Against that order is the present revision petition.

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* C. R. P. No. 576 of 1951. 13th December, 1951.

Mr. Ramachandra Aiyar appearing for the sixth defendant, who is the petitioner herein, contends that the petitioner-first defendant cannot be a proper or necessary party to the suit. He also points out to the fact that the sixth defendant has himself filed another suit against the respondent herein in another Court for declaring his title to the properties and also for an injunction restraining the first respondent from interfering with his possession. That suit is still pending, though an interim injunction was ordered against the present first respondent. The claim of the first respondent is that she is the real owner of the properties which have been purchased benami in the name of the sixth defendant, and that since she is the real and legal owner of the properties and since the partition suit involves an adjudication as to whether these properties themselves are part of the joint family properties or not, she should be present in Court before any final adjudication takes place affecting her rights to the said properties. Mr. Ramachandra Aiyar has invited my attention, in support of his contention that the first respondent cannot be a necessary or proper party to the suit, to the decisions in *Nilakanta Iyer* v. *Ramanarayana Iyer*[1], *Chidambaram Chettiar* v. *Subramaniam Chettiar*[2] and *Palaniswami Chettiar* v. *Komara Chettiar*[3]. In my view the facts in the cases relied on by the learned counsel for the petitioner are easily distinguishable from the facts that obtain in the present Civil Revision Petition. In this Civil Revision Petition the question involved is as to whether items 9 to 18 do or do not belong to the joint family and whether they are available or not for the purpose of division among the members of the joint family, who are entitled to the same. In order to decide whether these properties do or do not form part of the joint family assets and available for division among the heirs or claimants, whoever they are, it will be necessary to decide as to what exactly is the claim and title to the properties of the joint family. If the properties are claimed by third parties to belong to them, then the question involved in the suit for decision would also comprehend as to whether the properties are really that of the joint family or that they belong to third parties, in which case the claimants, who may be third parties and who claim the properties in their own absolute right, will have to be before Court in order that a decision may be arrived as to whether those properties are or are not to be included in the properties available for partition. In that view, I do not think that the right of this first respondent, who is claiming an absolute title to items 9 to 18 and who is disputing the title of the sixth defendant to claim the said properties on the ground that he is only a benamidar, to be brought on record, could be resisted. It may be that the sixth defendant claims these properties in his own right, but in so far as the decision whether these properties will or will not be available for partition is concerned, the question involved will not be between the parties to the suit alone but also the stranger and other parties. In interpreting Order 1, rule 10 (2), Civil Procedure Code, it has been held that the construction of the language of the section should be as liberal and as wide as possible and should not be restricted merely to the parties involved in the suit but that the attempt should be always to make parties all persons who may be necessary in order that there might be a final and complete adjudication of the points involved in the suit. In that view I think the decisions relied upon by the learned counsel for the first respondent have a bearing on the point involved in this Civil Revision Petition. *Pitchayya* v. *Rattamma*[4], *Ramaswami Chettiar* v. *Vellappa Chettiar*[5] and *Sivarama Pillai* v. *Ganesanath Pillai*[6] certainly make it clear that it will be necessary, to effectively and completely adjudicate and settle all questions involved in the suit, that all parties who claim any title to the properties in suit should be before the Court. Even so the decision of Patanjali Sastri, J., in *Venjiappa* v. *Annamalai*[7] holding that a liberal interpretation should be put upon the language of Order 1, rule 10 (2), Civil Procedure Code, will apply to the facts of the present case. I therefore hold that what the learned Subordinate Judge has done is not in any way an error of law or a wrong exercise of his jurisdiction

1. (1948) 2 M.L.J. 504.
2. (1927) 53 M.L.J. 269.
3. (1949) 2 M.L.J. 568.
4. (1928) 55 M.L.J. 856.
5. (1930) 60 M.L.J. 229.
6. A.I.R. 1935 Mad. 353.
7. (1939) 2 M.L.J. 55.

in having allowed the petition of the respondent and added her as a defendant in the suit. This petition is therefore dismissed and the order of the learned Subordinate Judge is upheld. The petitioner will pay the costs of the first respondent in this Civil Revision Petition.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI AND MR. JUSTICE RAMASWAMI.

Bandi Peda Ramireddi .. *Appellant**

v.

Tagaram Bichalu .. *Respondent.*

Civil Procedure Code (V of 1908), section 11 and Order 21, rule 63—Decision in suit under Order 21, rule 63 to which the claimant and judgment-debtor were parties as co-defendants—If operates as res judicata *in a subsequent suit by the claimant against the representative in interest of the judgment-debtor in regard to the same property.*

The decision in a suit under Order 21, rule 63, Civil Procedure Code, to which the claimant and judgment-debtor were parties as co-defendants, regarding the title to the property in dispute would operate as *res judicata* in a subsequent suit between the claimant and the representative in interest of the judgment-debtor where the title of the same property is in dispute as the three requisite conditions laid down by the Privy Council in *Munni Bibi* v. *Tirloki Nath*, (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.), for the applicability of the rule of *res judicata* as between co-defendants are satisfied.

Narasimhachariar v. *Raghava Padayachi*, (1945) 2 M.L.J. 89 : I.L.R. (1946) Mad. 79 (F.B.), explained.

Second appeal preferred against the decree of the Subordinate Judge's Court, Guntur, in A.S. No. 113 of 1946 preferred against the decree of the District Munsif Court of Gurzala in O.S. No. 175 of 1947.

P. Satyanarayana Raju and *M. B. Rama Sarma* for Appellant.

Ch. Suryanarayana Rao for Respondent.

The case coming on for hearing before Mr. Justice Subba Rao on 13th December, 1951, His Lordship made the following

ORDER OF REFERENCE TO A BENCH.

The question in this second appeal is one of *res judicata*. The relevant facts necessary to appreciate the question may be briefly narrated.

The plaint schedule property originally belonged to one Khasim. His wife Yelli sold the same for a sum of Rs. 100 to the plaintiff, Tagaram Bichalu, under a sale deed, Exhibit P-1, dated 28th May, 1936. One Gogireddi Narasamma as guardian of her minor son Vengayya filed O.S. No. 589 of 1936 on the file of the Court of the District Munsif of Gurzala on promissory notes alleged to have been executed by Yelli, and obtained a decree therein. The aforesaid property was attached before judgment and subsequently a decree was passed in the suit. The plaintiff filed a claim petition, E.A. No. 378 of 1940, basing his title on the sale deed Exhibit P-1 in his favour. The claim petition was allowed. The decree-holder filed O.S. No. 480 of 1941 for setting aside this claim order. To that suit the plaintiff was made the first defendant and Yelli, the second defendant. The second defendant was *ex parte*. The learned District Munsif held on the evidence that there was no necessity to sell the property, that the alleged sale was not supported by consideration and that it was taken fraudulently only to avoid the debt due to the creditor. He also accepted the evidence adduced on the side of the plaintiff that the second defendant continued to be in possession after the alleged sale. In short, the finding of the District Munsif was that the sale deed was executed nominally to defraud the rights of the decree-holder. It appears that, after the said judgment, the decree in O.S. No. 589 of 1936 was discharged by the plaintiff depositing the decree amount in Court on 22nd June, 1945. The plaintiff thereupon filed O.S. No. 175 of 1945 on the file of the Court of the District Munsif of Gurzala for a declaration of his right to the suit property and for an injunction restraining

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* S. A. No. 2510 of 1947. 13th December, 1951.

the defendants from interfering with the plaintiff's possession. The defendant in the present suit claims to have purchased property from Yelli under Exhibit D-4, dated 24th January, 1944. The learned District Munsif held on the evidence that the sale deed, dated 28th May, 1936, executed by Yelli in favour of the plaintiff was a nominal and sham transaction and that the sale in favour of the defendant was true and supported by consideration. In the result, he dismissed the suit. In appeal, the learned Subordinate Judge of Guntur held that Exhibit P-1, the sale deed in favour of the plaintiff, was a *bona fide* transaction supported by consideration. When it was argued that the finding given by the District Munsif in O.S. No. 480 of 1941 would preclude the plaintiff, from re-asserting his title in the present suit on the principle of *res judicata*, the learned Subordinate Judge following the decision in *Narasimhachariar* v. *Raghava Padayachi*[1] held that it was not barred by *res judicata*. The first defendant preferred the above second appeal.

Two questions were raised before me: (1) that the finding of the lower Court that Exhibit P-1 was *bona fide* and supported by consideration was wrong; and (2) that the plaintiff's suit was barred by *res judicata* in view of the decision in O.S. No. 480 of 1941.

The first question is essentially one of fact and it is not permissible to canvass its correctness in a second appeal. I, therefore, accept the finding of the lower Court.

On the second question, the learned counsel for the appellant contended that the finding of the learned District Munsif in O.S. No. 480 of 1941 would operate as *res judicata* between the parties in the present suit as that decision between the defendants was necessary for giving relief to the plaintiff in that suit. As aforesaid, the plaintiff in that suit was the creditor; the first defendant was the present plaintiff and the second defendant was Yelli. The defendant in the present suit is claiming under that Yelli The title of the suit property was in issue between the defendants and that was necessary for giving relief to the creditor, for the creditor would be entitled to execute his decree only if the title of Yelli was established. His suit would be dismissed if the first defendant's title was recognised. The scope of the doctrine of *res judicata* between co-defendants was stated in clear terms by the Judicial Committee in *Munni Bibi* v. *Tirloki Nath*[2]. The facts in that case were: In 1909 the holder of the decree against the appellant's father had sued for a declaration that he was entitled to execute the decree against the house; he joined as defendants the appellant, who did not appear, and a Hindu female who then represented the estate which had since devolved upon the respondents. It was held therein that the decree could be executed against the house. In 1919, the appellant brought the suit which went up to the Privy Council against the respondents claiming possession of the same house. The Judicial Committee held that the decision of the suit in 1909, the title to the house was *res judicata* in favour of the appellant as between her and her co-defendant, and the decree was equally binding upon the respondents as reversionary heirs in the absence of proof that it was obtained by fraud or collusion. The principle was stated as follows at page 111:

> "In such a case, therefore, three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided."

Their Lordships applied the principle of *res judicata*, notwithstanding the fact that one of the defendants was *ex parte* in the prior suit. The facts of the present case are similar to those found in the aforesaid decision. If the conditions laid down by the Judicial Committee are applied to the present case, it follows that the decision in O.S. No. 480 of 1941 would preclude the plaintiff from reagitating the question of title on the principle of *res judicata*.

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1. (1945) 2 M.L.J. 89: I.L.R. (1946) Mad. 79 (F.B.).

2. (1931) 61 M.L.J. 196: L.R. 58 I.A. 158: I.L.R. 53 All. 103 (P.C.).

But it was contended that that judgment had no application to a case where the earlier decision was given in a claim suit, for it was said that the operation of such a decision was only confined to that suit and to the execution proceedings in regard to which that suit was filed. For the said proposition, reliance was placed on the Full Bench decision in *Narasimhachariar* v. *Raghava Padayachi*[1]. In that case the question was whether the order passed dismissing the objection preferred to an attachment under Order 21, rule 58, Civil Procedure Code, no suit having been filed under rule 63, would operate beyond the proceedings in execution of that particular decree. Though there was no claim suit in that case, the learned Judges made observations which would cover a case where such a suit also was filed. At page 88 Leach, C.J., observed :

"Subject to the operation of the doctrine of *res judicata* in any particular case, we hold that an order on a claim petition filed under Order 21, rule 58 or a decree in a suit filed under rule 63 does not extend beyond the execution of the decree which has given rise to those proceedings."

Horwill, J., applied the Full Bench decision to the following facts in *Angathevan* v. *Natarajan Chettiar*[2]. In the case before the learned Judge, a property was brought to sale in execution of an earlier decree. In the execution proceedings the question arose whether the property in dispute was that the first defendant, or whether it was the property in which the third defendant had a share which could be attached and sold in execution of the decree against him. It was held that the third defendant did have a share in the property. The same question arose in execution of another decree. Horwill, J., relying upon the Full Bench decision held that it would not operate as *res judicata*. It is not clear from the facts stated in the judgment whether the previous question was decided in a suit between the parties; but from the observations made by the learned Judges it looks as if such a finding was given in an earlier suit, for, the learned Judge says :

"It is, however, unnecessary to decide whether the ordinary rule of *res judicata* between co-defendants would here apply; because it was held in *Narasimhachariar* v. *Raghava Padayachi*[1] that a decision in a claim suit as well as in the claim petition has no application beyond the execution of the decree which had given rise to those proceedings. It is true that it was not necessary for the Full Bench in *Narasimhachariar* v. *Raghava Padayachi*[1] to consider whether the decision in a claim suit operated as *res judicata* in proceedings in execution of another decree; but the learned Judges clearly felt it necessary to decide that question in order to set at rest the conflicts and uncertainties arising out of the previous decisions. The point was carefully considered and the learned Judges were of opinion that a claim suit, arising as it does out of claim proceedings, has relationship only to the particular decree that was being executed."

Prima facie these observations appear to me rather wide and not warranted by the decision of the Full Bench. The Full Bench did not decide that section 11, Civil Procedure Code, was abrogated by some other principle of law specially applicable to suits filed to set aside claim orders. Indeed, the learned Judges took special care not to entrench upon the principle of *res judicata*, when they stated as follows at page 88 :

"Subject to the operation of doctrine of *res judicata* in any particular case, we hold that an order on a claim petition filed under Order 21, rule 58, or a decree in a suit under rule 63 does not extend beyond the execution of the decree which has given rise to those proceedings."

I am inclined to take the view, that the Full Bench decision is not in the way of my holding that the decision in O.S. No. 480 of 1941 would operate as *res judicata*. But as this question is likely to arise frequently and as the parties appear to be poor and therefore may not be in a position to file a Letters Patent Appeal against my judgment, I think it is proper and advisable that this matter should be referred to a Bench for the purpose of elucidating the scope of the Full Bench decision in *Narasimhachariar* v. *Raghava Padayachi*[1]. I therefore refer this second appeal to a Bench.

(Pursuant to an Order of Reference to the Bench by Subba Rao, J., dated 18th July, 1951, this appeal coming on for hearing the Court delivered the following) Judgment.)

1. (1945) 2 M.L.J. 89 : I.L.R. (1946) Mad. 79 (F.B.).
2. (1947) 2 M.L.J. 189.

The Judgment of the Court was delivered by

Chandra Reddi, J.—The question referred to the Bench is whether a judgment rendered in an earlier suir filed under Order 21, rule 63 to which the claimant, the decree-holder, and judgment-debtors were impleaded as parties could operate as *res judicata* in a subsequent suit between the claimant and a representative in interest of the judgment-debtor. The facts of the case are fully set out in the order of reference; but for an appreciation of the question involved in this case we may briefly state a few facts. The suit property originally belonged to one Khasim. Subsequent to his death his widow Yelli sold the same for a stated consideration of Rs. 100 to the plaintiff under Exhibit P-1, dated 28th May, 1936. A creditor of Yelli filed O.S. No. 589 of 1936 and obtained a decree. Prior to judgment the suit property was attached when the plaintiff intervened with a claim based on Exhibit P-1. This claim was allowed which led to the filing of a suit by the creditor, O.S. No. 480 of 1941 for vacating the claim order. To that suit were impleaded not only the claimant, *i.e.*, the present plaintiff, but the judgment-debtor as well. In the suit it was decided that the property continued to be that of Yelli despite Exhibit P-1 for the reason that Exhibit P-1 was a sham and nominal transaction and was liable to be attacked. Consequent upon this decision Yelli sold the property to the defendant for a stated consideration of Rs. 300, a portion of which was for discharging the decree debt in O.S. No. 589 of 1936. Subsequently, *i.e.*, on 22nd June, 1945, the present plaintiff deposited the decree amount into Court. But as already the decree was discharged, the amount deposited by the present plaintiff was not utilised and he was informed of the same. Consequently the plaintiff has filed this suit for a declaration of his title and for an injunction restraining the defendant from interfering with his possession.

The defendant filed a written statement contending *inter alia* that the finding that the property continued to be that of Yelli was *res judicata*, that Exhibit P-1 was a sham and nominal transaction and would not therefore bind him and hence his sale had a priority over that of the plaintiff.

The trial Court dismissed the suit accepting the defence. On appeal the Subordinate Judge of Guntur reversed the finding of the trial Court and decreed the suit holding that the sale in favour of the plaintiff was a *bona fide* transaction. The Subordinate Judge negatived the contention urged on behalf of the defendant in support of the judgment that the decision in O.S. No. 480 of 1941 operated as *res judicata*. In support of its view that it did not operate as *res judicata* the lower appellate Court relied on a ruling of a Full Bench of this Court in *Narasimhachariar* v. *Raghava Padayachi*[1]. The defendant who is aggrieved by the judgment and decree of the lower appellate Court has preferred this second appeal.

When the matter came on for hearing before Subba Rao, J., after deciding that the finding of the lower appellate Court that Exhibit P-1 was not a sham and nominal transaction but was a *bona fide* one was binding upon the second appellate Court, he referred the matter to a Bench as he was of opinion that the question stated above was of considerable importance and in view of a ruling of Horwill, J., in *Angathevan* v. *Natarajan Chettiar*[2]. The learned Judge was inclined to disagree with Horwill, J., and take the view that the decision in the earlier suit would operate as *res judicata* in the present suit. However he referred the matter to a Bench as he thought that an authoritative ruling should be given on this question. Therefore the point for consideration in this second appeal is whether the present suit is affected by the doctrine of *res judicata* in view of the finding in O.S. No. 480 of 1941 that the transaction evidenced by Exhibit P-1 was not a genuine one.

The principle of *res judicata* as applicable to co-defendants is laid down by the Judicial Committee of the Privy Council tersely in *Munni Bibi* v. *Tirloki Nath*[3]. In that case the property, a house in Agra which formed the subject-matter of

1. (1945) 2 M.L.J. 89 : I.L.R. (1946) Mad. 79 (F.B.).
2. (1947) 2 M.L.J. 189.
3. (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.).

decision by the Judicial Committee, originally belonged to one Joti Prasad, his wife being one Mukhandi. They had two sons by name Bishamber Nath and Amar Nath and two daughters, Ratan Dei and Kashi. Prior to his death Joti gifted this property to his wife; but this was not accompanied by possession. In the partition between the two sons of Joti after his death, they treated the property in dispute as a partible asset ignoring the gift deed in favour of their mother and the property was allotted to the share of Amar Nath. The latter who was very much involved in debts subjected all his properties including the house in question to a mortgage and on the foot of that mortgage a decree was obtained. There were various proceedings in respect of this property and it is not necessary to allude to all of them. Suffice it to say that by 1908 the property happened to be in the possession of a donee from one of the daughters of Mukhandi, the root of title being the gift deed in favour of Mukhandi. In or about the year 1908 an assignee of a decree against Amar Nath proceeded to attach the property as belonging to Amar Nath. The person in possession of the property objected to the attachment and the objection was allowed. Thereupon, the assignee decree-holder instituted a suit for setting aside the summary order and for a declaration of his right to proceed against the property in question in execution of his decree. To this suit were added as parties not only the heirs of Mukhandi but also the daughter of Amar Nath, Munni Bibi, both Amar Nath and his widow having been dead by that time. The claim of the decree-holder to proceed against the properties was upheld and the suit was decreed. But the property was not allowed to be sold in execution as one of the maternal grandsons of Mukhandi discharged the decree. Subsequently Munni Bibi, the daughter of Amar Nath, instituted a suit for a declaration that that was the property of Amar Nath and for recovery thereof. One of the questions that arose for consideration was whether the decision in the earlier suit that the property was that of Amar Nath and that the heirs of Mukhandi had no title thereto operated as *res judicata* or not. Their Lordships decided that it operated as *res judicata*. For judging whether a decision was *res judicata* as between co-defendants or not their Lordships propounded three tests: (1) There must be a conflict of interest between the defendants concerned, (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and (3) the question between the defendants must have been finally decided. As their Lordships thought that that case satisfied all the three tests requisite for the decision that it operated as *res judicata*, they held that the judgment in the earlier suit operated as *res judicata*. In coming to the conclusion that it operated as *res judicata* their Lordships relied upon the dictum laid down by Wigram, V.C., in *Cottingham* v. *Earl of Shrewsbury*[1]:

"If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound, but if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

In our opinion the present matter comes within the scope of the ruling in *Munni Bibi* v. *Tirloki Nath*[2].

As in the lower appellate Court, here Mr. Suryanarayana Rao, learned counsel for the respondent, relied on a decision of the Full Bench in *Narasimhachariar* v. *Raghava Padayachi*[3]. We shall now examine that ruling to see if it helps the respondents in any way. There in a suit on a mortgage, a personal decree was given against the mortgagor and in execution of the personal decree some properties were attached as belonging to the mortgagor. The mortgagor's brothers filed a petition claiming the properties as their own. The claim was allowed, but as the decree was otherwise satisfied, the decree-holder did not take any steps to vacate the summary order. Subsequently in execution of another mortgage decree obtained against the same

1. (1843) 67 E.R. 530 at 535.
2. (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.).
3. (1945) 2 M.L.J. 89 : I.L.R. (1946) Mad. 79 (F.B.).

judgment-debtor, the same properties happened to be attached as properties belonging to him. His brothers again preferred a claim to these properties. The question arose whether the order in the claim proceedings that the property did not belong to the judgment-debtor operated as *res judicata*. The Full Bench decided that the rule of *res judicata* has no application to that case for the reason that an order under Order 21, rule 58 was conclusive only in respect of execution of a decree which has given rise to the proceedings. The learned Judges thought that the conclusiveness attached only to the rights worked out in pursuance of attachment in execution of the decree and did not extend beyond the execution of the decree giving rise to those proceedings. In that view they overruled the decision of a Bench of this Court in *Singariah Chetty* v. *Chinnabbi*[1]. Referring to *Kumara Goundan* v. *Thevaraya Reddi*[2], which doubted the correctness of *Singariah Chetty* v. *Chinnabbi*[1], the learned Chief Justice who delivered the judgment on behalf of the Full Bench observed as follows :

> "The opinion expressed by Ramesam, J., in *Kumara Goundan* v. *Thevaraya Reddi*[2], that the filing of a suit under Order 21, rule 63 makes all the difference cannot be accepted without qualification. It is conclusive between the parties to the suit or their representatives so far as the execution of the particular decree is concerned; but, where the property is sold in execution proceedings arising out of an entirely different decree, the claimant will not be precluded from setting up his title as against a stranger purchaser."

It is these observations that have given rise to the contention that a decision given in a suit under Order 21, rule 63 would not operate as *res judicata* in a subsequent suit based on an entirely different cause of action and which also formed the basis of the ruling in *Angathevan* v. *Natarajan Chetti*[3]. In that case a decree-holder attached certain property as belonging to the judgment-debtor. The property attached was claimed by a third party as belonging to him exclusively which resulted in the claim being allowed. Thereupon the decree-holder seems to have instituted a suit for setting aside the summary order. In the suit a decision was given that the judgment-debtor has a share in the property, it being the property of the joint family and so liable to be sold in execution of the decree. In a subsequent suit the same question arose in execution of another decree. When the matter came up in second appeal to this Court Horwill, J., relying on *Narasimhachariar* v. *Raghava Padayachi*[4] held that it did not operate as *res judicata*. The learned Judge expressed the opinion that that case was governed by *Narasimhachariar* v. *Raghava Padayachi*[4] though in *Narasimhachariar* v. *Raghava Padayachi*[4] there was no suit under Order 21, rule 63 to vacate the summary order. He remarked :

> "It is true that it was not necessary for the Full Bench in *Narasimhachariar* v. *Raghava Padayachi*[4] to consider whether the decision in a claim suit operated as *res judicata* in proceedings in execution of another decree ; but the learned Judges clearly felt it necessary to decide that question in order to set at rest the conflicts and uncertainties arising out of previous decisions. The point was carefully considered, and the learned Judges were of opinion that a claim suit, arising as it does out of claim proceedings, has relationship only to the particular decree that was being executed."

We do not think that the observations in *Narasimhachariar* v. *Raghava Padayachi*[4], lend themselves to the interpretation that in no case will the decision given in a suit under Order 21, rule 63 with reference to title to property would operate as *res judicata* in a subsequent suit. That this is so is clear from the observations of the learned Judges at page 88 of the same report :

> "Subject to the operation of the doctrine of *res judicata* in any particular case, we hold that an order on a claim petition filed under Order 21, rule 58, or a decree in a suit filed under rule 63 does not extend beyond the execution of the decree which has given rise to those proceedings."

It is clear from this statement of law that the learned Judges did not intend to lay down that in no case would the doctrine of *res judicata* apply to a decision given under Order 21, rule 63. The earlier observations must be understood in the light of this later statement of law contained in the same judgment and we may take it that the former related to a case where the rule of *res judicata* would have

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1. (1920) 40 M.L.J. 7 : I.L.R. 44 Mad. 268.
2. (1924) 48 M.L.J. 616.
3. (1947) 2 M.L.J. 189.
4. (1945) 2 M.L.J. 89 : I.L.R. (1946) Mad. 79 (F.B.).

no application, as for instance, in a suit instituted by the claimant or by the decree-holder, the judgment-debtor was not made a party and the right was only between the claimant and the decree-holder. Viewed in that light we think there is no conflict between the two statements of law contained in the same judgment. We should not assume that the learned Judges laid down a conflicting dicta.

In these circumstances in our judgment the decision in *Narasimhachariar* v. *Raghava Padayachi*[1] is not in any way conflicting with the ruling in *Munni Bibi* v. *Tirloki Nath*[2] and does not carry the respondent very far. In our opinion the judgment given in the earlier suit under Order 21, rule 63 would operate as *res judicata* as between co-defendants provided the three requisite conditions for the applicability of the rule of *res judicata* mentioned above are satisfied. In these circumstances we answer the reference in the affirmative and direct the dismissal of the suit. This is a fit case in which we should direct each party to bear his own costs throughout.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

The Indian Metal and Metallurgical Corporation .. *Petitioner**

v.

The Industrial Tribunal, Madras and another .. *Respondents.*

Constitution of India (1950), *Article* 19 (1) (g)—*Industrial Disputes Act* (*XIV of* 1947)—*Right of employer to close down his business—Jurisdiction of Tribunal to decide whether an employer is entitled to close down—Jurisdiction of Government to refer the question for decision of the Tribunal.*

The right conferred by Article 19 (1) (*g*) to carry on any business is not absolute. Undeniably the State has got the right to regulate any business, and it is not confined to 'public utility' business only. The freedom of contract can to a certain extent be curtailed if such curtailment is reasonable and in the general interests of the public. But if a citizen has got a right to carry on business, it follows he must be at liberty not to carry it on if he so chooses.

The Industrial Tribunal has got the jurisdiction to adjudicate on the question whether a particular lock-out was justified or not, but it cannot decide the question whether an employer can close down his business temporarily for an indefinite period or permanently.

The Government by their G.O. referred to the Industrial Tribunal an industrial dispute alleged to have arisen between the workers and the management of the petitioner (a factory) and one of the matters said to be in dispute was whether the closure of the factory from a particular date was justified. The Industrial Tribunal found that none of the reasons given by the management would have really justified the closing down of the factory, and directed the petitioner to carry on the business. On a petition to quash the order and award of the Tribunal,

Held, (*i*) the award in so far as it directs the petitioner to continue to carry on the business is void as it is inconsistent with the Constitution.

(*ii*) Closing down a business even temporarily is distinct and different from lock-out and an Industrial Tribunal cannot decide the question whether an employer can close down his business. That question is completely outside the scope of Industrial Disputes Act and the reference by the Government was without jurisdiction and consequently the award was bad.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ calling for the records of the proceedings in I. D. No. 5 of 1951, dated 25th June, 1951, before the Industrial Tribunal, Madras, published at page 21 of the *Fort St. George Gazette*, Madras, Supplement to Part I, dated 17th July, 1951.

K. V. Venkatasubramaniam and *R. Vaidyanathan* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) instructed by *V. P. Sarathy* for the State Counsel (*John and Row*) and *K. Bashyam* for *Messrs. Arunachalam and Jagannatha Das* for Respondents.

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1. (1945) 2 M.L.J. 89 : I.L.R. (1946) Mad. 79 (F.B.).
2. (1931) 61 M.L.J. 196 : L.R. 58 I.A. 158 : I.L.R. 53 All. 103 (P.C.).

*Writ Petition No. 260 of 1951. 3rd November, 1951.

The Court made the following

ORDER.—This is an application made under Article 226 of the Constitution to issue such directions, writs or orders as may be deemed appropriate to the case and in particular to call for the records of the proceedings in Industrial Dispute No. 5 of 1951 before the Industrial Tribunal, Madras, and to quash the award passed therein and the reference on which it is based and pass such further or other orders as may be deemed fit. The petitioner is the Indian Metal and Metallurgical Corporation, a partnership firm and the affidavit in support of the application has been filed by one of its partners. The firm carries on *inter alia* the business of manufacture of brass, copper and aluminium sheets at Mettur. It has also a factory at Tondiarpet in Madras where brass and stainless steel utensils are manufactured. On 3rd February, 1951, the management put up a notice as follows :—

"The factory at Mettur Dam is closed and hence the raw materials for this factory are not coming. Owing to the serious developments in the foreign countries, the present condition in the local market is far unfavourable to work. Further still many machineries are to be installed for economising production. So we are forced to suspend the work for an indefinite period till we are able to complete the erection and trial to get the sheets (raw materials) from our own plant. Therefore the work will be suspended from Saturday, 17th instant after the 14th day from to-day."

In pursuance of the said notice a further notice was put up on 16th February, 1951, that payment of the wages due to the workmen would be made between 17th February and 19th February, and subsequently the time for disbursement was further extended, but most of the workers did not turn up to receive their wages. On 18th April, 1951, the Government by their Order MS. 1762 referred for adjudication to the Industrial Tribunal at Madras an industrial dispute alleged to have arisen between the workers and the management of the petitioner Corporation. In the annexure to the order were set out the four matters in dispute, namely :

1. Whether the closure of the factory from 17th February, 1951, is justified ;

2. Whether any compensation is to be paid to the discharged workers ;

3. Whether the discharged workers have preferential claim for re-employment at the time of the reopening of the factory ; and

4. Whether the discharge of four workers, namely, P. A. Dilly, turner ; T.D. Balakrishnan, turner ; A. Raju, fitter ; and G. Vasudevan, fitter, is justified.

On notice from the Industrial Tribunal to the petitioner calling upon the petitioner to present its statement after receipt of the workers' statement, the petitioner filed a counter-affidavit demurring to the competency and validity of the order of reference, the jurisdiction of the Tribunal and canvassing the merits of the case. The management also sought to impeach the order of reference made by the Government by an application made to this Court, but this Court felt that there was not sufficient material for deciding the question and also expressed the view that the petitioner may advance its pleas before the Tribunal. The matter eventually came up before the Tribunal and the Tribunal after an inquiry made an award on 25th June, 1951, directing the payment of all arrears of pay, etc., from 17th February, 1951, till they were taken back to work to a moiety of the personnel in the different branches, the selection being determined in the strict seniority, the reinstatement of the remaining personnel within a period of four months after the publication of the award and also directing the reinstatement of A. Raju (fitter) as from 7th February, 1951. The Industrial Tribunal went into the question whether the management was justified in closing the factory. He dealt with the several reasons put forward by the management for the closure. The first reason put forward was that necessary raw materials were not available for continuing the work of the factory. The Industrial Tribunal found that though it was difficult to get steel during the period, it was not impossible to do so and that in any case, there was sufficient steel available with the company to carry on the manufacture in steel for some appreciable period. Even if there was a comparable shortage of brass in the local factory, the shortage could have been easily overcome through purchase in the open market. The second reason was that it was necessary to

instal various new machines. In the opinion of the Industrial Tribunal, the installation of new machines would hardly involve the closure of a factory. The Tribunal also rejected the third reason that the management was justified in closing the factory and there could be no complaint by the workers as they were all temporary hands. The last reason was that the factory was working at a loss, Though certain extracts from the accounts were filed before the Tribunal to show that the factory was working at a loss, the Tribunal held that *prima facie* the local factory should have earned a considerable profit more particularly since the Mettur factory was said to have resulted in heavy loss. He summed up his finding thus:

"It is clear, therefore, that none of the reasons given by the management would have really justified the closing down of the factory, though the apparent shortage of brass to some extent and the necessity for the installation of new machinery may have justified the actual factory work being reduced to some extent."

The Industrial Tribunal did not go into the question whether the petitioner had an inherent and fundamental right to close down the factory and it is this aspect that has been most strongly pressed before us. The petitioner submits that the management could not in law be compelled to continue the business, if it did not desire to continue it and that the right of an employer to close his factory whenever he desires to do so subject to the legal rights of the workmen to wages and other benefits is part of the fundamental right of property guaranteed by the Constitution. The employer cannot be forced to continue to run his factory; nor can he be compelled to carry on his business to enable the workers to earn wages, so the argument ran.

The application was strongly opposed by the General Industrial Workers Union representing the workers of the petitioner corporation. In the affidavit filed by the Secretary of the Union, it was alleged that the factory was closed down with the intention of putting down the workers and curbing their activities in forming an union of workers. They met the plea that the management could not be compelled to continue the business with the assertion that the management was wrong in thinking that in a Democratic Republic State the management could throw out its workers at its whims and fancies and close down the factory to suit its convenience and pleasure. A preliminary objection was also taken to the maintainability of the application, because there was an appeal against the award to the Industrial Appellate Tribunal.

There is no substance in the preliminary objection. The appeal will obviously be confined to the merits of the case. We doubt if the Appellate Tribunal has the power to declare the reference by the Government to be invalid or to hold that Industrial Disputes Act itself is invalid or otherwise. In any event the question which has been raised before us, namely, whether the owner of a business can be compelled to continue it against his will could not have been decided by the Appellate Tribunal.

Mr. Venkatasubramania Aiyar, learned counsel for the petitioner, relied on principles of American Constitutional law bearing on similar questions. The leading decision of the Supreme Court is that in *Wolff Packing Co.* v. *Court of Industrial Relations*[1]. The company was a corporation in the State of Kansas engaged in slaughtering hogs and cattle and preparing the meat for sale and shipment. It had about 300 employees. More than half of its products were packed and sold beyond the State. The president and secretary of the Meat Cutters Union filed a complaint with the Industrial Court, established under the Court of Industrial Relations Act, against the company respecting the wages its employees were receiving. The Court made an order directing an increase of wages. The company refused to comply with the order and the Industrial Court then instituted mandamus proceedings in the Supreme Court of the State to compel compliance. That Court appointed a Commissioner who made a report that the company had lost heavily during the previous year and that there was no sufficient evidence of an emergency or danger

1. 262 U.S. 522: 67 L.E. 1103.

to the public from the controversy to justify action by the Industrial Court. The State Supreme Court overruled this report and held that the evidence showed a sufficient emergency and upheld the order of the Industrial Court and the validity of the Act. The Supreme Court of the United States reversed the judgment of the State Supreme Court. The opinion of the Court was delivered by Chief Justice Taft. He first pointed out that the necessary postulate of the Industrial Court Act was that the State representing the people was so much interested in their peace, health and comfort that it could compel those engaged in the manufacture of necessities like food and clothing and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the State, if they cannot agree. The Act therefore in essence curtailed the right of the employer on the one hand and of the employee on the other to contract about his affairs and this was part of the liberty of the individual protected by the guarantee of the due process clause of the Fourteenth Amendment. This abridgment of the liberty of the individual could only be justified by exceptional circumstances. The question was whether there existed such circumstances. The argument on behalf of the State ran on the following two lines : (1) the Act declared that the preparation of human food was affected by public interest and therefore the Legislature had power to regulate the business, (2) the power to regulate a business affected with a public interest extended to fixing wages and terms of employment to secure continuity of operation. In discussing the question, the learned Chief Justice divided businesses said to be clothed with a public interest justifying some public regulation into three classes as follows :—

"1. Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

2. Certain occupations, regarded as exceptional, the public interest attaching to which, recognised from earliest times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills.

3. Businesses which, though not public at their inception may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner, by devoting his business to the public use, in effect grants the public an interest in that use, and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner, and to be entitled to protection accordingly."

It is not necessary to refer at length to the learned Chief Justice's discussion as to when a business could be said to be clothed with a public interest, as it was common ground before us that the business with which we are concerned in this case is not one such. But even in respect of such a business, he points out that

"to say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner."

Dealing with businesses which fall under the third head the learned Judge observes :

"The ordinary producer, manufacturer or shop-keeper may sell or not sell as he likes."

He cites with approval the following passage from the opinion in *Munn* v. *Illinois*[1] :

"When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use ; but so long as he maintains the use, he must submit to the control"

and says :

"The power of a Legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct, and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that, if operation is impossible without continuous loss (*Brooks Scanlon Co.* v. *Railroad Commission*[2]), it may give up its franchise and enterprise ;

1. 94 U.S. 113 : 24 L.E. 77. 2. 251 U.S. 396 : 64 L.E. 323.

but, short of this, it must continue. Not so the owner when, by mere changed conditions, his business becomes clothed with a public interest. He may stop at will, whether the business be losing or profitable."

In the result the Court held that the Industrial Court Act in so far as it permits the fixing of wages in the plaintiff's company, was in conflict with the Fourteenth Amendment, as it deprived it of its property and liberty of contract without due process of law.

In *Dorchy* v. *Kansas*[1], the principle of the decision in the *Wolff Packing Co. case*[2] was applied to the coal mines in the same State. It was held that the system of compulsory arbitration violated the Federal Constitution. In the second *Wolff Packing Co. case*[3], the Supreme Court held that the Industrial Relations Act was unconstitutional in so far as it authorised an administrative board to fix hours of labour in industries relating to food, clothing and fuel as it was merely a system of compulsory arbitration for the settlement of labour disputes. The judgment in this case affirmed once again the principles laid down in the first *Wolff Packing Co. case*[2]. It is sufficient to extract the following passage from the concluding part of the opinion in this case :

"The system of compulsory arbitration which the Act establishes is intended to compel, and if sustained will compel, the owner and employees to continue the business on terms which are not of their making. It will constrain them not merely to respect the terms if they continue the business, but will constrain them to continue the business on those terms. True, the terms have some qualifications, but as shown in the prior decision the qualifications are rather illusory and do not subtract much from the duty imposed. Such a system infringes the liberty of contract and rights of property guaranteed by the due process of law clause of the 14th Amendment."

We agree with Mr. Venkatasubramania Aiyar, the learned counsel for the petitioner, that the later decision in *Nebbia* v. *New York*[4], has not affected the correctness of the decisions in the *Wolff Packing Co. case*[2-3] which are cited without disapproval in the course of the judgment in that case. But the question is how far the principles laid down in these American decisions can be applied to the present case which must be decided on the provisions of our Constitution as interpreted by us. The relevant provision is Article 19 (1) (*g*) which says that every citizen has a right to practise any profession or to carry on any occupation, trade or business. Clause (6) of the same Article confers power on the State to impose restrictions on this right. It would appear that so far as such restrictions are concerned, the only question to be determined under our Constitution is whether the restrictions are reasonable and in the interests of the general public. There is the further fact that our Constitution, unlike the Constitution of the United States, does not declare or recognise the freedom of contract. We therefore very much doubt if we can apply wholesale the American decisions to cases arising under our Constitution. For instance we find it difficult to hold that a legislation fixing minimum hours of work or regulating the wages is unconstitutional in this country.

Obviously the right conferred by Article 19 (1) (*g*) to carry on any business is not absolute. Undeniably, the State has got the right to regulate any business, and this right need not be confined to what we may call "public utility businesses" only. Businesses which are likely to prove dangerous to public safety or public health may be subjected to severe restrictive regulations, as for instance, the manufacture and sale of ammunition. Inasmuch as the general public would be interested even in a private business in the sense that the general public is the ultimate object of service and supply, the State may impose conditions in the interests of the general public subject to which only any business could be carried on. We think it is equally clear that in the interests of a large section of the public, namely, industrial workers, Legislature may provide, whether directly or indirectly through administrative bodies for the fixing of reasonable and adequate wages and generally regulate the conditions of service. The Industrial Disputes Act is evidently such a piece of legislation. We fail to see how the Act as such and *in toto* can be held

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1. 264 U.S. 286 : 68 L.E. 685.
2. 262 U.S. 522 : 67 L.E. 1103.
3. 267 U.S. 552: 69 L.E. 785.
4. 291 U.S. 502 : 78 L.E. 940.

to be void as being inconsistent with the Constitution. In the absence of a guarantee of the freedom of contract, we do not think it unreasonable to presume that the freedom of contract can, to a certain extent, be curtailed if such curtailment is reasonable and in the general interests of the general public. This may be necessary in regard to the relationship between the employer and employees in a large industrial concern, where it is clear that the contracting parties, namely, the employer and the employee do not stand on the same level.

In this case, however, we are concerned with a much narrower question, namely, whether an award made by the Industrial Tribunal appointed under the Industrial Disputes Act and published by the Government in accordance with the provisions of the Act can direct the management of an industry to continue to carry on any business against their will. If a citizen has got a right to carry on business, we think it follows that, he must be at liberty not to carry it on if he so chooses. A person can no more be compelled to carry on a business than a person can be compelled to acquire or hold property. A person with money can certainly dispose of it as he pleases. He may invest it or part of it in running a business, but he need not. He can invest it in other ways or he may keep the money idle. Mr. Bhashyam was really unable to convince us how any one can be compelled to carry on a business against his will and yet be said to enjoy a right to carry on a business.

We do not wish to say anything regarding industries which come within the definition of "public utility services" in section 2 (*n*) of the Industrial Disputes Act. From the constitutional standpoint of view, it is arguable if a mere declaration by the Legislature that a particular business or occupation is a public utility service would be conclusive on the question whether it can in law be brought under that category. We are also not dealing with businesses or industries which have been commenced with the special help rendered to them by the Government and which have received special benefit from the Government. It may be that in such cases the private owner may be compelled to continue the business unless he is willing to surrender the rights and privileges conferred on him by the Government and compensates the Government for the loss sustained by them by a stoppage of the business. We are here concerned with a business which is admittedly not a public utility service and which has not received any special consideration from the Government. Even assuming that indirectly the public have a sort of interest in this business, such interest would last only so long as a business is continued. On this point we follow with great respect the observations that fell from Chief Justice Taft in the first *Wolff Packing Company case*[1], Mr. Bhashyam who appeared for the workers was unable to support his contention by any authority. He relied more on the general features of the economic system which throws the employee at the mercy of the employer. He referred to certain observations in *National Labour Relations Board* v. *Jones and Laughlin Steel Corporation*[2]. But the decision in that case has not even a remote bearing on the facts of the case before us. What Chief Justice Hughes says about the position of employees is unexceptionable. With great respect we agree with him—

> "that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give labourers opportunity to deal on an equality with their employer."

This is true, but it does not follow, because several employees may be thrown out of employment, the employer can be compelled to carry on a business. We also agree with Mr. Bhashyam that the State has an undoubted power to regulate the carrying on of a business or the running of an industry; but regulation is one thing and compulsion to carry on a business is quite another. Logically, according to the argument of Mr. Bhashyam there is nothing to prevent the State compelling any person with money to commence a new business to provide employment for several unemployed persons.

1. 262 U.S. 522: 67 L.E. 1103. 2. 301 U.S. 1: 81 L.E. 893.

We hold therefore that the award in so far as it directs the petitioner to continue to carry on the business is void as it is inconsistent with the Constitution.

In this view, it is not necessary to embark on an enquiry as to whether the petitioner had proper grounds for deciding to close down the factory temporarily. We do not think it is open to us to canvass the grounds which prompted the owner to discontinue the business. The ground may be actual loss or apprehended loss. It may equally be disinclination to run the risk of running the business. Mr. Bhashyam asserted that even if an employer *bona fide* decides to close down the business, because he does not want to continue it, he cannot be permitted to do so. We cannot agree with him, and his contention is not supported by any authority.

Apart from this constitutional aspect, we are also inclined to hold that the question whether an employer could or could not close down a business permanently or temporarily falls outside the purview of the Industrial Disputes Act. No doubt the term "Industrial dispute" has been very widely defined in section 2 (*k*) of the Act; but it appears to be clear to us that the definition of an "industrial dispute" and the Act taken as a whole assume the continued existence of an industry. The Act does deal with lock-outs and strikes, but Mr. Bhashyam conceded that there has been no lock-out in this case and he made the concession rightly. In the case of a lock-out, the industry as such is not closed down even temporarily; only particular workers are refused work. Closing down a business even temporarily is distinct and different from a lock-out, just as the dincontinuance from service of an employee is not the same thing as a strike. While therefore the Industrial Tribunal has got the jurisdiction to adjudicate on the question whether particular lock-out was justified or not, it cannot decide the question whether an employer can close down his business temporarily for an indefinite period or permanently. There cannot be dispute strictly so-called between an employer and an employee as regards the continuance, of the business itself. This question was completely outside the Industrial Disputes Act, and we hold that the reference by the Government was without jurisdiction and consequently the award was bad.

The application must be allowed and the award in so far as it directs the petitioner to continue to carry on the business and says that he had no right to close it must be quashed. There will be no order as to costs.

We certify that the case involves a substantial question of law as to the interpretation of the Constitution and in particular Article 19 (1) (*g*).

V.P.S. ——— *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE RAMASWAMI GOUNDER.

M. G. Narayanaswami Naidu and another .. *Appellants**

v.

M. Balasundaram Naidu and others .. *Respondents.*

Trust—Private trust—Right of members of founder's family to seek redress in a Civil Court where the trustee mismanages—Scheme suit—Maintainability.

Even in the case of private trusts it is open to any member of the founder's family where his rights are impugned to seek redress in Courts of law. The public or beneficiaries have no manner of right at all. The Court cannot refuse to frame a scheme in the matter of a private trust. So far as the members of the family are concerned who are interested in the trust, if the trustee for the time being mismanages or acts in breach of trust, it is a civil right which is infringed and under section 9 of the Civil Procedure Code they are entitled to seek redress in Court for the purpose of remedying the mischief.

Appeals preferred against the decrees of the Court of the Subordinate Judge, Madurai, in O.S. No. 1 of 1946, dated 22nd February, 1947 and 5th July, 1947, respectively.

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* Appeals Nos. 319 of 1947 and 799 of 1948. 28th September, 1951.

P. S. Raghavarama Sastri and *M. N. Narayanaswami* for Appellants.

E. Vinayaka Rao for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—Both these appeals arise out of the decrees of the Sub-Court, Madura, in O.S. No.1 of 1946, wherein a preliminary decree for the framing of a scheme, after removing the appellant from the office of trustee was passed on 22nd February, 1947 and A.S. No. 319 of 1947 is preferred against that decree. Against the scheme actually framed, A.S. No. 799 of 1948 has been filed and the two appeals were heard together.

One Narayanaswami Naidu who died long ago created a disposition of property for the object of conducting a mandagapadi in the town of Madurai and the person who conducts it now is the first defendant, who is Narayanaswami Naidu's grandson, *i.e.*, the son of Govindaswami Naidu, one of the sons of Narayanaswami Naidu by his second wife. The plaintiff in the lower Court is another grandson of Narayanaswami Naidu being the son of Venkataswami Naidu, the uncle of the first defendant. The other defendants are the descendants of Venkataswami Naidu. It is not necessary to set out in detail the relationship between the parties as the same is admitted and is found in the genealogical tree appended as Schedule B to the scheme. The history of this trust is set out in the judgment of this Court in A.S. No. 406 of 1943.

During the procession in the month of Chitrai of the Kalla Alagar Deity from the Alagar hills to the Vaigai river, there are mandagapadis conducted by various pious citizens on the route. Similarly during the month of Vaikasi the Koodal Alagar Deity is also taken in procession, and that procession also stops at various mandapams on the route where poojas are offered. These are generally known as mandagapadis. The plaintiff's case is that Narayanaswami Naidu created a trust of certain properties for the purpose of offering pooja when the aforesaid processions take place and the first defendant, as the present trustee of those properties, is guilty of various acts of misappropriation, malfeasance and breach of trust. It was on that footing that the suit was filed with the object of removing the first defendant from the trusteeship and for the framing of a scheme. The recitals in the plaint as to how the trust came into existence are as follows.

Narayanaswami Naidu, the original ancestor, being a gentleman of considerable status and of pious disposition, desired to provide a mandagapadi to receive God Sri Kalla Alagar during the Chitrai festival and Koodal Alagar during the Vaikasi festival every year. With that object he put up a stone mandapam now in existence in item 1 of the plaint schedule and constructed two shops shown as item 2 in the plaint schedule. He endowed these items for the purpose of the mandagapadi aforesaid and was conducting the mandagapadi charity in the mandapam in item 1 from out of the income of items 1 and 2. The suit properties are therefore trust properties and are inalienable. They are a private family trust in which the members of the family of the founder alone are interested and have the right of management, control, supervision, etc. That this is a private trust has been confirmed by various decisions the last of which was in A.S. No. 406 of 1943 by this Court. The plaint proceeded to state that the first defendant has been deliberately mismanaging the trust and is guilty of misconduct and gross breach of trust.

The written statement of the first defendant while admitting that mandagapadi has been carried on, denied that the properties were acquired or constructed with a view to dedicate them to any trust and that they have not been dedicated to any private trust by Narayanaswami Naidu at all and that there has been no such dedication of the entire income of the properties for the conduct of the plaint mentioned mandagapadi. The first defendant admitted that there was private worship in the mandapam in item 1 of Gods Kalla Alagar and Koodal Alagar on the two days in the year during the Chitrai festival and Vaikasi festival but stated that this private worship did not last for more than three minutes and that

the amount necessary did not exceed Rs. 20 a year whereas the income from the properties would be Rs. 500 per annum. Such being the case the defence was that there was no dedication whatever. The learned trial Judge found that the defence cannot be accepted and that there is a trust created for the purpose of performing the mandagapadis. The learned Judge also found that the first defendant was guilty of breach of trust and removed him from office.

The question as to whether a private trust was created does not admit of any serious doubt. The previous litigations regarding these properties have ended in decisions that the trust is a private trust. In Exhibit P-6, a judgment in S.A. No. 281 of 1896, Subramania Ayyar and Benson, JJ., found that the property was trust property. But the more recent decision is contained, as we have stated, in A.S. No. 406 of 1943. That arose out of O.S. No. 6 of 1942 on the file of the District Court of Madurai. The Hindu Religious Endowments Board, on the footing that the trust in question was a public trust, framed a scheme for the management of the trust, whereupon the first defendant filed O.S. No. 6 of 1942 on the file of the District Court of Madura for setting aside the scheme on the ground that the properties dedicated do not constitute an endowment of a public trust. The District Judge dismissed the suit considering that the offerings made to a deity when installed in the mandapam in item 1 was a service connected with the temple and considered that the mandagapadi was an integral part of the temple itself as it was performed in the course of the festival. The High Court (Leach, C.J. and Clark, J.) after considering the evidence in the case as well as the decisions arrived at in previous litigations, came to the conclusion that the endowment in question is an endowment for a private trust and the public has no connection with it whatever. Though the first defendant alone among the present parties, was involved in the litigation and the plaintiff was not a party thereto, it should be deemed as if the first defendant represented the descendants of the founder when he contested the Endowments Board and wanted a decision that the trust was a private trust. In any event according to the decision in *Secretary of State* v. *Syed Ahmed Badsha*[1], this judgment has abundant evidentiary value and we have to pay attention to it. It is surprising that after this decision the first defendant should have thought of contesting the character of the trust at all. Though there is no deed of trust executed by Narayanaswami Naidu it is clear from Exhibit P-1, a power-of-attorney executed by him on 3rd May, 1857, in favour of his son Alagiriswami by his senior wife, that his intention was to create a trust. That document clearly states that he has constructed the mandapam and chatram on the northern side of the Vaigai river and has built and set apart two substantial terraced shops existing in Madurai east markets for the purpose of charity. It further states that Alagiriswami, from and out of the rent amount received from the two shops and from the rent amount received from the substantial terraced house and site lying on the west of the tiled house to the east of his house, and also from out of the income got from the garden on the west of the mandapam, should manage the mandagapadi vagaira charity throughout the year receiving honours, etc. It is also stated that he should keep the necessary utensils and other materials for the purpose of the pooja. The last sentence in Exhibit P-1 is clearly to the effect that a trust has been created and it is as follows :

> "After I have arranged that the said charity should be conducted in common, since I think that the charity might shortly be endangered and since I believe that you being my eldest son, and honest, would, in accordance with my directions, conduct and progressively improve the said charity, this power-of-attorney has been executed by me with consent."

There can be no doubt whatever that the intention of Narayanaswami Naidu was to create a trust for the purpose of conducting the mandagapadi. But the argument of Mr. Rajagopala Aiyangar for the appellant is that the mandagapadi pooja which lasts only for about three minutes would cost only about Rs. 20 though the income from the property set apart according to the document is about Rs. 500 or Rs. 600. Therefore the learned counsel contends that there has been no dedication of the entire income for this purpose. At the utmost all that could be said

1. (1921) 41 M.L.J. 278 : I.L.R. 44 Mad. 778 (F.B.).

is that the income from the properties is charged with the duty of the performance of this mandagapadi and since there is no dedication of these properties for the trust, the suit cannot be maintained. Exhibit P-1 does not show that any part of the income should be utilised for any other purpose. It is clear that the author of the trust intended that the entire income should be utilised for the purpose of the two mandagapadis. According to the learned counsel for the appellant, the mandagapadi costs only about Rs. 20; but the evidence in the case is the other way. P.W. 1, the plaintiff, deposes that during the time his father was performing the mandagapadis he used to invite relations and to spend about Rs. 600 to Rs. 700 a year. It is common knowledge that a mandagapadi does not mean only the performance of the pooja to the deity, but also includes the attendant and consequent feeding of the guests invited for the occasion and other expenses connected with the pooja. A poor man may perform a mandagapadi on a small scale but persons in affluent circumstances like the parties to these appeals would not think of conducting a mandagapadi on a scanty and meagre scale of R. 20. We can take judicial notice of the fact that mandagapadis in Madura town conducted during the course of the procession of the Kalla Alagar and Koodal Alagar deities to the Vaigai river are performed by devotees in accordance with their status and position in life and the expenses would depend upon the wealth of the individual. We have no doubt whatever that the author of the trust intended the entire income to be utilised for the mandagapadi and despite Mr. Rajagopala Aiyangar's strenuous arguments that the mandagapadi would cost only Rs. 20 we prefer to accept the evidence of P.W. 1 and hold that the entire income from these properties has to be utilised for the performance of the mandagapadi.

In a recent decision reported in *Vasudeva Rao* v. *Rangai Gounder*[1], to which one of us was a party the question regarding the dedication of property, where the performance of certain ceremonies was made a charge on the income, has been considered and the conclusion arrived at is that if there is no appreciable surplus income and if that surplus income has not been earmarked for any purpose, then it should be taken that the entire property has been dedicated as trust. On a reading of Exhibit P-1 coupled with the subsequent conduct of the parties and the judicial decisions evidenced by Exhibits P-5 and D-13 we have no doubt whatever that Narayanaswami Naidu intended that the entire income from the two shops and from the bungalow should be utilised for the purpose of the mandagapadi and that these properties were dedicated in trust for the purpose of mandagapadi pooja.

Relying upon the observations at pages 923 and 924, paragraphs 792 and 793 of Mayne's Hindu Law that the onus of proof of dedication is on the party setting up the trust, the learned counsel contends that the plaintiff has not discharged that onus. It seems to us that in view of the decision of this Court to which great evidentiary value should be given contained in Exhibit D-13 we can have no doubt whatever that there has been a complete dedication to trust. We do not think it necessary to expatiate more upon this point as the matter has been elaborately dealt with by the learned Judge in the Court below.

It is further contended that whatever might have been the state of the things more than 100 years ago, when the trust was created, at least so far as item 1 of the plaint schedule properties is concerned the first defendant has acquired ownership to it by adverse possession and therefore that property cannot be termed to be trust property at all. What happened was that while the trust was being conducted by Venkataswami Naidu, the father of the plaintiff, he, the plaintiff, and others, were adjudicated insolvents and item 1 of the plaint schedule was taken possession of by the Official Assignee of Madras as being the property of the insolvents, whereupon the present first defendant's brother Meenakshi Naidu, got a release of those properties from the Official Assignee as is shown by Exhibit D-10, which is to the effect that Meenakshi Naidu entered into a guarantee with the Official Assignee and thereby got a release of this property from the Official Assignee. According

1. (1951) 1 M.L.J. 588.

to the learned counsel for the appellant, Exhibit D-10 should be construed as an assignment of this item by Official Assignee in favour of Meenakshi Naidu, and from that date onwards Meenakshi Naidu remained in possession in his own right and prescribed a title against the trust. We do not see any force in this contention because the list of properties in the insolvency as shown by Exhibit P-6 (2) contains an entry that the house in the river side Madurai and the two bazaars and one abkari distillery in Madurai were properties exempted under section 52 (1) of the Presidency Towns Insolvency Act. It is therefore clear that these properties were not considered as the properties of the insolvents. Moreover the first defendant has not produced before us the application which Meenakshi Naidu made to the Official Assignee for getting these properties released from the insolvency. Exhibit D-10 is, on the face of it, not a conveyance. It is a release of the Official Assignee's rights whatever they may be in favour of Meenakshi Naidu on the ground that Meenakshi Naidu has guaranteed the Official Assignee to indemnify him against any possible claims that may be made by the creditors. Exhibit D-10 does not at all show that the Official Assignee transferred this item absolutely to Meenakshi Naidu for any consideration whatever. We have no hesitation at all in holding that what happened was that when properties in the possession of the insolvents which had been dedicated in trust were taken possession of by the Official Assignee as belonging to the estate of the insolvents, Meenakshi Naidu put in a claim on the footing that the ownership of these properties did not vest in the insolvents and therefore the Official Assignee has neither right nor title to them. When the Official Assignee was satisfied about the trust character of those properties, especially since in the list of the insolvents' properties this was sought to be excluded under section 52 (1) of the Presidency Towns Insolvency Act, the Official Assignee released all his rights in favour of Meenakshi Naidu and allowed him to take possession of them on a guarantee given by him. In pursuance of Exhibit D-10 when Meenakshi Naidu got into possession of item 1, it cannot be said that his possession was in any other capacity except that of a lawful trustee and if that is so there is no animus to possess it adversely to the trust. When a person enters into trust property in the capacity of a trustee lawfully he cannot prescribe against the trust and in our view Exhibits P-6 (*a*) and D-10 show clearly that the origin of the possession of Meenakshi Naidu was for and on behalf of the trust. Such being the case we feel that no question of adverse possession arises. Though there was no clear and specific issue on this point regarding the acquisition of title by adverse possession, Mr. Rajagopala Aiyangar contended that certain passages in the learned Judge's judgment afforded material for him to contend that the point was taken in the Court below. Whether it is correct or not, we feel that the argument to the effect that under Exhibit D-10 Meenakshi Naidu got an absolute title to item 1 is not entitled to any weight whatever. This contention therefore fails.

The only other point which remains for consideration is one which arose during the course of the arguments, *viz.*, whether a suit for removing a trustee of a private trust and for the framing of a scheme is maintainable. There is no doubt that section 92, Civil Procedure Code, in terms does not apply because that relates specifically and definitely to the case of public trusts. There are no provisions in the Indian Trusts Act for the framing of a scheme and that Act does not apply to private religious endowments. The distinction between a public trust and a private trust is not so clearly marked in England as in India. At page 11 of Tudor on Charities, 5th Edition, we find the following statement :

"In the first place, it may be laid down as a universal rule that the law recognises no purpose as charitable unless it is of a public character. That is to say, a purpose must, in order to be charitable, be directed to the benefit of the community or a section of the community."

At page 180, the learned author observes :

"The charitable jurisdiction of the Court does not arise where the gift is not charitable in the legal sense as, where it is for private charity."

This rule is based upon the doctrine of the rule against perpetuities. We find in Halsbury's Laws of England, Volume 4, 2nd Edition, at pages 346 and 347 that

at present in England there is general jurisdiction to enforce trusts. That is to say, the High Court has jurisdiction to enforce the observance or redress breaches of all trusts, charitable as well as private. The jurisdiction in the case of charities is more extensive than in the case of private trusts. At page 347, the learned author observes :

"After some conflict of judicial opinions the rule is now established that, wherever there is a gift to charity and the donor either created or intended to create a trust, whether the objects are specified or indefinite, the Court has jurisdiction to enforce the execution of the trust, and, if necessary, to apply the gift to charitable purposes by means of a scheme."

The earlier law in England can be gathered from the decision of *Ommaney* v. *Butcher*[1]. In delivering the judgment of the Court the Master of the Rolls observed as follows at page 1102 :

"There is no case in which private charity has been made the subject of disposal in the Crown, or been acted upon by this Court. The charities recognised by this Court are public in their nature, they are such as the Court can see to the execution of. In this case the difference is obvious ; if a party is to execute the purpose of this testator he cannot give to public charities ; the disposition must be confined to private charity. In what respects does private charity differ from benevolence."

There used to be some divergence of opinion so far as the Indian courts are concerned but it seems to us that the more prevalent and satisfactory view is that even in the case of private charities Courts can interfere to see that no breaches of trust are created. So far as the members of the family are concerned, who are interested in the trust, if the trustee for the time being mismanages or acts in breach of trust, it is a civil right which is infringed and under section 9 of the Civil Procedure Code they are entitled to seek redress in Court for the purpose of remedying the mischief. In *Gopal Lal Sett* v. *Purna Chandra Basack*[2], the Judicial Committee had to consider the case of a private trust created by means of a will which specified the person to conduct the trust and charged him with maintenance of the worship but which did not create any heritable shebaitship. In dealing with that aspect, Lord Buckmaster held that the Court had power to appoint a trustee. At page 468 the following observation occurs :

"Their Lordships see no reason to doubt that the Court executing the duty of appointing trustees would pay due regard to the claims of that branch of the family with whom the worship was established and by whom the services were performed, but they regard the gift as in effect a private trust to which the provisions of section 539, Civil Procedure Code, 1882, would not apply, and consequently the establishment of a scheme for its administration, as provided by the decree of the High Court, is *inappropriate*."

This sentence is very much relied upon by the learned counsel for the appellant for justifying his contention that in the case of a private trust no scheme can be framed at all. In *Pramathanath Mullick* v. *Pradyumna Kumar Mullick*[3] where also the question related to a private trust, their Lordships held that the idol, in a matter where the rival shebaits were agitating their claims, should be represented by a disinterested guardian and remanded the appeal for that purpose to the lower Court with this observation at page 827 :

"Their Lordships are accordingly of opinion that it would be in the interests of all concerned that the idol should appear by a disinterested next friend appointed by the Court. The female members of the family should also be joined and a *scheme should be framed*, for the regulation of the worship of the idols."

It would seem at first sight that the observations in the two decisions run counter to each other. The matter was discussed at some length in *Bimal Krishna Ghosh* v. *Jnanendra Krishna Ghosh*[4]. B. K. Mukherjea, J., in delivering the judgment of the Court notes the conflict and refers not only to these two decisions but also to another decision by Sir Asutosh Mookerjee, J., in *Manohar* v. *Peary*[5]. He distinguished the case in *Gopal Lal Sett* v. *Purna Chandra Basack*[2] in the following manner :

1. (1823) T. and R. 260 : 37 E.R. 1098.
2. (1921) 43 M.L.J. 116 : L.R. 49 I.A. 100 : I.L.R. 49 Cal. 459 (P.C.).
3. (1925) 49 M.L.J. 30 : L.R. 52 I.A. 245 : I.L.R. 52 Cal. 809 (P.C.).
4. I.L.R. (1937) 2 Cal. 105.
5. (1919) 30 C.L.J. 177.

"In a case like this, where a private trust was created not of a purely religious character and the ownership of the property was vested in the trustee in the legal sense of the word the Court could not possibly frame a scheme for the administration of the trust estate. In religious endowment, however, where the deity who is a perpetual infant is the legal owner of the property and the shebaits occupy the position of managers or guardians, the position is different."

Then the learned Judge discusses the observations of Sir Asutosh Mookerjee, J., in *Manohar* v. *Peary*[1]. It would seem from this judgment that if the trust is a private one and not purely of a religious character and the ownership of the property is vested in the trustee, then the Court cannot interfere. But this distinction is not supported by any authority. On the other hand in *Rabindranath* v. *Chandi Charan*[2] Mullick and Guha, JJ., have held that Civil Courts have jurisdiction to entertain a suit brought by the heirs of the founders of a private debutter trust, for the framing of the scheme, for the preservation and management of the debutter estate, on the allegation of mismanagement and maladministration. The learned Judges rely upon the decision of Sir Asutosh Mukherjee, J., in *Manohar* v. *Peary*[1]. We are not able to appreciate the distinction which B. K. Mukherjea, J., seeks to bring out in *Bimal Krishna Ghosh* v. *Jnanendra Krishna Ghosh*[3]. No such distinction was sought to be made out by Sir Asutosh Mookerjee, J., in *Manohar* v. *Peary*[1] at page 188 of the report. In *Prasaddas Pal* v. *Jagannath Pal*[4] which was also a case of private trust, the Court gave certain directions for the framing of a scheme. In all these cases, the trust was a private one and was purely of a religious character as in the present case. The case in *Sathapayyar* v. *Periasami*[5] also related to a private trust. That was referred to by Sir Asutosh Mookerjee, J., in *Manohar* v. *Peary*[1] at page 188 of the report. Even if the observations of the learned Judge B. K. Mukherjea, J., can be accepted, still the trust in the present case is purely of a religious character though the ownership of the property is not vested in the idol. There are no Madras cases expressing an opinion either way though the case in *Sathapayyar* v. *Periasami*[5] related to a mutt and the learned Judges held that sanction under section 539, Civil Procedure Code (section 92 of the present Civil Procedure Code) was not a prerequisite for the purpose of filing the suit. In our view the correct position is that even in the case of private trusts it is open to any member of the trustee's family where his rights are impugned to seek redress in Courts of law. The public or the intended beneficiaries have no manner of right at all. It seems strange that on a subject like this, there are no direct decisions of our Court; at any rate no decision has been brought to our notice and even in *Manohar* v. *Peary*[1] only a receiver was appointed and no scheme was framed. In partition suits in joint Hindu families provisions are generally made for the conduct of family charities, but in those cases, such trusts form the subject-matter of the suit and the suit would not be for framing a scheme simpliciter. Either in principle or in precedent do we find any justification for refusing to frame a scheme in the matter of a private trust. Therefore the objection regarding the maintainability of the suit fails.

The only other point that needs consideration relates to the details of the scheme which form the subject-matter of A. S. No. 799 of 1948. The learned counsel for the appellant contends that so far as trusteeship is concerned, an age limit should be fixed because under the Hindu Religious Endowments Act the age of 70 is fixed for a trustee. We do not find any justification for fixing an age in the case of a private trust like this where properties are not considerable and where the management does not involve any strenuous exertion at all. With regard to the other details of the scheme we have perused them and find nothing to which objection can be taken. The scheme is just and equitable and must be confirmed.

The appeals therefore fail and are dismissed with costs of plaintiff (first respondent) one set only.

K.S. *Appeals dismissed.*

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1. (1919) 30 C.L.J. 177.
2. A.I.R. 1932 Cal. 117.
3. I.L.R. (1937) 2 Cal. 105.
4. (1932) I.L.R. 60 Cal. 538.
5. (1890) I.L.R. 14 Mad. 1.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE RAGHAVA RAO AND MR. JUSTICE VENKATARAMA AYYAR.

Kandula Radhakrishna Rao and others .. *Appellants**

v.

The Province of Madras represented by the Collector of West Godavari, Eluru and another .. *Respondents.*

Madras General Sales Tax Act (IX of 1939), *section* 2 (b)—*Commission agents—If and when "dealer" liable to sales tax.*

A broker is an agent employed to make a bargain for another and receives a commission on the transaction which is usually called brokerage. He has usually neither the custody nor the possession of the goods. It is the broker's duty to establish privity of contract between the principal and the third party. The broker cannot sell in his own name nor can he sue on the contract. A commission agent, on the other hand to whom goods are entrusted by sellers with full authority to transfer property and title in the goods to buyers who obtain delivery from the commission agents themselves without even being aware of the identity of the seller principals, is not like a broker. He has, almost invariably, custody or possession of the goods, actually or constructively. He often sells in his own name and in certain circumstances can sue the buyer himself. A commission agent is not bound to keep separate accounts at his bankers, for he is not a fiduciary agent and the monies he receives are his own; and by the custom of the trade he is only liable as debtor to his employer for the amounts received. In spite of the parties supposing their relationships to be that of principal and agent, in point of law, it may be different.

In the Madras General Sales Tax Act "dealer" is defined as any person who carries on the business of buying or selling goods. "Sale" is defined as a transfer of the property in goods by one person to another in the course of trade or business for consideration.

In the case of a commission agent the accepted mercantile practice is that he has control over or possession of the goods and he has the authority from the owner of the goods to pass the property in and title to the goods. If this is so, when a commission agent sells goods belonging to his principal with his authority and consent without disclosing to the buyer the name of the owner, there is certainly a transfer of property in the goods from the commission agent to the buyer. A business which consists in such transactions can properly be described as a business of selling goods. A similar position would arise even in the case of a commission agent buying for an undisclosed principal. A commission agent doing this kind of business would fall within the definition of "dealer" in the Sales Tax Act. Neither the definition of "dealer" nor of "sale" contemplates as a necessary condition, that the goods sold should belong to the person selling or buying.

Province of Madras v. *Sivalakshminarayana*, (1949) 1 M.L.J. 530: I.L.R. (1950) Mad. 421, considered.

Government of Madras v. *Veerabhadrappa*, (1950) 1 M.L.J. 564: I.L.R. (1951) Mad. 257, distinguished and dissented from.

Accordingly the commission agents in the instant cases would be "dealers" within the meaning of that expression in the Madras General Sales Tax Act and liable to tax under section 3 but for the exemption given under section 8. The conditions of the licence are not infringed by the collection of *rusums* and commissions from both sellers and buyers as the same was a recognised mercantile usage and therefore the commission agents will be entitled to the exemption.

Appeals against the decrees of the District Court of West Godavari at Eluru in O. S. Nos. 34 of 1946, 12 of 1946, 33 of 1946 and 37 of 1945, respectively.

P. Somasundaram and *N.C.V. Ramanujachari* for Appellants and the Government Pleader (*P. Satyanarayana Raju*) for Respondent in Appeal No. 365 of 1947.

N. C. V. Ramanujachari for Appellant and the The Government Pleader (*P. Satyanarayana Raju*) and *C. Vasudeva Mannadiar* for Respondents in Appeal No. 447 of 1947.

The Government Pleader (*P. Satyanarayana Raju*) for Appellant and *C. V. Dikshitulu* for Respondents in Appeal No. 641 of 1947.

P. Somasundaram and *M. Nagaramayya* for Appellant and The Government Pleader (*P. Satyanaryana Raju*) and *K. N. Karunakaran* for Respondents in Appeal No. 468 of 1947.

* Appeals Nos. 365, 468, 551, 447 and 641 of 1947. 16th November, 1951.

P. Somasundaram and *N. C. V. Ramanujachari* for Appellant and The Government Pleader and *K. N. Karunakaran* for Respondent in Appeal No. 551 of 1947.

The Advocate-General (*V. K. Thiruvenkatachari*) appeared with the Government Pleader in all the cases.

The Judgment of the Court was delivered by

The Chief Justice.—These appeals have been posted before a Full Bench because of a conflict of opinion between Division Benches of this Court (*Province of Madras* v. *Sivalakshminarayana*[1], and *Provincial Government of Madras* v. *Veerabhadrappa*[2]) on the interpretation of some of the provisions of the Madras General Sales Tax Act, Madras Act IX of 1939. All these appeals arise out of suits filed for the recovery of amounts of sales tax alleged to have been illegally levied from the respective plaintiffs. Appeal Nos. 365, 468 and 551 of 1947 arise out of three original suits Nos. 12, 33 and 34 of 1946 which were disposed of by a common judgment by the learned District Judge of West Godavari at Ellore. All these suits were dismissed and the plaintiffs are the appellants before us. Appeal No. 447 of 1947 is from the decree dismissing O. S. No. 37 of 1945. This suit was disposed of by the same learned Judge who disposed of the three first mentioned suits. O. S. No. 93 of 1946 from which Appeal No. 641 of 1947 is the appeal was tried by another Judge, the learned Subordinate Judge of Ellore, who took a view different from that of the learned District Judge of West Godavari and decreed the suit. Hence the State of Madras is the appellant in this appeal. In all the appeals, common questions of law arise. Before these points are discussed, it is necessary to set out in brief the salient facts in these cases which have a material bearing on the questions which fall for decision. But even before this it will be helpful to refer to the main provisions of the Madras General Sales Tax Act.

The object of the Act is to provide for the levy of a general tax on the sale of goods in the Province of Madras. The following definitions in section 2 of the Act are important. Section 2 (*b*) defines a "dealer" as meaning any person who carries on the business of buying or selling goods. "Sale" is defined in clause (*h*) thus:

"'sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge, or pledge,

Explanation. (1) A transfer of goods on the hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains the title in the goods as security for payment of the price, be deemed to be a sale."

Clause (*i*) defines "turnover" thus:

"Turnover means the aggregate amount for which goods are either bought by or sold by a dealer whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee; tenant or otherwise, shall be excluded from his turnover:

Explanation. (1) Subject to such conditions and restrictions, if any, as may be prescribed in this behalf—

(i) the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of or before the delivery thereof;

(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover; and

(iii) where for accommodating a particular customer a dealer obtains goods from another dealer and immediately disposes of the same to the said customer, the sale in respect of such goods shall be included in the turnover of the latter dealer but not in that of the former."

Section 3 is the charging section. Section 3 (1) says:

"Subject to the provisions of this Act, every dealer shall pay in each year a tax in accordance with the scale specified ......

Provided that any dealer whose turnover in any year is less than ten thousand rupees shall not be liable to pay the tax under this sub-section for that year."

1. (1949) 1 M.L.J. 530 : I.L.R. (1950) Mad. 421.
2. (1950) 1 M.L.J. 564 : I.L.R. (1951) Mad. 257.

The second proviso avoids the possibility of double taxation. It runs thus:

"Provided further (1) that in respect of the same transaction of sale, the buyer and the seller shall not both be taxed, but only one of them, as shall be determined by the rules made in this behalf under sub-section (2), shall be taxed thereon, and (2) that when the amount for which any goods were bought by a dealer has been included in his turnover, the amount for which the same goods were sold by him shall not be included in his turnover, for the purpose of this Act."

Section 8 is the next important section and as one part of the argument relates entirely to a construction of this section, it is useful to set it out *in extenso*. It runs:

"The Provincial Government, may on the application and on payment of such fee as may be prescribed in that behalf, license any person under this section who for an agreed commission or brokerage buys or sells on behalf of known principals specified in his accounts in respect of each transaction and may exempt from the tax under section 3, such of his transactions as are carried out in accordance with the terms and conditions of his licence:

Provided always, that, save where the transaction consists of a sale by a grower of produce grown by him or on his land, no such exemption shall be given unless the amounts for which the goods concerned in such transactions are sold, are included in the turnover of the principals or of the dealers from whom purchases were made, or would have been so included but for an exemption provided under this Act."

Under section 9 (1) every dealer whose turnover is ten thousand rupees or more in a year is bound to submit a return of his turnover. Section 9 (2) deals with the manner of assessment. Section 13 makes it incumbent on every dealer and every person licensed under section 8 to keep and maintain a correct account showing the value of the goods sold and bought by them. Section 19 confers power on the Provincial Government to make rules. Rules have been framed by the Government in exercise of the powers conferred by this section.

The plaintiffs in all the suits carry on independent business of their own and also commission business. Every one of them has obtained a licence under section 8 of the Act. The licences granted to them are in the following form:

"FORM No. V.

Licence under section 8 Madras General Sales Tax Act of 1939.

See rule 6 (5).

Whereas, having their place of business in have paid to him a licence fee of Rs. 10 in words (ten rupees only) a licence is hereby granted under section 8 of the Madras General Sales Tax Act of 1939 subject to the provisions of the said Act, subject to the rules made thereunder and subject to the following conditions:

1. The licence-holder shall submit to the undersigned as before the last day of every month, a return in form No. 6 for the previous month.

2. The licence-holder shall be exempt from the tax payable under section 3 (1) of the Madras General Sales Tax Act of 1939, only to the extent to which the goods bought or sold through him are included in the turnover of the principals or in the turnover of the dealers from whom purchases were made.

3. This licence shall not apply to the transactions of the licence-holder carried on otherwise than for an agreed commission or brokerage on behalf of known principals (including firms) in the province specified in his accounts, or to the transactions of the licence-holder on behalf of principals outside the province.

No correction in this licence shall be valid unless it is ordered and attested by the undersigned.

Licensing Authority."

The Sales Tax Officers held that these plaintiffs had violated the conditions of the licence and so forfeited the exemption from the payment of the sales tax provided by section 8 because the plaintiffs had made extra collections from the buyers in addition to the cost of the goods and appropriated these amounts for themselves without passing them on to their seller principals or including them in the turnover of their principals. The extra collections which appear to have been made by the plaintiffs are not all of them of the same nature. The amounts collected as *Kolagram, Dharmam, Digumati and Cooly* do not purport to be appropriated by the plaintiffs for their own use. *Kolagram* represents the amount paid as weighment or measurement charges. The *Dharmam* amounts are set apart (or intended to be set apart) for charity. *Digumati* is a charge for unloading. The *gumastha rusum* indicates by its name that it is more or less a levy for clerical expenses. The general

evidence is that these charges are made by all the commission agents in the locality and have received the sanction of mercantile usage. Indeed, the learned Advocate-General did not address any argument in respect of these collections. The Government appear to have recognised this fact as is evident from condition 5 contained in the form which was substituted for the original form by a Government Order dated 7th February, 1948. It runs thus:

"(5) The agreed commission or brokerage specified in the accounts shall be the entire remuneration of the agent and each legitimate incidental charge actually incurred by him in respect of insurance, transport, loading and unloading, godown rent, interest, correspondence, telegrams, the use of the telephone and the like shall be specified in the accounts separately."

In addition to the levy of these amounts the plaintiffs, at least in most of the cases, appear to have also collected amounts under the heading of *rusum*. Initially the rate of the *rusum* synchronised with that of the sales tax though there is evidence that the rate was increased in some cases. These amounts which were collected by the plaintiffs from the buyers were admittedly not passed on to their sellers though the *rusums* did find a place in the accounts of the plaintiffs and it is said that the plaintiffs had included these amounts in their turnover. It is common ground that there is no secrecy about this charge and the argument proceeded before us on the footing that this custom of commission agents collecting *rusums* from the buyers at a particular rate and appropriating them was well established and the sellers either actually knew or must be deemed to have known of this usage.

The case of the Government shortly is that the plaintiffs have been obtaining in these transactions a further benefit than the agreed commission or brokerage. From another point of view also there has been a violation of the conditions of the licence because the amounts collected by the plaintiffs as *rusums* really must be deemed to be part of the price of the goods and these amounts were not included in the turnover of the seller principals as part of the price. The plaintiffs met these charges by pleading firstly that these amounts ought not to be added to the price of the goods and secondly that they should be deemed to be part of the agreed commission. Though there was an attempt to contend that in effect the plaintiffs were acting as agents for both the sellers and the buyers and therefore were charging as they were entitled to charge, commission from both the seller and the buyer, the attempt was not persisted in and the appeals were argued on the basis that the plaintiffs were only agents for the sellers. It was further contended on behalf of the plaintiffs that even assuming that they had committed a breach of any of the conditions of the licence granted to them under section 8, they were not liable as commission agents to the sales tax because they could not in law be held to be dealers within the meaning of the definition of dealer in the Act.

The first question which arises for decision is whether on the evidence it can be held that the plaintiffs had violated any of the conditions of the licence granted to them under section 8 of the Act by reason of the fact that they had collected the *rusum* from the buyers and had not passed it on to their seller principals and also because the *rusum* amounts were not included in the price of the goods and included as such in the turnover of the principals. The two trial judges came to conflicting decisions on this point on practically the same kind of evidence. I am inclined to agree with the learned Subordinate Judge at Ellore who decided O. S. No. 93 of 1946. He held that the *rusums* collected by the plaintiffs were in pursuance of a trade usage and that they form part of the agreed commission contemplated under section 8 of the Act. In coming to this conclusion he was largely influenced by the evidence of merchants who came and deposed that this practice of collection of *rusum* by the commission agents was well known to the merchants of the locality and was acquiesced in. The other learned Judge considered that the question of the knowledge of the seller principals was wholly irrelevant from a purely legal point of view. Though he was prepared to concede that certain of the seller principals knew about the collections of *rusum* by the commission agents from the buyer, he agreed with the view taken by the Board of Revenue that the *rusum* collections were in the nature of prices and should have been included in the turnover of the seller principals. We were taken through

the evidence which related to this part of the case by counsel at the bar. On the whole the impression left on me as a result of the evidence is that these amounts were not considered by any party, either the seller or the buyer or the commission agent, as part of the price. In effect the evidence is that the commission agent obtained a remuneration both from the seller and the buyer and this was in accordance with the mercantile usage. It is as if the agreement between the parties was that the commission agent should get a particular amount from the seller and another amount from the buyer as his commission. There is nothing either in the decision in the *Province of Madras* v. *Sivalakshminarayana*[1] or in the decision in the *Provincial Government of Madras* v. *Veerabhadrappa*[2] to preclude us from holding that the *rusums* must be treated as part of the agreed commission. Govinda Menon, J., was of the opinion that if the commission agent collected *rusums* openly and not clandestinely, then the *rusums* should be deemed to be part of the agreed commission. The learned Judge observed :

> " It is therefore clear that in collecting an amount designated '*rusums*' the commission agents were really collecting a commission . . . . . ."

Mack, J., accepted the finding of the lower Court that they charged *rusums* as a little additional commission and said :

> " There can be no doubt, nor is it disputed, that this charge of *rusum* was a new practice which arose out of the Sales Tax Act, 1939. It appears to have originated from prudent sellers making this charge and ensuring against a sales tax levy being made on their total turnover . . . . We are therefore unable to accept the learned Advocate-General's contention that *rusum* is in the circumstances something charged by the commission agent in addition to the agreed or customary commission of one per cent."

The learned Judge was apparently of the view that if there is no evidence or material to show that the sellers principals agreed to the *rusum* being collected from the buyers by the commission agents and being appropriated by them, the charge of *rusum* could not be held to be either an addition to the agreed commission or an item of expenditure legitimately incurred by the commission agent on behalf of the principal. In the cases before us, I think on the evidence it should be held that the seller principals must be deemed to have agreed to the collection of the *rusums* by the plaintiffs. In the latter case (*Provincial Government of Madras* v. *Veerabhadrappa*[2]) Viswanatha Sastri, J., observed as follows :

> " It is true that the respondents have taken out licences under section 8 in respect of their commission agency business. In accordance with the custom of the groundnut trade at Adoni they charged a small brokerage from buyers as well as sellers of groundnuts for whom they acted as commission agents. It is also true that they charged a small sum as *rusum* or *mahimai* for charity and establishment expenses in addition to the commission proper of a quarter anna in the rupee. Those amounts are also shown in their accounts and in my opinion, they really form part of the commission they collected though distributed under separate heads. There is no provision in the Act or the rules fixing the maximum brokerage permissible and it is left to be settled by contract between the broker or commission agent and his principals or by the usage of the trade. It may be that it is a vicious practice for brokers to charge brokerage both from the buyer and the seller of goods in respect of one and the same transaction. But it is a matter of notoriety that the practice is deeply rooted in many places and several trades. The licence issued to the plaintiffs in these cases, which we have perused, does not prevent such a mode of earning brokerage or commission."

It must therefore be held that the plaintiffs in these cases have not violated the conditions of the licences granted to them under section 8 of the Act.

The next question and by far the more important one is assuming that the plaintiffs have violated the conditions of the licences and therefore were not entitled to exemption under section 8 of the Act whether they would be liable to the tax as dealers. This question appears to us to be a mixed question of fact and of law and not a mere question of law. It is therefore necessary to ascertain the nature of the business transacted by the plaintiffs as commission agents. It was indeed common ground and amply supported by the evidence that the plaintiffs were acting as agents for several seller principals who entrusted them with goods for sale at specified prices. Though these principals were known to the plaintiffs,

1. (1949) 1 M.L.J. 530 : I.L.R. (1950) Mad. 421.
2. (1950) 1 M.L.J. 564 : I.L.R. (1951) Mad. 257.

they rarely, if ever, disclosed their names to the several buyers. So far as the buyers were concerned, the transactions were between them and the plaintiffs. The seller and the buyer as a rule were not brought into contact with each other. The plaintiffs, as commission agents, are given full authority to pass the property and the title in the goods to the buyers. P.W. 1 in O. S. No. 93 of 1946, a partner of the firm of the plaintiffs in that case, deposed that the firm had 100 to 200 principals, 90 per cent. of whom resided outside the place of business. The principals send the goods to the firms for sale. On these facts must be determined the question whether the plaintiffs can fall within the definition of "dealer" in the Act. I have referred to these facts because during the course of the argument, it became evident to me that the actual decision in *Provincial Government of Madras* v. *Veerabhadrappa*[1] on the facts found in that case was unassailable. I shall briefly show what divergence there is between the facts in the present cases and the facts in the case before the learned Judges in *Provincial Government of Madras* v. *Veerabhadrappa*[1]. Satyanarayana Rao, J., extracted in his judgment the summary of the evidence made by the learned District Munsiff as regards the nature of the business carried on by the plaintiffs in that case. That summary clearly demonstrates the fact that the plaintiffs were acting merely as brokers and were bringing the sellers and the buyers together. The sellers brought their goods to the plaintiffs' shop and the plaintiffs sent for prospective purchasers who came in person or sent their representatives. The purchasers themselves inspected the goods and the prices were fixed after discussion between the sellers and the buyers and the commission agents. Thereafter, there was delivery made to the buyers. The plaintiffs were paid commission and the other amounts which were called *gumastha*, *dharma*, *rusum*, etc. The payment of these sums was consented to by the sellers. Viswanatha Sastri, J., alludes to the nature of the business in the following passage in his judgment:

"Here the plaintiffs are mere commercial agents who brought buyers and sellers of groundnuts together, arranged the sale or purchase and earned a small commission or brokerage from both of them. The learned District Judge described the situation thus:

'An agent who merely brings a buyer and seller together cannot be said to buy or sell his goods in his own behalf, any more than a marriage broker who brings the parties together can be said to be a party to the marriage'."

The facts in the *Public Prosecutor* v. *Narasimha Reddy*[2] were also similar to the facts in *Provincial Government of Madras* v. *Veerabhadrappa*[1]. Chandrasekhara Aiyar, J., referred to the accused in the case as having acted as a broker or commission agent who brought the seller and the buyer together. He pointed out that the word "turnover" as defined was not appropriate to what is done by an agent "in the way of bringing together a buyer and a seller for brokerage or a commission."

On the facts found in the *Public Prosecutor* v. *Narasimha Reddy*[2] and the *Provincial Government of Madras* v. *Veerabhadrappa*[1], there can be no doubt whatever that the merchants in those cases do not fall within the definition of "dealer." They themselves neither sold nor bought the goods. They simply brought the seller and the buyer together and received a brokerage or commission by way of remuneration for their trouble. It does not appear that the plaintiffs in those cases were entrusted with the possession or control of the goods or that they had authority to transfer the property or the title in the goods. They could not therefore have effected a sale as defined in section 2 (*h*) of the Act.

It appears to me that the learned Judges in the *Provincial Government of Madras* v. *Veerabhadrappa*[1] were not really concerned with ascertaining the nature of the business transacted by the commission agents who were not mere brokers bringing together the sellers and the buyers but who were entrusted with the goods by their seller principals with authority to transfer the property and title in the goods to the buyers who obtained delivery from the commission agents themselves without even being aware of the identity of the seller principals. The position in

1. (1950) 1 M.L.J. 564: I.L.R. (1951) Mad. 257.

2. (1947) 2 M.L.J. 220.

law of a commission agent to which category the plaintiffs in the cases now before us belong, must, I think, be properly appreciated before we can decide the question whether they would be dealers within the meaning of section 2 (*b*) of the Act.

A broker is an agent employed to make a bargain for another and receives a commission on the transaction which is usually called brokerage. He has usually neither the custody nor the possession of the goods. It is the broker's duty to establish privity of contract between the principal and the third party. The broker cannot sell in his own name nor can he sue on the contract. A commission agent, on the other hand, of the class to which the plaintiffs belong, is not like a broker. He has, almost invariably, custody or possession of the goods, actually or constructively. He often sells in his own name and in certain circumstances can sue the buyer himself. As pointed out by Jessel, M.R., in *Kirkham* v. *Peel*[1] commission agents receive goods from anybody who sends goods to them and no person in their position ever dreams of keeping separate accounts at their bankers, in respect of each of the transaction of each of their members. He observed :

"The course of trade always was, and it is shown in this case by the accounts current, that a commission agent is liable to the consignor of the goods for the amounts received, and is in the habit of making advances to the consignor. He charges interest, and debits himself with the amounts received when they are received, and credits himself with interest on the other side of the account so that the real transaction between the parties is for the consignor to treat such a consignee as creditor for his advances and interest and to regard him as a debtor for the amounts received and interest."

In Blackwood Wright's Law of Principal and Agent this case is cited as authority for the position that a commission agent is not bound to keep separate accounts at his bankers, for he is not a fiduciary agent and the monies he receives are his own ; and by the customs of trade he is only liable as debtor to his employer for the amounts received—(*see* 2nd Edn., p. 189). That in spite of the parties supposing their relationship to be that of principal and agent, in point of law it may be different as well illustrated by the case of Ex parte *White* : In re *Nevill*[2]. In *Kalyanji* v. *Tikaram*[3], the legal position of a commission agent is very fully discussed by Vivian Bose, J. (as he then was). The course of business found in that case was as follows. The plaintiff was a merchant who dealt in the purchase and sale of grain and cotton seed. The defendants were also merchants who acted as commission agents in respect of these commodities. The arrangement between them was this : The plaintiff was to send the defendants consignments of these goods from time to time ; the defendants were to keep these goods with them and await instructions from the plaintiff about the sale ; then as soon as the plaintiff gave them the word they were to sell and in due course hand over the sale proceeds to the plaintiff less their commission charges. At first sight it would appear that the defendants would come within the definition of agent given in section 182 of the Contract Act. But the learned Judge held that the Contract Act does not draw a fine distinction between different classes of agents nor is the Act exhaustive so far as this part of the law was concerned. The learned Judge held that so far as the sales in the cases were concerned, the defendants were not acting on behalf of the plaintiff as his agent but on behalf of themselves. The intention was that the plaintiff would sell to the commission agents and the commission agents to the persons to whom they sold. No privity of contract was intended to be established between the plaintiff and the purchasers as would have been the case in a case of agency pure and simple. The learned Judge then made the following observation with which I respectfully agree :

"Commission agents are of course agents up to a point and to that extent they stand in a position of active confidence towards their principals, but beyond that they are not agents in the real sense of the term and the relationship between the parties from then on is one of debtor and creditor." (255)

". . . . . The test to my mind is this : does the commission agent when he sells have authority to sell in his own name ? Has the authority in his own right to pass a valid title ? If he has then he is acting as a principal *vis a vis* the purchasers and not merely as an agent and therefore from that point on he is a debtor of his erstwhile principal and not merely an agent." (256)

1. 43 L.T. 171.
2. (1870) 6 Ch. Ap. 397.
3. A.I.R. 1936 Nag. 254.

The following description the learned Judge's judgment of the course of business of a commission agent in general is very illuminating and appears to me to be apposite to the present cases :

"We also know that commission agents in general deal with a large number of what I may call principals scattered throughout India and sometimes abroad. It can hardly be supposed that the customers who come to their shops for purchasing a given quantity of cotton seed or grain look beyond them to those other persons resident elsewhere or deal with them otherwise than as principals in their own behalf. The customer in such circumstances can scarcely be expected to ask or know or even care who is the owner of each handful of grain he purchases ; in fact, it may well be that the commission agents themselves do not know once they have bought the grain from their godowns and mixed it with other stock which is being retailed in their shops ; nor would the principals care who those purchasers are. Their contracts are with the commission agents and ordinarily no privity is established between the principals and ultimate purchasers. In general there is nothing to prevent these commission agents from purchasing the commodities themselves and then selling thereafter at a profit to themselves. This profit they will be entitled to retain. A mere agent could not do that. Looking then to the general dealing between the parties in this case, looking to the fact that these conditions are the usual conditions upon which commission agents operate and to the fact that the defendants were themselves grain and seed merchants actually running a shop, I am clear that the understanding between the parties was that the defendants were to sell the grain and cotton seed in their own right and be responsible for the plaintiff as debtors for the sale proceeds less their agency charges."

Bearing in mind the peculiar nature of a commission agent's business, let me examine the definitions in the Madras General Sales Tax Act. "Dealer" is defined as any person who carried on the business of buying or selling goods. "Sale" is defined as a transfer of the property in goods by one person to another in the course of trade or business for consideration. The general law relating to sale of goods is contained in the Indian Sale of Goods Act. Under section 4 (1) of that Act a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Sections 18 to 26 of the Act embody the general and special rules relating to the transfer of *property* as between seller and buyer. Sections 27 to 30 embody the rules relating to the transfer of title and this distinction made between property in the goods and title to the goods is not without significance. In law there can be a transfer of property in goods without a transfer of title to them. A sale of goods refers to the transfer of property irrespective of the fact whether the title also is transferred or not. The language of section 27 clearly contemplates a sale by a person who is not the owner of the goods for it says :

"Subject to the provisions of this Act and of any other law for the time being in force where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his consent precluded from denying the seller's authority to sell."

As no written conveyance, still less a registered deed, is necessary for the sale of goods, unlike in the case of sale of immoveable property, the contract of sale is performed when the goods are actually delivered. It is because that there can be a sale by a person who has no title to the goods that section 27 enunciates the rule that the buyer acquires no better title to the goods than the seller had. In the case of a commission agent, the accepted mercantile practice is that he has control over or possession of the goods and he has the authority from the owner of the goods to pass the property in and title to the goods. If this is so, undoubtedly when a commission agent sells goods belonging to his principal with his authority and consent and without disclosing to the buyer the name of the owner, there is certainly a transfer of property in the goods from the commission agent to the buyer. A business which consists in such transactions can properly be described as a business of selling goods. A similar position would arise even in the case of a commission agent buying for an undisclosed principal. A commission agent doing this kind of business would, in my opinion, fall within the definition of dealer in the Sales Tax Act. Neither the definition of "dealer" nor of "sale" contemplates as a necessary condition that the goods sold should belong to the person selling or buying. There can be a sale or purchase on behalf of another.

Now I shall briefly deal with the two decisions which are alleged to contain conflicting opinions. In *Province of Madras* v. *Sivalakshminarayana*[1], the point did not arise directly. One of the learned Judges, Mack, J., does not consider how far a commission agent would be a dealer. Govinda Menon, J., however, in passing observed that a commission agent should be deemed to be a person who carries on the business of buying or selling goods and said :

"Had it not been for the incorporation of section 8, even a person who, for an agreed commission or brokerage, buys or sells goods on behalf of known principals, specified in his accounts in respect of each transaction, will be a 'dealer' within the meaning of the Act and hence liable to be taxed."

In *Provincial Government of Madras* v. *Veerabhadrappa*[2], on the facts found by the District Munsiff from whose judgment an extract is to be found in the judgment of Satyanarayana Rao, J., it is clear that the question which has come up before us for decision could not have arisen. In that case there was obviously no sale by the plaintiffs because all that the plaintiffs did was to bring the seller and the purchaser together and to earn a commission for themselves. They would not obviously be "dealers" within the meaning of the definition because they never transferred the property in the goods to the buyer. But the learned Judges did go into the question in a general way whether a commission agent would be a "dealer" within the meaning of the definition in the Act. In so far as the learned Judges held that the plaintiffs in the case before them were not dealers within the meaning of the Act, no possible exception could be taken. But if they meant to lay down that a commission agent would never fall within the definition of a "dealer" with due deference to them, I cannot agree. In view of the great regard I have for the two learned Judges, I shall deal with the judgments separately in some detail.

Satyanarayana Rao, J., prefaces the discussion of the point with the assumption that when a "dealer" is defined as a person who carries on the business of buying or selling goods, that means that he buys or sells the goods on his own account. That, in his opinion, is the primary meaning of the definition. While I agree that ordinarily buying and selling by a person may be on his own account, there is nothing in the language of the definition to exclude from its ambit persons buying and selling goods on account of others. When a person buys or sells goods on behalf of some one else, even then it will not be inaccurate to say that he buys and sells goods. The learned Judge seeks to receive support for his view from Explanation (2) which includes within the definition the agent of a person resident outside the Province who carries on the business of buying and selling goods in the Province. I do not think that the Explanation throws any light on the point in issue. The reference in the Explanation is presumably to an agent of a person who carries on business *qua* agent of that person who however is residing outside the Province. Now it is well known and it was admitted by counsel before us that the plaintiffs in the cases before us though they describe themselves as commission agents, do not purport to be agents of any particular person or persons. Some of them admittedly get goods from as many as 100 principals. It will be opposed to facts to say that they are carrying on business as the agent of these persons. In the case of an agent who carries on business professedly as an agent of another then it is really the principal who can be deemed to be carrying on the business and the Explanation (2) refers to such a case. The learned Judge then refers to the definition of turnover and again makes the assumption that to constitute the turnover of the agent he must buy or sell the goods for himself. Dealing with the definition of "sale" as a transfer of property in goods the learned Judge draws the implication that the property in the goods at the time of the sale vested in the person who sells and by reason of the sale, the purchaser obtains a transfer of the property in the goods from the seller. If the learned Judge meant "title" by the term "property" then undoubtedly property does not vest in the commission agent; but I think it would be correct to say that a commission agent who has custody

1. (1949) 1 M.L.J. 530 : I.L.R. (1950) Mad. 421.
2. (1950) 1 M.L.J. 564 : I.L.R. (1951) Mad. 257.

and possession of the goods is vested with the property in the goods and he does have the authority to transfer the property in the goods to the buyer. Personally I am inclined to think that section 27 of the Sale of Goods Act to which I have already adverted earlier supports my view. The learned Judge says:

" . . . . except in the limited classes of cases contemplated by section 27 of the Sale of Goods Act, it is impossible for an agent to convey or transfer property in the goods except under the authority of the principal."

But a commission agent does sell goods with the authority and consent of the owner of the goods. After a brief reference to the definition of agent in section 182 of the Indian Contract Act, the learned Judge concludes that a commission agent who sells or buys on behalf of the principal is not a dealer.

The learned Judge was apparently confronted with section 8 which to my mind in the clearest possible way assumes that but for the exemption the persons described therein would be liable to the tax under section 3 of the Act as dealers. These are the persons who for an agreed commission or brokerage buy or sell on behalf of known principals specified in their accounts in respect of each transaction, persons like the plaintiffs in the cases before us. The only way in which the learned Judge gets over the implication of section 8 is by holding that the section was enacted "by way of abundant caution in order to make the machinery of taxation move smoothly and with speed." He says:

"Section 8, it must be remembered, is not a taxing section but a section which creates exemption on the assumption that otherwise the person is liable to taxation. If that assumption falls to the ground as shown already, there is no need really for the exemption."

In another place he opines that section 8 was intended to cover transactions of accommodation contemplated by Explanation (4) to the definition of "turnover" in the Act. In my opinion though it is true that section 8 is not a taxing section, yet occurring as it does in the same enactment, it must be read as throwing some light on the other related provisions and in view of the fact that there is nothing in the definition of "dealer" to indicate that the buying or selling must be on the person's own account, the obvious inference from section 8 is that the definition would cover also the case of persons mentioned in section 8 who would, but for that section, be liable to taxation under section 3.

The other learned Judge also came to the conclusion that an agent can in no event be included in the definition of a "dealer." But there are observations in his judgment which appear to me to be not inconsistent with the view I am taking. I do not for a moment differ from him when he says

"A broker or commission agent who merely brings together the buyer and seller does not transfer the property in the goods."

But with respect I am unable to follow how an agent who might effect transfer of the property in the goods to the buyer if he had been authorised to sell by the owner of the goods cannot be said to have sold the goods in view of the definition of sale in the Act. Again I do not disagree with him in the following statement of the law:

"A broker is an agent who, in the ordinary course of his business, is employed to make contracts for the purchase or sale of goods of which he is not entrusted with the possession or control. Usually he contracts in the name of the principal and arranges contracts of sale or purchase in such a way as to bind both the buyer and the seller. There may be other kinds of agents for the sale or purchase of goods on behalf of and employed, by a principal. It is elementary that goods can be sold so as to transfer title to the buyer only by the owner of the goods or by a person acting under his authority or with his consent."

It is true that ordinarily no agent can maintain an action in his own name to enforce a contract made by him merely in this capacity as agent. But a commission agent selling the goods of an undisclosed principal can certainly maintain an action in his own name. Once more I find myself in agreement with the learned Judge when he says:

"The mere fact that an agent, who is entrusted with goods for sale, sells them without disclosing who the principal is, does not make the transaction a sale of the agent's goods nor does it convert the relationship between him and his principal into one of vendor and purchaser."

That may be so but when the commission agent entrusted with the possession of the goods and authorised to sell them on behalf of his principal enters into a contract of sale with a third party, *i.e.*, the buyer and transfers the property in the goods to the buyer, I fail to see why the transaction between the commission agent and the buyer would not be a sale within the meaning of the definition of that term in the Act. The learned Judge is unable to get over section 8 though he sets out what according to him that section was intended to cover.

Both the learned Judges discuss the well-known decision in *Ireland* v. *Livingston*[1]. We are not concerned as to how far Lord Blackburn's dictum about the relationship between a commission agent and a foreign consignee as being that of vendor and purchaser is correct law. All that we are concerned with in this case is to determine whether the plaintiffs in these cases would be dealers, *i.e.*, persons engaged in the business of buying or selling goods. I do not therefore propose to deal at any length with either the decision in *Ireland* v. *Livingston*[1] or *Cassabogolou* v. *Gibb*[2].

In my opinion, the learned Judges in *Provincial Government of Madras* v. *Veerabhadrappa*[3] went too far in holding that in no event and under no circumstances can a commission agent be deemed to be a person carrying on the business of buying or selling goods and I must express my respectful dissent from them. In my opinion, the plaintiffs in these cases would be dealers within the meaning of that expression in the Act and liable to tax under section 3 but for the exemption given by section 8. As I have held that the conditions of the licence granted under section 8 have not been infringed, the plaintiffs will be entitled to the exemption. All the suits will therefore be decreed.

In the result, Appeal Nos. 365, 468, 551 and 447 of 1947 will be allowed and Appeal No. 641 of 1947 will be dismissed. There will be decrees as prayed for. The plaintiffs will have their costs here and in the Court below.

K.S. ——— *Appeal No.* 641 *of* 1947 *dismissed; all other appeals allowed and all the suits decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRA REDDI.

Pentakota Ayodhyaramayya and others .. *Appellant**

v.

Pentakota Venkata Krishnam Naidu .. *Respondent.*

Damages—Defendant in possession of land under wrong decree—Sale of bricks and tiles made of earth dug out of land—Restitution ordered—Claim by plaintiff of the value of bricks or tiles as damages—Not maintainable—Proper measure of damages.

In an application for restitution under section 144 of the Code of Civil Procedure only such damages as would restore the person seeking restitution to the position which he would have occupied but for the wrong decree, should be directed to be paid. The measure of damages is the loss caused to the plaintiff which in all ordinary cases is measured by the resulting diminution in the value of the property.

Accordingly, where the defendant was in possession of land under a wrong decree and when restitution was ordered the plaintiff claimed as damages the value of bricks and tiles made out of earth dug out of the land.

Held, that the plaintiff was entitled to be paid only the value of the depreciation sustained by him as a result of the action of the defendant.

Appeal against the order of the Court of the Subordinate Judge, Vizagapatam, in A.S. No. 246 of 1948 preferred against the order of the Court of the District Munsif of Vizagapatam in E.A. No. 188 of 1946 in O.S. No. 103 of 1940.

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1. (1871) L.R. 5 H.L. 395.
2. (1883) 11 Q.B.D. 797.
3. (1950) 1 M.L.J. 564 : I.L.R. (1951) Mad. 257.

*A.A.A.O. No. 83 of 1949. 28th September, 1951.

E. Venkatesam and *E. L. Bhagiratha Rao* for Appellants.

B. V. Ramanarasu for *U. Sethumadhava Rao* for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of E.A. No. 188 of 1946, in O.S. No. 103 of 1940 in the Court of the District Munsif of Visakapatnam, for restitution.

In a suit for partition instituted by the sons of one Goteti Subba Rao, the present first respondent was directed to put the appellants in possession of 44.3/4 cents of land which was found to be in excess of the property to which he was entitled and which, according to the trial Court, belonged to the appellants. An appeal was filed by the present first respondent against this direction which was dismissed by the Subordinate Judge of Vizagapatam. But this Court, in S.A. No. 2154 of 1944, reversed the decisions of the Courts below holding that

> "those portions of the lower Court's decree which do not relate to the plaintiffs shall be deleted and the rights of the defendants *inter se* be and hereby are left to be adjudicated upon, if necessary, in a different litigation."

Consequently, the first respondent, in addition to applying for redelivery of that property, *inter alia*, claimed a sum of Rs. 2,000 as the value of two lakhs of bricks and two lakhs of tiles prepared by the present appellants from out of the earth dug from the 44.3/4 cents of land.

Dealing with this claim the trial Court held that the only relief which the present first respondent could get was a direction to the present appellants to fill up the pits dug in the land at their cost within 15 days from the date of the order.

The first respondent herein who was aggrieved by this order, filed an appeal to the Subordinate Judge of Vizagapatam. The lower appellate Court, which confirmed the findings of the trial Court on other issues, held that the proper direction in working out the rights of the parties, so far as the claim for damages in respect of the pits dug on the land of the first respondent, was concerned was to direct the present appellants to pay the money value or the compensation for the earth dug and utilised by them and allow the present first respondent to fill up the pits in the manner he thought best as it thought that there were various difficulties in working out the direction of the trial Court as regards the filling up of the pits. But in valuing the earth dug and utilised by the appellants the lower appellate Court took into consideration the net profits realised by the appellants by the sale of the bricks and the tiles which were manufactured out of the earth dug from the land in question.

In this appeal filed against the order of the learned Subordinate Judge, Mr. Venkatesam, the learned counsel for the appellants urges that the basis adopted by the lower Court in assessing the value of the earth was erroneous that the profits realised by the appellants have no bearing or relevancy on the question of the value of the earth utilised by them in manufacturing the bricks. It is argued by Mr. Venkatesam that the proper measure of damages to be awarded in cases like this is either the value of the earth dug out of the land or the value of the depreciation that was caused by the act of his clients, *viz.*, the digging of pits in the land, and that in any event, the first respondent is not entitled to the net profits derived by his clients from the sale of the bricks.

In support of his contention he places reliance on a judgment of Govinda Menon, J. in *Periyayya Moopan* v. *Marudai Konar*[1]. In dealing with the question as to how a person that is put to loss by the act of the parties against whom damages are sought should be compensated, the learned Judge observed :

> "I am of opinion that at the utmost the first defendant would be liable to pay the price of the mud and silt at the time he utilised them for manufacturing the bricks."

The learned Judge also stated that the net profits of the bricks manufactured out of the mud and silt would not represent the value of the mud and silt used for manufacturing the bricks.

1. S.A. No. 1341 of 1947.

Mr. Ramanarasu, learned counsel for the respondent relies upon a decision of Raghava Rao, J. in *Vajjula Ananthataman* v. *Adapala Subba Reddi and another*[1], in support of his plea that his client is entitled to the net profits made by the appellants in this case. It was laid down by Raghava Rao, J., in that case the defendants who trespassed upon the land of the plaintiff, dug out earth from that land and utilised the same for manufacturing bricks, were liable to pay the net profits made by them to the plaintiff. It is very doubtful whether the principle enunciated by the learned Judge in that case is applicable to a claim arising under section 144 of Civil Procedure Code for in an application for restitution only such damages as would restore the person seeking restitution to the position which he would have occupied but for the wrong decree should be directed to be paid. It could not be said that if the wrong decree was not passed by the trial Court in this case, the person seeking restitution would have made this amount. Even otherwise with respect I must express my disagreement with the view taken by the learned Judge in that case, as it does not seem to be in consonance with the principle applicable to such cases.

Mr. Ramanarasu next cited to me a decision of the Calcutta High Court in *Cerrit Moran & Co.* v. *Manmatha Nath Mukherji*[2]. I do not think this decision carries him very far. There the point which the learned Judges were considering was whether a person who committed trespass, plucked tea leaves from the estate, manufactured them and transported the same, was entitled to deduct the cost of plucking, manufacturing and transporting the tea, in a claim for damages by the plaintiff against the trespasser. The learned Judges held that the defendant, who was guilty of fraud or negligence, would not be entitled to a deduction of the expenses incurred by him for the process of plucking, preparing and transporting them for sale but the only reasonable deduction to which he was entitled was the commission paid by the defendant trespasser to the brokers. In support of his conclusion Derbyshire, C.J. with whom Lort Williams, J., agreed relied upon the following passage in the judgment of Lord Sankey, L.C. in *Banco De Portugal* v. *Waterlow and Sons, Ltd.*[3], which in my opinion does not countenance the contention put forward by Mr. Ramanarasu :

"It was similarly stated by Lord Blackburn in the House of Lords in *Livingstone* v. *Rawyards Coal Company*[4], in these words 'Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had had sustained the wrong for which he is now getting his compensation or reparation. There is no doubt as to the law . . . . . ."

The test to be adopted in awarding damages even in cases of trespass is laid down in several decisions of English Courts and also of Indian Courts. In Volume 10 of Halsbury's Laws of England, Hailsham Edition, at page 134 the following passage occurs :

"In respect of injuries done to the land by trespass the measure of damages is the depreciation in the selling value of the land, or in the selling value of the plaintiff's interest in it, and not the amount required to put the premises in repair . . . . The amount recoverable, however, will not necessarily be the cost of re-instatement, the true measure of damage being the difference between the money value of the owner's interest before and after the injury."

In support of this statement of law the learned author relies upon a number of English decisions which it is unnecessary for me to refer now. In the same volume at page 137 the learned author says :

"If the defendant was guilty of fraud or negligence, the plaintiff is entitled to recover the value of the minerals at the time they first became chattels—that is, their value at the pit's mouth—allowing for the cost of raising them to the surface. If the defendant acted honestly and without negligence, the plaintiff is only entitled to the value of the minerals at the pit's mouth after allowing for the cost of getting them as well as that of raising them to the surface."

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1. S.A. No. 2249 of 1947.
2. I.L.R. (1941) 1 Cal. 285.
3. (1932) A.C. 452 at 475.
4. (1880) 5 A.C. 25, 39.

These passages were quoted with approval not only by Govinda Menon, J. in *Periyayya Moopan* v. *Marudai Konar*[1] but also by a Bench of the Calcutta High Court in *Krishnalal* v. *Radhika Mohan*[2].

In Salmond on the law of Torts, tenth Edn. at page 210 the learned author says :

"When a trespass has caused physical damage to the land, the measure of damages is the loss thereby caused to the plaintiff, which in all ordinary cases is measured by the resulting diminution in the value of the property. The measure of damages is not the cost of reinstatement—the cost of restoring the land to the condition in which it formerly was—a cost which may greatly exceed the actual diminution in the value of the land."

In *Currimbhoy & Co., Ltd.*, v. *L. A. Creet*[3], the measure of damages to be awarded to a co-owner who dug out more than his share of the coal was considered. At page 201 the point is dealt with thus :

"The measure of damages in a case like this is the fair market value of the coal (be it remembered that Creet was a part owner of the coal) at the pit mouth at the time when it was served subject to just allowances. As to what allowances there shall be depends on the conduct of the parties and the other circumstances of the case. There are two rules—(1) the harsher, under which only the cost of bringing the coal to bank is allowed and (ii) the milder under which the expense of hewage and haulage, *i.e.*, the cost of working and severing as well as of bringing to bank is allowed."

In that case the milder rule was applied as the learned Judges thought that the co-owner was not guilty of misconduct of a substantial character.

On this discussion it follows that the basis adopted by the learned appellate Judge for arriving at the value of the earth was wrong.

Mr. Ramanarasu maintained that the value of the earth dug out from the land belonging to the first respondent would not represent the true measure of damages in a case like this and that his client would be restored to the position which he would have occupied but for the wrong decree only if he is paid the value of the depreciation sustained by him as a result of the action of the present appellants. Mr. Venkatesam concedes that this is the fair basis of allowing restitution in a case like this.

Consequently the order of the lower appellate Court has to be set aside and the case remanded to the trial Court for an enquiry as to the value of the depreciation. For this purpose the parties are at liberty to adduce such evidence as may be necessary to prove their respective cases. The enquiry is to be confined to the value of the property before the digging of the pits and the value thereof immediately after the digging. The costs of this second appeal will abide and follow the result of the enquiry in the trial Court.

The Memorandum of cross-objections is not pressed and is dismissed without costs. (Leave refused).

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Gangiredla Mathayya .. *Petitioner.**

Criminal Procedure Code (V of 1898), section 437—Accused charge-sheeted for offences exclusively triable by Sessions Court—Charge by Magistrate after evidence only in respect of offences triable by him—If amounts to discharge of graver offence—Power of District Magistrate to direct committal.

Where the committing Magistrate after hearing the prosecution evidence and arguments holds that no case is made out against the accused for an offence exclusively triable by the Court of Sessions with which he was charged by the police and frames charges only in respect of offences triable by him, it must be deemed to have been decided, in effect, that the accused had been discharged by the Magistrate of the graver offence and in such a case the District Magistrate is therefore competent to set aside the order of discharge and direct that the accused be committed to the Sessions. Case-law discussed.

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1. S.A. No. 1341 of 1947.
2. A.I.R. 1931 Cal. 462.
3. (1929) I.L.R. 57 Cal. 170.

*Cr.R.C. No. 688 of 1950.
(Cr.R.P. No. 633 of 1950.)

22nd November, 1951.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional District Magistrate, Vizagapatam, dated 31st March, 1950 in Criminal R.P. No. 2 of 1950 preferred against the order of the Taluk Magistrate, Bimlipatam in P.R.C. No. 3 of 1949.

S. Suryaprakasam and *A. S. Prakasam* for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This is a criminal revision case filed against the order made by the Additional District Magistrate of Visakhapatnam in C.R.P. No. 2 of 1950 which raises an interesting point.

The facts are: Gangiredla Mathayya and six others were charge-sheeted by the police for offences under sections 147 and 302 read with section 149, Indian Penal Code. This case was enquired into in the Court of the Taluk Magistrate of Bimlipatam as Preliminary Register Case No. 3 of 1949. The Magistrate after hearing witnesses came to the conclusion that only offences under sections 325 and 323, Indian Penal Code were made out and framed charges and wanted to proceed with the trial. Thereupon the Additional District Magistrate has been moved on the ground that the Taluk Magistrate, Bimlipatam had improperly discharged these accused for offences triable exclusively by the Sessions Court and the Additional District Magistrate, in what can legitimately be described as an elaborate and considered order has directed the committal.

The only interesting point that has been taken by Mr. Suryaprakasam is that in this case, there was no discharge of the accused persons and that in fact charges have been framed; that there has been no termination of these proceedings and that, in these circumstances there can be no interference by way of revision by the Additional District Magistrate of Visakhapatnam. In this contention he is fortified by a Bench decision of the Allahabad High Court by Dayal and Bhargava, JJ. in *Abdul Waheed* v. *Rex*[1]. The substance of that decision is that it was not necessary for a Magistrate who decides to try a case himself and does not commit the accused to the Court of sessions, to record reasons for his not charging the accused with the offence exclusively triable by the Court of Sessions; and when the Magistrate decides that the accused be tried by him or any other Magistrate, the accused is not discharged, and, therefore, no question of recording of reasons arises; and that the mere non-framing of a charge cannot amount to an order of discharge so long as the accused is on trial with respect to the offences which are charged against him; that the Magistrate is free to frame a charge which he did not consider necessary to frame, at an earlier stage of the proceedings at a later stage, and that so long as the Magistrate retains the option of framing a charge against the accused, with respect to the allegations made against him it cannot be said that the Magistrate had by his non-framing of the charge discharged the accused of the offence which might have been made out against him on the basis of those allegations and that therefore there can be no interference in revision.

The arguments in this Bench decision, if I may venture to say so, are interesting, but with very great respect, it seems to me that they overlook the scheme of the Criminal Procedure Code, wherein cases are classified into four categories, *viz.*, Preliminary Register cases, Summons cases, Warrant cases and Summary Trials. The Criminal Procedure Code then proceeds to prescribe the mode of procedure in regard to each of these four categories. In the case of offences which are *prima facie* wholly triable by a Sessions Court at their inception, the procedure is to try the case as a Preliminary Register case. If it is found by the Magistrate after enquiry, that the graver charge making it exclusively triable by the Sessions Court, has not been made out to drop that accusation or discharge or not proceed with the accused on that graver charge, whatever phrase we might use, and then proceed

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1. (1950) A.L.J. 647.

to frame a charge himself if he considers that he is competent to dispose of the matter himself or adopt other modes of procedure in the Criminal Procedure Code.

Then this is precisely what has happened in this case, namely, after a particular stage, the Magistrate has come to the conclusion that the graver charge has not been made out and that he should proceed with the case on the less serious charge, that he was competent to dispose of the matter himself and that thereupon he has proceeded to frame charges. If this is not a discharge, of the graver count what else can be a discharge. The argument that it will be still open to the Magistrate to commit at a later stage and therefore there is no termination of the proceedings on the graver charge is a mere talking point because after practically the entire prosecution is before Court and the accused has to enter upon his defence what aggravating factor would come before Court to make the Magistrate convert the calendar case into Preliminary Register case? Such a likelihood is not beyond the bounds of possibility but hardly ever likely to rise in practice. The conclusion of the Bench decision, with very great respect, that the non-framing of charge will not amount to a discharge does not commend itself to me. In this conclusion we are fortified by two considerations, namely, first of all, if really we adopt the reasoning in this decision, then section 437, Criminal Procedure Code would be rendered practically nugatory. Suppose an accusation against a person is for an offence under section 302, Indian Penal Code and it is started as a Preliminary Register case and enquired into by the second class Magistrate as happens in this Province, and the second class Magistrate after enquiring into the matter comes to the improper conclusion that the offence of murder has not been made out and frames a charge for the offence of hurt under section 324, Indian Penal Code; and then he proceeds to dispose of the matter as in a warrant case and acquits the accused. Wherein in this picture does the Sessions Judge and the Additional District Magistrate come by way of revision? How can the order of this Magistrate clutching at jurisdiction, assuming that it is such a case, be corrected?

It is unnecessary to proceed further to discuss this matter elaborately, because really if this interpretation is placed, then section 437, Criminal Procedure Code would become a mere dead letter so far as the Sessions Judge and the Additional District Magistrate are concerned, because they can only interfere in cases of discharge and only the High Court can interfere in cases of acquittal.

In expressing this opinion which I do so with great diffidence having regard to the fact that the learned advocate is relying upon a Bench decision of the Allahabad High Court, I am fortified by the fact that the Bench decision itself says that its views are opposed to that of the Madras High Court and that it has held the contrary opinion.

I shall now briefly set out the decisions of the Madras High Court in regard to this matter. The earliest decision we have is a Bench decision of this High Court in *Gandi Appa Razu*, In re[1]. In this case, it was held that though the complaint alleged facts against the accused constituting an offence under section 302, Indian Penal Code, the Sub-Magistrate disbelieving the evidence on this point did not frame any charge under section 302 or 304, Indian Penal Code his action amounted in law to an order of discharge on those counts, even though no express order of discharge was recorded by him, and that being so, it was open to the Sessions Judge under section 436, Criminal Procedure Code to act *suo motu* and set aside the implied discharge and direct the committal of the accused to the sessions on being satisfied that he had been improperly discharged as the offence under section 304, Indian Penal Code is one exclusively triable by the Sessions Court. This decision relies upon and refers to an earlier decision of this Court *Krishnareddi* v. *Subbamma*[2]. Subsequently on the same lines, this Court has been interpreting this matter as it can be seen from the two following decisions, viz., *Lakshmayya* v. *Emperor*[3]. There Happell, J. held that in a case where the Sub-Magistrate after hearing the prosecution evi-

1. (1919) 38 M.L.J. 194: I.L.R. 43 Mad. 330.
2. (1901) I.L.R. 24 Mad. 136.
3. (1945) 2 M.L.J. 139.

dence and the arguments that no case has been made out against the accused for an offence under section 307, Indian Penal Code and framed charges under sections 147, 323 and 325 of the Indian Penal Code it must be deemed to have been decided, in effect, that the accused had been discharged by the Sub-Magistrate in respect of the offence under section 307, Indian Penal Code and that the Additional District Magistrate was therefore competent to set aside this order of discharge and direct that the accused be committed to the sessions. In *Parameswarayya, In re*[1], it has been held by Govinda Menon, J., that when a charge sheet was filed against the accused for an offence under section 307, Indian Penal Code and the Magistrate was of opinion that the offence on the evidence placed before him was one under section 337 converted the Preliminary Register case into a Calendar Case and convicted the accused under section 337, Indian Penal Code the action of the Magistrate amounted to a discharge of the accused of an offence under section 307, Indian Penal Code and that it was open to the District Magistrate either to order a further inquiry under section 436, Criminal Procedure Code or to order commitment to the Court of Sessions and that section 403, Criminal Procedure Code was bar to the trial of the offence under section 307, Indian Penal Code.

Therefore the point of law taken fails and in regard to the order of the Additional District Magistrate himself, it is an exhaustive one and he has set out elaborately the reasons for coming to the conclusion that a case had been made out to commit the accused to sessions. It would be improper to discuss the pros and cons of these arguments at this stage, because this is a matter which ought to be gone into in the trial Court itself untrammelled by the observations of the Additional District Magistrate.

Therefore subject to these remarks, I decline to interfere and dismiss the petition.

The petitioners will continue to remain on bail until the disposal of the sessions case and on the same terms as before.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

K. S. Deenadayalu Reddy .. *Appellant**

v.

Lalithakumari .. *Respondent.*

Hindu Women's Rights to Separate Residence and Maintenance Act (*XIX of* 1946), *section* 2—*Ex parte decree obtained by husband for restitution of conjugal rights—Wife not asked to comply with decree—Suit by wife for maintenance on the ground of desertion—Husband marrying again pending suit—Wife's right to maintenance under the Act.*

Under section 2 of the Hindu Women's Rights to Separate Residence and Maintenance Act 1946, a Hindu wife is entitled to separate residence and maintenance when her husband marries again, but if she fails to comply with any decree or order of a competent Court without just and sufficient cause she would not be so entitled. The mere fact that the husband obtained a decree for the restitution of conjugal rights would not disentitle the wife of her rights. The husband has further to prove that the wife failed to comply with the decree and that such failure was without just and sufficient cause.

Where the suit itself is one for maintenance on the ground of desertion and pending the suit a further event takes place it is open to the plaintiff to take advantage of that ground which gives rise to a further cause of action for maintaining the suit.

Where the husband obtained an *ex parte* decree for the restitution of conjugal rights at Nagpur and the wife was not asked to comply with the decree, and the wife herself filed a suit for maintenance on the ground of desertion and pending the suit the husband married again,

Held, that the wife was entitled to rely upon the second marriage and that she was entitled to maintenance as the proviso to section 2 of the Act did not operate.

Appeal against the decree of the City Civil Court, Madras, dated 31st March, 1950, in O. S. No. 532 of 1948.

1. (1949) 1 M.L.J. 145.

* City Civil Court Appeal No. 50 of 1950. 4th December, 1951.

S. Balasingam Satya Nadar for Appellant.

P. Somasundaram for Respondent.

The Court delivered the following

JUDGMENT.—This appeal is against the decree of the learned City Civil Judge, granting maintenance at the rate of Rs. 20 per mensem to the plaintiff, who is married wife of the defendant. The marriage has taken place in 1943, and for a year or two the husband and wife lived amicably. Later on, when the husband was transferred to Nagpur where his employment took him, there seem to have been some differences between the husband and wife and there has been exchange of notices. In 1947, a suit seems to have been filed by the defendant appellant for restitution of conjugal rights against his wife. It was first instituted in the Poonamallee District Munsiff's Court and then on the ground that that Court had no jurisdiction, it was transferred to Nagpur and the appellant appears to have obtained a decree against his wife on the 20th of July, 1948, for restitution of conjugal rights. The respondent filed the present suit on the 12th of July, 1948, but in the plaint, she has referred to the filing of the suit by her husband at Nagpur for restitution of conjugal rights.

When the suit was pending, it transpires that the defendant appellant married a second wife on the 3rd of February, 1949. Before the trial of the suit was taken up by the learned City Civil Judge, an application was filed by the plaintiff for amending the plaint in view of the second marriage, which the defendant contracted. That amendment was allowed and the plaint was amended accordingly. The suit proceeded on the basis of the amended plaint.

The suit itself is filed under section 2 of Act XIX of 1946, an Act which gives a Hindu married woman the right to separate residence and maintenance under certain circumstances. Section 2 of that Act is to the following effect :

"Notwithstanding any custom or law to the contrary a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds, namely :—

(1) if he is suffering from any loathsome disease not contracted from her ;

(2) if he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him ;

(3) if he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish ;

(4) if he marries again ;

(5) if he ceases to be a Hindu by conversion to another religion ;

(6) if he keeps a concubine in the house or habitually resides with a concubine ;

(7) for any other justifiable cause:

Provided that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent court for the restitution of conjugal rights."

The learned City Civil Judge relying on the ground that the defendant had married a second time and finding that there was no desertion, gave a decree for maintenance against the appellant. The defendant relied upon his decree for restitution of conjugal rights as a defence to the suit and contended that in so far as the plaintiff had failed without sufficient cause to comply with the decree of a competent Court for the restitution of conjugal rights she was disentitled to the claim for separate maintenance from the appellant. This contention was rejected by the learned City Civil Judge.

The learned counsel appearing for the appellant has raised various contentions before me to get the decree of the learned City Civil Judge set aside. The first ground taken up by him is that the learned City Civil Judge ought not to have allowed the amendment, as the amendment tantamounted to a new cause of action being substituted in the place of the old one, and that it tended to change the character of the suit. I do not think that I can agree with the learned counsel

for the appellant in this contention, for the reasons that the suit itself was for a separate maintenance on the ground that there was desertion on the part of the defendant, but during the pendency of the suit when a further event took place it cannot be said that it was not open to the plaintiff to take advantage of that ground, which would give rise to a further cause of action for maintaining her suit for separate maintenance. After all what she was claiming was only separate maintenance, and she could easily urge more than one ground for the purpose of establishing her claim for maintenance. It has been an accepted principle that Courts when deciding suits, could take into account events that happen either during the pendency of the suit, or even at the stage of the first or second appeal. Such being the case, it cannot be said that there was anything wrong in the learned City Civil Judge having allowed amendment sought for by the plaintiff. Even otherwise, it can be stated to be a legal ground, which was available to the plaintiff when the defendant had married during the pendency of the suit a second time and when it came to the knowledge of the plaintiff that that event had taken place. She was entitled to make use of it as a valid ground under the law. Therefore, I do not think that any illegality has been committed by reason of the allowing of the amendment of the plaint. The amendment having been allowed and the defendant having been given an opportunity to plead against the amendment, there has also been no prejudice caused to the defendant in the proper prosecution of his defence.

The next contention raised by the learned counsel for the appellant is that the learned City Civil Judge did not consider the failure on the part of the plaintiff to comply with the decree of the Nagpur Civil Court from the proper perspective. According to the learned counsel for the appellant the burden was on the plaintiff to show that she failed to comply with the decree for restitution of conjugal rights for sufficient cause and this burden not having been discharged by her and the learned City Civil Judge not having discussed this aspect of the case, the decree and judgment were vitiated and therefore, there was ground, according to the learned counsel for the appellant for remanding this suit for further trial, after framing an issue as to whether there was or no sufficient cause for the respondent to have failed to comply with the decree for restitution of conjugal rights. I do not think that this contention of the learned counsel for the appellant could be accepted. Section 2 of Act XIX of 1946 says that notwithstanding any custom or law to the contrary, a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the grounds which are given in the next seven sub-clauses to that section. After these sub-clauses, comes the proviso which says that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent Court for restitution of conjugal rights. The interpretation put upon the proviso by the learned counsel for the appellant is that the burden, in the matter of failure to comply with a decree of a competent Court for restitution of conjugal rights is thrown upon the married woman, who claims maintenance and not upon the persons who seek to disentitle the married woman, who is otherwise entitled to maintenance under the main part of section 2 of the Act. I do not think I can agree with this interpretation of the learned counsel for the appellant. The proviso is one, which seeks to disentitle a married woman from separate maintenance or residence, provided certain conditions exist and among those conditions one of them is failure for sufficient cause to comply with the decree of a competent Court for restitution of conjugal rights. If a married woman brings a suit against her husband, and if the husband wants that the woman should not be entitled to separate residence or maintenance, when there exists a decree for restitution of conjugal rights, then it will be open to the husband to show that she has failed to comply with that decree for restitution of conjugal rights without sufficient cause. I do not think that this proviso can be interpreted to throw the burden on the plaintiff, a married woman, who seeks to

enforce her right to residence and maintenance on grounds mentioned in the earlier part of section 2 of the Act.

As has been pointed out by the learned counsel for the respondent it may be that the appellant has secured a decree for restitution of conjugal rights against the respondent, but the mere fact of obtaining such a decree and, in this case, it being an *ex parte* decree, will not *ipso facto* disentitle the married woman, the wife of the appellant to claim maintenance. Having obtained a decree, as provided for under Order 21, rule 32, appellant should have proceeded to execute the decree thereby giving an opportunity to the respondent to obey and comply with the decree. Though the learned counsel for the appellant would say that the decree was sought to be executed, there is absolutely no shred of evidence on record in this suit to show that there has been any such execution, or that notices have been exchanged between the parties calling upon the respondent to comply with the decree that was obtained by the appellant in Nagpur. No question appears to have been put to the appellant, when he was in the witness box as to what steps he took in regard to the execution of the decree obtained by him, and what opportunity he gave to the respondent to comply with that decree, in order that her failure to comply with such a decree might be made a ground for disentitling her to the maintenance, which she is otherwise entitled under the law. If such an opportunity had been given and then, if a failure had arisen certainly the question of whether such failure was due to sufficient cause or otherwise, would arise. The more *majore premise* not having been satisfied in this case, I do not think that the question of any sufficient cause or otherwise arises to justify a remand of this suit for further hearing on the question of sufficient cause for failure to comply with the decree for restitution of conjugal rights. I therefore think that inasmuch as the appellant not having discharged the duty cast upon him to prove that there was failure on the part of the respondent to comply with the decree that had been obtained by the appellant against her and that such failure was without any sufficient cause, the mere obtaining of a decree for restitution of conjugal rights would not be a sufficient defence to defeat the right of the plaintiff to maintenance from her husband, the appellant. The rule laid down in *Kishore Bun Mohunt* v. *Dwaranath Adhikari*[1] would seem to apply to the facts of this case, and I do not think that there is any justification for me to adopt the course suggested by the learned counsel for the appellant. I am inclined to hold that the decision of the learned City Civil Judge is not wrong in having declined to consider the existence of a decree for restitution of conjugal rights operating as a defence against the claim of the plaintiff for separate maintenance. His decision has therefore to be upheld and the respondent will be entitled to separate maintenance from the appellant.

The learned counsel for the appellant has objected to the demand of the respondent to enhance the quantum of maintenance, that has been awarded to the respondent. The respondent has preferred a memorandum of cross-objection stating that the quantum awarded by the learned City Civil Judge is inadequate and meagre, considering the hard days that prevail at present and the status and position of the parties to the suit. The learned City Civil Judge has taken into consideration the total income of the appellant, which is said to be Rs. 165 and taking into consideration that he has to maintain himself as also his second wife whom he has married, has fixed the maintenance allowance at the rate of Rs. 20 per mensem. There has been no evidence to show that this appellant has any other additional source of income beyond the Rs. 165 he is said to be earning by means of his employment at Nagpur. Considering the circumstances of the parties and there being also some evidence that the respondent is not really in very penurious circumstances I should say that the quantum of maintenance that has been fixed need not be revised. The rate of Rs. 20 per mensem will stand as it is.

The learned counsel for the respondent has also taken the ground that the finding on the question of desertion by the learned City Civil Judge is not correct.

1. (1894) L.R. 21 I.A. 89 : I.L.R. 21 Cal. 784 at pages 786 and 787 (P.C.).

I do not think that I need go into that question because I am inclined to hold that the finding of the learned City Civil Judge is well supported on the question of desertion. On the facts as they emerge in the suit, it cannot be said that the appellant has really deserted his wife.

In the result, the main appeal preferred by the defendant as well as the memo. of objections preferred by the respondent will both stand dismissed, with costs.

V.P.S. ——— *Appeal and memo. of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

R. Balakrishnan .. *Petitioner**

v.

The State of Madras, represented by the Director of Controlled Commodities, Khaleel Mansions, Mount Road, Madras .. *Respondent.*

Cotton Textiles (Control) Order, 1948, clauses 12 (4), 33 and 30—Scope and validity—If contravene fundamental rights under the Constitution—Legislation overriding fundamental rights—Power of Courts to declare void.

Clause 12 (4) of the Cotton Textiles (Control) Order, in terms imposes an absolute prohibition of acquisition and installation of new looms. It is highly doubtful if such total prohibition would be valid, having regard to the fundamental rights conferred on the citizen by Article 19 (1) (*f*) and (*g*) of the Constitution. A total prohibition from the exercise of any right cannot be justified as a reasonable restriction within the meaning of that expression as it occurs in Article 19 (5) and (6) and will be invalid unless it be for a short and prescribed time. There may be emergent situations when such absolute prohibition may be necessary. But such contingency is provided for by Article 358 of the Constitution. When the President is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened whether by war or external aggression or internal disturbances, he may by proclamation make a declaration to that effect (Article 352). While such proclamation is in operation nothing in Article 19 of the Constitution shall restrict the power of the State to make any law or to take any executive action which the State would but for the provisions contained in Part III of the Constitution be competent to make or take (Article 358). In such a state of emergency, a total prohibition of the exercise of the right conferred by Article 19 may be valid, but otherwise it would be unconstitutional. Clause 12 (4) of the Order by itself must therefore be held to be *ultra vires* and void after the coming into force of the Constitution. But clause 12 (4) of the Order has to be read with clause 33 which gave power to the Textile Commissioner to permit in particular cases the acquisition and installation of new looms. However the discretion of the Textile Commissioner is completely unfettered and such an arbitrary and unfettered discretion would not amount to a reasonable restriction within the meaning of Article 19 (5) and (6). It would be unreasonable to gamble on the reasonableness of the Textile Commissioner.

So long as the possibility of a provision like clause 33 being applied in a manner not sanctioned by the Constitution cannot be ruled out, it must be held to be void. In the absence of any statutory rules to indicate the manner in which the discretion of the Textile Commissioner should be exercised it is impossible to say whether his discretion in a particular case is or is not justified. There is scope for discrimination also. It is plainly a case of naked and arbitrary power. It is therefore not only desirable but also necessary that proper rules should be framed and general principles laid down to govern the discretion vested in the Textile Commissioner under clause 33. If that is done and individual cases are dealt with accordingly without making any discrimination there could be no valid complaint.

Clause 30 of the Order confers on the Textile Commissioner power to direct any manufacturer or dealer or any class of manufacturers or dealers to sell to specified persons only such quantities of cloth or yarn as the Commissioner may specify and likewise not to sell or deliver cloth or yarn except to specified persons. But there is no rule laid down as to the manner in which the proper distribution has to be effected among the several concerned persons. If in the exercise of the powers granted under clause 30, the Textile Commissioner has evolved a proper scheme of distribution which does not offend either against Article 14 or Article 19 (1) (*f*) and (*g*) read with Article 19 (5) and (6) then, there is no room for complaint by any person on the ground that his rights have been unlawfully affected to his prejudice. In the absence of any such scheme and when there is a discrimination against a particular person in the distribution of yarn to him it must be held that there has been a breach of the guarantee of the equal protection of laws vouchsafed by Article 14 and of the fundamental right declared by Article 19 (1) of the Constitution.

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*C.M.P. Nos. 6181, 6182 and 6183 of 1951. 7th September, 1951.

Authorities discussed.

Per Venkatarama Ayyar, J.—A valid statute cannot be rendered void by the incompetence of the person who has been charged with its administration any more than a void statute can be rendered valid by an efficient officer working it to satisfaction. In either case the validity of the enactment should be determined on its own merits. If the impugned provisions confer an absolute and unrestricted power, discrimination is inherent in their very nature and they must be declared void without further investigation as to whether in fact there has been discrimination or not.

The Legislature can confer on a person or body of persons large powers for the purpose of administering the Act. But it must prescribe the principles on which these powers are to be exercised. If there are no rules for guiding and controlling the exercise of discretion by the person or body of persons, then the power must be held to be arbitrary and unreasonable.

Before the Constitution of India (1950) came into force the British Parliament and the Indian Legislatures acting within the spheres allotted to them possessed plenary powers of legislation and the laws enacted by them could not be questioned in any Court on the ground that they deprived a person of his liberty or of his property. It is only with the Constitution that a change came over the situation. The principle of the American Constitution that it was necessary to safeguard the rights of the citizen against the despotism of the Legislature was adopted and limitations imposed on the powers of the Legislature, the most important of which are those set out in Part III. The subjects have now certain fundamental rights guaranteed to them and it is beyond the competence of the Legislature to override them and if they do, the courts can declare such legislation bad.

Clauses 33 (3) and 30 of the Cotton Textiles (Control) Order, 1948, are survivals of the benevolent despotism of the pre-Constitution Legislature and they are inconsistent with the fundamental rights guaranteed under the Constitution and accordingly void.

Petition praying for the reasons stated in the affidavit filed therewith, the High Court will be pleased to issue appropriate directions on Writs or Orders for the enforcement of the petitioner's fundamental rights mentioned in the affidavit and in particular to issue a Writ of Mandamus directing the respondent to forbear from and in any way interfering with the acquisition and installation by the petitioner of additional power looms in his mill and to award costs to the petitioner, etc.

K. V. Venkatasubramaniam and *A. Ramachandran* for *Row and Reddy* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) for the State Counsel (*S. Govind Swaminathan*) for Respondent.

The Order of the Court was made by

The Chief Justice.—In these two applications some of the provisions of the Cotton Textiles (Control) Order, 1948, were challenged as being opposed to certain Articles of the Constitution of India. This Order was made by the Central Government in exercise of the powers conferred by section 3 of the Essential Supplies (Temporary Powers) Act, 1946. It came into force on 2nd August, 1948, in the place of an earlier Order of February 1948. Two classes of special officers to work the provisions of this order are contemplated. One is the controller who is the principal officer appointed by a Provincial Government for the administration of the textile control and the other is the Textile Commissioner appointed by the Central Government. This Order provides for the control of raw materials and stores as well as cloth and yarn. In these two applications we are only concerned with the provisions relating to cloth and yarn. Clause (12) of the Order runs as follows :—

"12. (1) No producer who has no spinning plant shall work or cause or permit to be worked,

(*a*) looms in excess of the number of looms working in the undertaking on the 30th September, 1944.

(*b*) Any loom for a period which in any one month exceeds the average number of hours of work per loom per month in the undertaking during the year ending 30th September, 1944.

(2) No producer who has a spinning plant shall in any quarter—

(*a*) purchase a quantity of yarn exceeding 1/4 of the quantity of yarn purchased by him in the year 1944;

(*b*) sell a quantity of yarn less than 1/4 of the quantity of yarn sold by him in the year 1944.

(3) No producer who has no weaving plant shall instal or cause or permit to be installed any loom in his undertaking.

(4) No person shall acquire or instal any loom to be worked by power as defined in S. 2 (*f*) of the Factories Act, 1934.

(5) Any person having in his possession any loom which he is not entitled to work or cause or permit to be worked in accordance with this clause shall forthwith report the fact to the Controller and shall take such action as to its sealing or storage as the Controller amy direct."

The clause has to be read subject to clause 33 which provides for exclusion from and modification and relaxation of its operation. Clause (1) runs as follows :—

"The Textile Commissioner may by a general or special permit exclude from or modify or relax to such extent as may be specified by him, the operation of any such provision in respect of any person act or thing or any class of persons, acts or things."

Clause 30 confers certain powers on the Textile Commissioner in respect of the distribution of cloth and yarn. It is in the following terms :

"The Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order, direct any manufacturer or dealer, or any class of manufacturers or dealers—

(a) To sell to such person or persons such quantities of cloth or yarn as the Textile Commissioner may specify ; and

(b) not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify ; and may issue such further instructions as he thinks fit regarding the manner in which the direction is to be carried out."

The petitioner in these two petitions is the proprietor of Sundararaj Textiles situated at Kalapatti Post, Coimbatore district. It is exclusively a weaving mill and not what is referred to in the affidavits as a composite mill, *i.e.*, both a spinning and a weaving mill. In 1944, the petitioner had 10 power looms installed in his factory. In 1946 he added another 14 power looms with the permission of the Government and ever since he has been manufacturing cloth in these 24 power looms. In July 1949, he applied to the Textile Commissioner who had his office in Bombay for permission to acquire and instal 50 more power looms, as such permission was necessary under the provisions of the Cotton Textile Control Order, 1948. According to the petitioner, one important reason for this application to instal more looms was his desire to purchase, what is described as, a preparatory machinery for making, warping and sizing. This machinery was only available in units to serve 100 to 120 power looms in the count of yarn used by the petitioner's looms. As the petitioner had only 24 power looms he wanted to acquire further looms. The Textile Commissioner advised the petitioner to apply through the Provincial Textile Commissioner at Madras. The petitioner made an application accordingly on the 19th August, 1949. This application was refused by the Government on 6th December, 1949. He repeated his request and was informed by the Director of Controlled Commodities in his letter, dated 17th March, 1950, that permission for additional looms would not be granted in view of the meagre supply position of yarn in the State. The petitioner again made representations to the Minister of Industries with no success. On 5th July, 1950, he received a communication from the Secretary to Government, Development Department, that in view of the difficult conditions of yarn supply, the petitioner's request for permission to instal 36 additional looms would not be considered at present. Meanwhile the petitioner had purchased the preparatory machinery at a cost of about a lakh of rupees.

In the affidavit filed in support of C. M. P. No. 6181 of 1951, the petitioner stated that after 25th January, 1950, *i.e.*, after the Constitution came into force, clause 12 (4) of the Order became void as being inconsistent with the fundamental rights granted to him, more particularly by Article 19 (1) (*f*) and (*g*). The ground of attack is that the said clause, namely, 12 (4) absolutely prohibits the acquisition or installation of power looms and the prohibition is arbitrary and unreasonable. He also submitted that the restriction, if any, imposed under that clause was an excessive restriction not necessary in the interests of the general public. Clause 33 of the Order is attacked as being contrary to Article 14 of the Constitution inasmuch as it prescribes no standard or the basis on which any provision can be relaxed or excluded in respect of any person. The clause being discriminatory in character cannot be valid. In further support of his plea, the petitioner referred

to other textile mill owners who had acquired and installed new power looms, though the petitioner was himself refused. This the petitioner says is discriminatory.

The petitioner also complains against the conduct of the Government officers in their allotment of yarn per loom per month. He was being allotted 400 lbs. of yarn per loom per month in 1949. In January, 1950, this quantity of 400 was reduced to 200 and again in September, 1950, it was further reduced to 150 lbs. and in April 1951 still further to 100 lbs. per loom per month. This restriction was apparently imposed under clause 30 of the Order. This action on the part of the Government, *i.e.*, the State as represented by the Director of Controlled Commodities is impugned as being unreasonably and arbitrarily discriminatory. The petitioner mentions concrete instances in which even purely weaving mills like the petitioner's were being given 300 to 400 lbs. of yarn per loom per month though he was given considerably less. He alleges that with the amount of yarn allotment now being made it was not possible to run the mill. This might lead to even closing down the business. Both Articles 14 and 19 (1) (*f*) and (*g*) of the Constitution were infringed and clause 30 as well as the orders of Government were *ultra vires* and invalid.

The petitioner also complains that even the allotments of yarn made to him were not being regularly supplied every month. In C. M. P. No. 6181 of 1951 the petitioner's prayer is for the issue of writ of a *mandamus* or an order directing the respondent, namely, the State of Madras represented by the Director of Controlled Commodities to forbear from and in any way interfering with the acquisition and installation by the petitioner of additional power looms in his mill. In the second application (C.M.P. No. 6182 of 1951), the petitioner prayed that a writ or order may issue directing the respondent to allot and supply to the petitioner 400 lbs. of yarn per loom per month.

On behalf of the State an Upper Division clerk in the Office of the Director of Controlled Commodities swore to a counter-affidavit traversing the allegations and charges made by the petitioner in his affidavit. The learned Advocate-General confessed that the counter-affidavit could have been filed by some one more responsible than a clerk. The legal position taken up in this counter-affidavit was that the Textile Commissioner had full discretion to grant or refuse permission for acquisition and installation of new looms. The refusal to give to the petitioner permission to instal new looms was said to be due to the acute scarcity of yarn in the State. A reference is made to an All-India Yarn Distribution Scheme which provided for the internal distribution of cotton yarn to miscellaneous consumers including power looms. As regards the facts, the deponent of the affidavit put the petitioner to strict proof of several allegations in the affidavit.

The petitioner filed a reply affidavit in which he mentioned in detail several instances in which there had been discrimination as regards the grant of permission to acquire and instal new power looms and as regards the allotment of yarn. A further counter-affidavit on behalf of the State was filed during the hearing of the applications by the Assistant Director of Cotton. In this affidavit, he set out the history of cotton and yarn control from 1943 onwards. Provisions in the earlier orders similar to the impugned provisions of the new order are referred to. Clause 30 was in place of clause 18-B of the Cloth and Yarn Control Order, 1943. The purpose of this clause is said to be to secure proper distribution of yarn and proper distribution is understood to mean and means that the distribution is to be in accordance with the basic principles enacted in the order; that is to say, that while the scarcity continued, the distribution must be on the basis of the All-India Yarn Distribution scheme. As regards clause 33, it is stated that exceptions are made under this clause after careful consideration of the various factors and almost always subject to the condition that supply of free yarn to the distribution pool is not impaired. The permissions are given according to the deponent only on specific recommendations received from the Provincial State Controller. Though there is no obligation cast on the Textile Commissioner or the Provincial Con-

troller to feed new looms which are installed, it is pointed out that any unrestricted increase of looms will tend to affect the availability of free yarn to the pool and provide an incentive to mills and the merchants to take to blackmarket activities. The restrictive provisions to be found in clause 18 of the Order is an attempt to limit such tendencies to a reasonable minimum. The petitioner filed a supplementary reply affidavit in which he gave instances of permission being granted to new factories, *e.g.*, 200 power looms to a new factory in Virudhunagar and 20 power looms to a new mill in Cannanore. He also gave instances of unequal allotment of yarn among several mills.

The argument of Mr. Venkatasubramania Aiyar, learned counsel for the petitioner, was in the main based on Article 14 of the Constitution which ensures to all persons equality before the law and equal protection of the laws from the State. The definition of "State" in Article 12 includes besides the Government and Parliament of India and the Government or Legislature of each of the States, also local or other authorities within the territory of India or under the control of the Government of India. Taking first the provisions regarding acquisition of looms, he contended that clause 12 (4) of the Cotton Textiles Control Order, though in terms prohibits any acquisition or installation, must be read with clause 33 which empowers the Textile Commissioner to exempt wholly or in part certain cases from the operation of the provision. The combined effect of clauses 12 (4) and 33 (1) would therefore be that unless permitted by the Textiles Commissioner no new looms can be acquired or installed. Clause 33 (1) does not mention the grounds or circumstances which should influence the Textile Commissioner in granting or withholding special permission. Ultimately, it comes to this, namely, that the Textile Commissioner's discretion is completely unfettered. The legal position taken up in the counter-affidavit filed on behalf of the State is just this. Learned counsel contended that conferment of such arbitrary power on the Textile Commissioner itself offends against the guarantee declared by Article 14 of the Constitution as such power gives ample room for discrimination. He also contended that in actual practice also the orders of the Textile Commissioner have been discriminatory. He strongly relied on the leading decision of the United States Supreme Court in *Yick Wo* v. *Hopkins*[1]. The city and county of Sanfrancisco made an Ordinance that it shall be unlawful for any person to engage in the laundry business within the corporate limits without having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed either of brick or stone. In Sanfrancisco there were about 320 laundries managed by the Chinese. Of them only about 10 were in brick buildings. The remainder were in wooden buildings, with the result that so far as the majority of the Chinese laundries were concerned, it depended entirely on the pleasure of the Board of Supervisors whether any of them would or would not be permitted to engage in the business in the wooden buildings. Actually it was found that the white laundries who were carrying on business in wooden buildings were given permission, the Chinese were refused permission. The validity of the Ordinance was challenged on the ground that it was capable of being and was so operated and enforced as to discriminate against the Chinese laundries and therefore offended section 1 of the Fourteenth Amendment of the Constitution. The Supreme Court held that the Ordinance was invalid because

"It confers a naked arbitrary power upon the board to give or withhold consent and makes all engaged in the business the tenants at will as to their means of living under the Board of Supervisors."

The following passages from the judgment of Mr. Justice Matthews were relied on in particular by petitioner's counsel.

"When we consider the nature and theory of our institutions of Government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary

1. 118 U.S. 356 : 30 L. Ed. 220.

power . . . . . But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possession, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilisation under the reign of just and equal laws, so that in the famous language of the Massachusetts Bill of Rights, the Government of the Commonwealth 'may be a Government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living or any material right essential to the enjoyment of life, at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

Mr. Justice Matthews quoted with approval the following observations made by the Court of Appeals of Maryland in the case of *Baltimore* v. *Radecke*[1].

"But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore, to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the Ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear and that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld, may be actually benefitted by what is thus done to their neighbours; and, when we remmber that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favouritism and other improper influences and motives easy of concealment and difficult to be detected and exposed it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an Ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

Learned counsel referred to the several instances mentioned in the affidavits filed by the petitioner as demonstrating the arbitrary nature of the power conferred on the Textile Commissioner by clause 33. There is no use, counsel urged, relying upon any presumption that the Textile Commissioner would not do anything improper or unjust or unreasonable. It is dangerous that the rights of persons should depend upon any personal quality of a particular officer. In a recent case *Namazi* v. *Deputy Custodian of Evacuee Property, Madras*[2], relating to the Administration of Evacuee Property Ordinance (XXVI of 1949), this Court was called upon to pronounce on the validity of certain of its provisions. Section 20 of the Ordinance prohibits an intending evacuee from transferring in any manner whatsoever any immovable property in which he has any right or interest except with the previous approval of the Custodian, and any transfer made in contravention of the section shall be void. It was conceded that there were no rules laying down the grounds on which any transfer could be approved or refused. Meeting the argument that the Custodian would not ordinarily refuse to approve any transfer unless for proper grounds, I said,

"But surely that would be gambling on the reasonableness of the Custodian. As the section stands, there is nothing to prevent the Custodian from most unreasonably refusing to approve of any transfer by an intending evacuee."

Reliance was placed on these remarks by the learned counsel for the petitioner. Reference was also made to the decision in *Anumathi Sadhukhan* v. *A. K. Chatterjee*[3], for the general proposition that deprivation of valuable rights of property without the necessity of giving any reasons for the action would be unconstitutional. Bose, J., observed in that case thus:

"An order which arbitrarily or excessively invades the right of an individual cannot be said to contain the quality of reasonableness. Clauses 9 and 13 of the Rice Mills Control Order which no doubt empower cancellation or refusal of a licence already issued and refusal to issue a new licence without assigning any reasons. But there can be no doubt that these provisions over-step the limits of reasonableness and must be held to be invalid in the face of the written Constitution of India. It is clear law that an arbitrary or capricious exercise of the power is no exercise at all. If no reasons are assigned it is not possible to know or judge whether the order is a valid or a *mala fide* or arbitrary order."

More or less the same line of reasoning was adopted when the learned counsel also invoked the provision of Article 19 (1) (*f*) and (*g*) of the Constitution read

1. 49 Mad. 217.
2. (1951) 2 M.L.J. 1.
3. A.I.R. 1951 Cal. 90.

with Article 19 (5) and (6). It was contended that a total prohibition of acquisition and installation of looms would not be a reasonable restriction and the decision of the Supreme Court of India in *Chintamanrao* v. *The State of Madhya Pradesh*[1] was cited in support of the contention. In that case the impugned Act totally prohibited the carrying on of the business of manufacture of beedies in certain villages within the agricultural season. Their Lordships held that this was not in the nature of reasonable restriction within the meaning of Article 19 (6). Mahajan, J., who delivered the judgment of the Bench construed the phrase "reasonable restriction" in the following manner:

"The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19 (1) (g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

The learned Advocate-General did not completely endorse the legal propositions set out in the counter-affidavit filed on behalf of the State as regards the arbitrary and unfettered discretion of the Textile Commissioner. He relied in general upon circumstances which compelled the State to regulate the proper distribution of yarn and manufactured cloth, and the acute shortage of yarn. He also relied on the circumstance that the main Act, Essential Supplies (Temporary Powers) Act, was itself a temporary measure. Any scheme devised by the Government for a fair and equal distribution of essential commodities cannot be said to be imposing unreasonable restrictions though the scheme may certainly affect prejudicially some persons. It will be difficult and improper for the Court to embark on the actual measures taken by the Government or its special officers to secure a fair and equitable distribution He cited to us two decisions of the United States Supreme Court which dealt with this question of distribution. In *Railroad Commission of Texas* v. *Rowan and Nicholas Oil Co.*[2], the validity of an order promulgated by the Railroad Commission of Texas came up for consideration. The statutes empowered the Railroad Commission to make rules and regulations for the prevention of waste of oil and natural gas. It was specially provided that in the exercise of the powers conferred on them, the commission shall in the event of any regulation was adopted limiting the production of oil and natural gas in any pool, prorate or apportion the allowable production of the pool among the various producers on a reasonable basis. The Railroad Commissioner made a proration order under which allowances were based upon the hourly potential capacity of the well. The result was a flat per well allowance to the producers. The validity of the order was challenged on the ground that it was opposed to the Fourteenth Amendment because the proration order was not reasonable and it was arbitrary. An alternative mode of distribution was suggested as better than the principle adopted by the Railroad Commission in their order. The Supreme Court held that the order in question was quite valid and that a Court in reviewing the action of an administrative agency to which the promotion and execution of State Policy has been entrusted must not substitute its notions of expediency and fairness for those which have guided such agency. Whether in prorating oil production, any particular system was better than the others was a question not for the Courts but for the administrative agency entrusted by the State with the duty of making such proration. Mr. Justice Frankfurter who delivered the opinion of the Court pointed out the innumerable difficulties in trying to adjust the many conflicting interests and that the commitments of a delicate process of adjustment to the administrative process will not escape challenge in Courts, but such cases, were only episodes in the evolution of adjustment among private interests and on the reconciliation of all the private interests with the underlying public interests in vital sources of energy.

1. (1950) S.C.J. 571.
2. 310 U.S. 573 : 84 L. Ed. 1368.

In the other American case, *Secretary of Agriculture* v. *Central Roig Refining Co.*[1], an order of the Secretary of Agriculture allotting sugar quota among various refineries under the provisions of the Sugar Act of 1948 came up for review. To counteract the serious evils resulting from an uncontrolled sugar market and to rationalise the mischievous fluctuations of a free sugar market, the Legislature adopted the devise of a quota system and the volume of sugar moving to the continental United States market was controlled to secure an harmonious relation between supply and demand. Under the Act of 1948, five sugar producing areas were defined and to each area was allotted an annual quota of sugar. Under section 205-A of the Act the Secretary of Agriculture was authorised to allot the refined sugar quota as well as the inclusive allowance of a particular area among those marketing sugar on mainland from that area. The section *inter alia* provided that allotment shall be made in such manner and for such amounts as to provide a fair, efficient and equitable distribution of such quota or proration thereof by taking into consideration three factors (1) processings of sugar to which proportionate shares pertained, (2) past marketings; and (3) ability to market the amount allotted. An allotment made by the Secretary in exercise of the power conferred by the section was challenged on the ground that the Act itself was not valid under due process clause of the Fifth Amendment, besides other grounds. It was held that the Act did not offend the due process clause because of the alleged discriminatory character. Mr. Justice Frankfurter who delivered the opinion of the Court after referring to the old and obstinate sugar problem of the country and the necessity for some sort of regulation to ameliorate the effect of disorderly competition observed that it was not for the Court to substitute its notion of expediency and fairness for that of the Congress. He said:

> "It would be a singular intrusion of the Judiciary into the legislative process to extrapolate restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the due process clause express,"

and again,

> "This Court is not a tribunal for relief from the crudities or inequities of complicated experimental economic legislation."

The learned Advocate-General also cited to us a decision of the High Court of Australia in *Mccarter* v. *Brodie*[2]. The Transport Regulation Act provided that a commercial goods vehicle should not operate on any public highway unless licensed in accordance with the Act. The Transport Regulation Board was empowered to grant such licences, and it was provided that in granting or refusing licences the Board should have regard to the interests of the public generally and should take into consideration the advantages of the service proposed to be provided, its convenience to the public, the adequacy of the existing transportation, etc. It was held that the Act did not contravene section 92 of the Constitution which provided that,

> "Trade, commerce and intercourses among the States, whether by means of internal carriage or ocean navigation shall be absolutely free."

It was held that section 92 did not preclude the Commonwealth or State Parliament from in any way regulating or controlling inter-State trade and commerce and what was not permitted was prohibition and not regulation. Latham, C.J., posed the question in issue thus,

> "Is the effect of a challenged Act in relation to inter-State trade and commerce direct or remote? If it is remote no question in relation to section 92 arises. Next, where the effect of the Act is direct, is the Act in its true character regulatory and not merely prohibitive? If it is truly regulatory and not prohibitive it will not be invalidated by section 92. The question, therefore, is whether the Transport Regulation Acts of Victoria are regulatory or prohibitive."

I shall first take up clause 12 (4). In terms this provision imposes an absolute prohibition of acquisition and installation of new looms. I have grave doubts if such a total prohibition would be valid, having regard to the fundamental rights conferred on the citizen by Article 19 (1) (*f*) and (*g*). Can total prohibition

1. 338 U.S. 604; 94 L.Ed. 381. 2. 80 C.L.R. 432.

from the exercise of any right be ever justified as a reasonable restriction within the meaning of that expression as it occurs in Article 19 (5) and (6). I am inclined to think that a total prohibition unless it be for a short and prescribed time will be invalid. I quite realise that there may be emergent situations when such absolute prohibition may be necessary. But such contingency is provided for by Article 358 of the Constitution. When the President is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened whether by war or external aggression or internal disturbance, he may by proclamation make a declaration to that effect (Article 352). While such proclamation is in operation nothing in Article 19 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of the Constitution, be competent to make or to take (Article 358). In such a state of emergency a total prohibition of the exercise of the right conferred by Article 19 may be valid, but otherwise, I am of opinion that it would be unconstitutional. An illustration of this principle is to be found in the *Beedi case*[1]. Clause 12 (4) by itself must therefore be held to be *ultra vires* and void after the coming into force of the Constitution.

But both sides argued before us on the footing that there was really no absolute prohibition but there was only a restriction, because clause 12 (4) has to be read with clause 33 which gave power to the Textile Commissioner to permit in particular cases the acquisition and installation of new looms. What the petitioner's counsel urged before us was that there was nothing in clause 33 to indicate the factors which should be taken into account in the exercise of the Textile Commissioner's discretion. If his discretion is completely unfettered, as was suggested in the counter-affidavit filed on behalf of the State, can it be said that the provision does not conflict with the right of equal protection conferred by Article 14? Is there not scope for, if the clause does not really invite discrimination? Can valuable rights of citizens be left entirely to the arbitrary discretion of the Textile Commissioner? I think that such an arbitrary and unfettered discretion would not amount to a reasonable restriction within the meaning of Article 19 (5) and (6). It would be unreasonable to gamble on the reasonableness of the Textile Commissioner, to use the language in an earlier decision of this Court in *Namazi* v. *Deputy Custodian of Evacuee Property, Madras*[2]. The salutary principle enunciated in *Yick Wo* v. *Hopkins*[3], would render such a provision obnoxious to the Constitution. So long as the possibility of a provision like clause 33 being applied in a manner not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void. As the Supreme Court observed in *Romesh Thappar* v. *The State of Madras*[4],

> "Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting such rights it is not possible to uphold it even so far as it may be applied within the constitutional limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void."

The petitioner has also mentioned concrete instances to show that there has been discrimination in the grant of exemptions under clause 33 of the order. It is not necessary for us to discuss whether the exemption in each case was justified or not. What is of significance is that there is scope for discrimination. In the absence of any statutory rules to indicate the manner in which the discretion of the Textile Commissioner should be exercised it is impossible to say whether his discretion in a particular case is or is not justified. If the yardstick is only the personal opinion of the Officer concerned, it is plainly a case of a naked and arbitrary power. It is therefore not only desirable but also necessary that proper rules should be framed and general principles laid down to govern the discretion vested in the Textile Commissioner under Clause 33. If that is done and individual cases are dealt with accordingly without making any discrimination there could be no valid complaint.

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1. 1950 S.C.J. 571.
2. (1951) 2 M.L.J. 1.
3. 118 U.S. 356: 30 L. Ed. 220.
4. (1950) 2 M.L.J. 390: 1950 S.C.J. 418 at 428 (S.C.)

The proper order in the circumstances which I think should be passed on this petition (C.M.P. No. 6181 of 1951) is to direct the respondent to deal with and dispose of the petitioner's application without making any discrimination on any ground, in the light of the observations made herein.

In C.M.P. No. 6182 of 1951 relief is sought in respect of the allotment of yarn. Clause 30 of the Order already extracted above confers on the Textile Commissioner power to direct any manufacturer or dealer or any class of manufacturers or dealers to sell to specified persons only such quantities of cloth or yarn as the Commissioner may specify, and likewise not to sell or deliver cloth or yarn except to specified persons. Besides the indication in the opening words of the clause, namely

> "with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order"

there is no rule laid down as to the manner in which the proper distribution has to be effected among the several concerned persons. The petitioner complains that in actual practice the Textile Commissioner has discriminated between person and person, but apart from actual discrimination, he also challenges the validity of the provision on the ground that it contravenes the principle of equal protection of the laws and also that it is not a reasonable restriction on the exercise of the right conferred by the Constitution under Article 19 (1) (*f*) and (*g*). In the original counter-affidavit filed on behalf of the State, except stating that the petitioner's request to allot 400 lbs. of yarn per month cannot be complied with in view of the acute scarcity of yarn in the State and that supplies of yarn are being regulated to the power looms month after month on the basis of the yarn allotments made to this State by the Textile Commissioner, Bombay, there is nothing else which gives us any information as to the principles on which the distribution is made. In the petitioner's affidavit it was definitely alleged that certain purely weaving mills, *i.e.*, mills belonging to the same category as that of the petitioner were still being given 300 to 400 lbs. of yarn per month and that he was being discriminated unreasonably and arbitrarily. In the counter-affidavit, there is only a bare denial and the petitioner is put to strict proof of the allegations. I must confess that I am surprised at this attitude on behalf of the State. Even in the affidavit subsequently filed by the Assistant Director of Cotton, Bombay, there is no indication as to the basis on which the yarn is allotted to the several mills.

I quite realise that during periods of acute shortage of essential goods and commodities, it is not only desirable but also imperative that the State should take steps to regulate their purchase and sale with a view to an equitable distribution among all the consumers. Legislation undertaken with this object, though it may in a sense, be restrictive of free trade, cannot be declared to be unconstitutional so long, of course, as restrictions are necessary in the interests of the general public and the restrictions are reasonable. It is also clear that legislation in the matter of controls cannot go into the minutest detail of the actual distribution. As Mr. Justice Frankfurter observed in *Railroad Commission of Texas* v. *Rowen and Nicholas Oil Co.*[1],

> "merely writing laws is only the beginning of the matter. The administration of these laws is full of perplexities."

The commitment of the delicate task of adjusting many conflicting interests and overcoming innumerable difficulties in making an equitable distribution must needs be to administrative agency. But the question is whether the administrative agency should have an arbitrary and unfettered discretion or should be bound by certain broad principles and rules which it could not transgress. In *Secretary of Agriculture* v. *Central Roig Refining Co.*[2] the same learned Judge (Mr. Justice Frankfurter) made the following illuminating observations in speaking of the administrative function entrusted to the Secretary of Agriculture in allotting sugar quotas,

> "He could not be left at large and yet he could not be rigidly bounded." Either extreme would defeat the control system. They could be avoided only by laying down standards of such breadth

1. 310 U.S. 573 : 84 L. Ed. 1368. 2. 338 U.S. 604 : 94 L. Ed. 318.

as inevitably to give the secretary leeway for his expert judgment. Its exercise presumes a judgment at once comprehensive and conscientious."

It will be seen that in the two American cases above referred to on which the learned Advocate-General placed reliance, the administrative officer was not left at large. In the Oil case there was a general rule of prorata allotment. In the sugar case the Legislature laid down three factors which had to be taken into consideration in making the quotas. But in the present case no rules or principle have been made or laid down which should guide the Textile Commissioner in making a proper distribution of cloth or yarn. As the clause stands, there is nothing to prevent the Textile Commissioner from issuing any arbitrary order. He can exclude for no reasons certain persons altogether in his scheme of distribution. He can also discriminate. The petitioner's definite charge that mills placed in the same position as his mill have been allotted more quantities of yarn than his mill stands unrefuted.

The question then is what this court should do in these circumstances. Learned counsel for the petitioner asked us to declare clause 30 to be wholly *ultra vires* and void. The result of such a declaration would be to destroy the whole scheme of textile control. I spent anxious thought on the disastrous consequences of such a course. I have already said that during the periods of acute shortage of essential goods there could be, indeed there should be, a certain amount of regulation with a view to ensure fair and equitable distribution. I have already referred to observations of learned Judges of the Supreme Court of the United States that the details of any scheme of regulation or control can only be worked out by administrative agency and not by definite provisions in the Statute. In this connection I found the following passage in Willi's Constitutional Law very suggestive :

"Is it proper classification to put in one class those who get the consent of a board or of an official and into another class those who do not, where no standard is set up to control the action of the board or official? Some cases answer this question in the affirmative, while other cases answer it in the negative. Perhaps the best view on this subject is that due process and equality are not violated by the mere conference of unguided power but only by its arbitrary exercise by those upon whom conferred.

If a Statute declares a definite policy, there is a sufficiently definite standard for the rule against the delegation of legislative power, and also for equality if the standard is reasonable. If no standard is set up to avoid the violation of equality, those exercising the power must act as though they were administering a valid standard. For this reason there is a need for a judicial review to see whether or not power delegated has been exercised arbitrarily."

Clause 30 lays down the ultimate end in view, namely, a proper distribution of cloth and yarn. If in accordance with and in pursuance of this policy, the Textile Commissioner had arrived at a scheme of distribution on a certain and ascertainable basis which is free from any charge of discrimination and he had placed that scheme before this Court and convinced us that the petitioner before us has been allotted the proper quota in accordance with the scheme, then we would have been loth to interfere. Unfortunately, however, and presumably in spite of the efforts of the learned Advocate-General, we have not been informed of any such general scheme. There is no doubt a reference to an All India Yarn Distribution scheme in the counter-affidavit filed on behalf of the State, but no particulars of the scheme have been put before us. We are unable to know if the quota allotted to the petitioner is covered by this scheme. The petitioner has stated in his affidavit that mills practically in the same category as his mill have been allotted 400 lbs. per loom per month. This allegation has not been shown to be wrong. Nor has it been shown that owing to other valid reasons, the quota of 400 lbs. should be reduced. In the absence of any justification for discriminating against the petitioner in this matter, we are compelled to hold that there has been a breach of the guarantee of the equal protection of laws vouchsafed by Article 14 and of the fundamental right declared by Article 19 (1).

At the same time I am not disposed in this application to declare that clause 30 is totally void. It appears to me that if in the exercise of the powers granted under clause 30, the Textile Commissioner has evolved a proper scheme of distribution which does not offend either against Article 14 or Article 19 (1) (*f*) and (*g*) read with Article 19 (5) and (6) then, there is no room for complaint by any person

on the ground that his rights have been unlawfully affected to his prejudice. If till now the authorities concerned have not evolved any general scheme it will be open to them to hereafter at least lay down the general principles of distribution.

In the circumstances, I think the proper order for us to make is to direct the respondent to consider the application of the petitioner for allotment of yarn on its merits without making any discrimination and in accordance with general rules as to fair and equitable distribution that may be made on the subject.

The petitioner will have his costs in the two applications,advocate's fee Rs. 250 in each.

Venkatarama Ayyar, J.—These are petitions filed under Article 226 of the Constitution raising the question of the validity of some of the provisions of the Cotton Textiles Control Order, 1948. The petitioner is the proprietor of a Weaving Factory called Sundararaj Textiles at Kalapatti in Coimbatore district. In 1944 the factory was equipped with ten power looms. In 1946 the petitioner applied to the Government for permission to instal 14 more power looms and the same was granted and the factory has been working ever since with 24 power looms. The Cotton Textiles Control Order, 1948 with which we are now concerned came into force on 2nd August, 1948. Clause 12 (4) of this Order runs as follows :—

"No person shall acquire or instal any looms to be worked by power as defined in section 2 (*f*) of the Factories Act, 1934."

Clause 33 (3) of the order is in these terms :—

"Notwithstanding anything contained in this order the provisions of the clauses specified in Schedule C shall have the effect subject to the powers of the Textile Commissioner under sub-clauses 1 and 2 to withdraw, modify or relax any or of all the restrictions enacted in those provisions."

Clause 12 is one of the provisions included in schedule C.

In 1949 the petitioner applied under clause 33 (3) for permission to instal 50 more power looms, but that was refused by a communication dated 6th December, 1949. The petitioner made further representations in the matter to the Government and again permission was refused by an order dated 17th March, 1950, the ground for refusal being the meagre supply position of yarn in the country. The petitioner contends that clause 12 (4) is an invasion of the rights to acquire property and to carry on trade conferred on him under Article 19 (1) (*f*) and (*g*) and that the power conferred on the Textile Commissioner to withdraw or modify the restriction in clause 12 (4) is arbitrary and discriminative and void under Article 14 of the Constitution.

The petitioner also complains that the quantity of yarn allotted to him by the Textile Commissioner has been undergoing a steady decline that starting with 400 lbs. per loom per month it has now been reduced to 100 lbs. per loom per month and that even that quantity is not regularly supplied and that under the circumstances it has become impossible to carry on business. Clause 30 of the Cotton Textile Control Order which empowers the Textile Commissioner to control the distribution of yarn is as follows :—

"The Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order, direct any manufacturer or dealer, or any class of manufacturers or dealers.

(*a*) to sell to such person or persons such quantities of cloth or yarn as the Textile Commissioner may specify,

(*b*) Not to sell or deliver cloth or yarn of a specified description except to such a person or persons and subject to such conditions as the Textile Commissioner may specify and may issue such further instruction as he thinks fit regarding the manner in which the direction is to be carried out."

The contention of the petitioner is that this clause also is repugnant to article 14 as it confers wide and arbitrary powers on the Textile Commissioner and that it is therefore void. Thus the points for determination are the validity of clause 12 (4), clause 33 (3) and clause 30 of the Cotton Textile Control Order 1948.

I shall first set out the relevant legislative provisions bearing on the question. Under 9 and 10 George VI Chap. 39 India (Central Government and Legislature) Act, the British Parliament conferred on the Central Legislature certain powers. In the exercise of those powers the Indian Legislature passed the Essential Supplies (Temporary) Powers Act, XXIV of 1946. The preamble to the Act shows that the object of the legislation was to continue the wartime control of the production, supply and distribution of essential articles for a further period.

Section 3 (1) enacts :

"The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability of fair prices, may by notified order provide for regulating or prohibiting the production, supply or distribution thereof and trade and commerce therein."

Section 3, clause (2) provides for the regulation of the production, manufacture, acquisition and transport etc., of the essential commodities by licences. Section 4 enacts that the Government might exercise these powers through any officer subordinate to the Central Government or through the Provincial Government or any Officer subordinate to the Provincial Government as may be specified. Under section 14 (1) no order made in exercise of any power conferred by the Act could be called in question in any Court. The life of this Act has been extended from time to time by resolutions of the Legislature, dated 25th February, 1948, 23rd March, 1949, and 20th December, 1949 and finally it has been extended upto 31st December, 1952 by Act LII of 1950. The Cotton Textiles Control Order now under consideration was made in the exercise of the powers conferred under section 3 (1) and came into force on 2nd August, 1948. There is no question but that this Order was valid when it was made. What is in dispute is whether the impugned clauses have become void under the Constitution.

It will be convenient to deal first with the question whether clause 33 (3) is void under the Constitution. This clause undoubtedly confers on the Textile Commissioner a wide and unrestricted power to withdraw or modify clause 12 (4) in such manner as he pleases. It lays down no principles which he has to observe in exercising this power. No rules have been made prescribing the conditions on which the applicant is to get exemptions or modification. No directions are given controlling in any manner the discretion of the Commissioner. He is not bound to give any reasons for his orders. On the language of clause 33 (3) there is nothing to prevent the Commissioner from granting exemption to some and refusing it to others at his own will and pleasure. Indeed the petitioner complains in his affidavits that there has been such discrimination and he has given particulars therefor.

The counter-affidavit contains a general denial and avoids an answer to the particulars but it is unnecessary to decide whether the complaints of the petitioner are well founded and whether there has been discrimination or not, because the validity of the provisions does not depend upon the result of their working. A valid statute cannot be rendered void by the incompetence of the person who has been charged with its administration any more than a void statute can be rendered valid by an efficient officer working it to satisfaction. In either case the validity of the enactment should be determined on its own merits. If the impugned provisions confer an absolute and unrestricted power, discrimination is inherent in their very nature and they must be declared void without further investigation as to whether in fact there has been discrimination or not. The well known observation occurring in *Regan* v. *Farmers Loan and Trust Co.*[1]

"This, as has been often observed is a Government of laws and not a Government of men"

seems eminently adapted to this context.

I shall now deal with the authorities cited on either side. Mr. K. V. Venkatasubramania Iyer the learned advocate for the petitioner relied on the decisions in *Yick Wo* v. *Hopkins*[2]. *Anumathi Sadhukhan* v. *A. K. Chaterjee*[3] and the observations

1. 154 U.S. 362 : 38 L. Ed. p. 1014 at 1024.
2. 118 U.S. 356, 374 : 30 L. Ed. 220.
3. A.I.R. 1951 Cal. 90.

in *Namazi* v. *The Deputy Custodian of Evacuee Property, Madras*[1]. In *Yick Wo* v. *Hopkins*[2] an order of the city and county of San Fancisco provided that it would be unlawful for any person to engage in laundry business in buildings other than those constructed of brick or stone without the permission of the Board of Supervisors. No regulations were made prescribing conditions to be complied with for obtaining the consent. In holding that this provision was invalid Matthews, J., delivering the unanimous opinion of the Court observed as follows :—

> " There is nothing in the Ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer and actually do confer not a discretion to be exercised upon a consideration of the circumstances of each case but a naked and arbitrary power to give or withhold, consent, not only as to places but as to persons."
>
> " It is purely arbitrary and acknowledges neither guidance nor restraint." (p.p. 356-374).

In *Anumathi Sadhukhan* v. *A. K. Chatterjee*[3], the question was about the validity of an order passed under West Bengal Rice Mills Control Order (1949). Clause 9 of this Order is as follows :—

> " Notwithstanding anything contained in this order the Commissioner, may, without assigning any reason direct any application for the issue of a licence or for the renewal of a license be refused."

Under this clause an order was passed prohibiting the husking of paddy after 14th December, 1950. In holding that this order was *ultra vires* Bose, J., observed as follows :—

> " An order which arbitrarily or excessively invades the right of an individual cannot be said to contain the quality of reasonableness. Clauses 9 and 13 of the Rice Mills Control Order which no doubt empower cancellation or refusal of a licence already issued and refusal to issue a new licenee without assigning any reasons. But there can be no doubt that these provisions overstep the limits of reasonableness and must be held to be invalid, in the face of the written Constitution of India. These provisions do not give any opportunity to the licence holder to make any representation against the action taken by the authorities concerned or to protect their interest against any wrongful action of the authorities and they further provide scope for the exercise of the power conferred on the authorities in an abritrary and capricious manner, if they so choose to do it. It is clear law that an arbitrary or capricious exercise of the power is no exercise at all. If no reasons are assigned, it is not possible to know or judge whether the order is a valid or *mala fide* or arbitrary order."

Reliance is also placed on certain observations occurring in *M. B. Namazi* v. *The Deputy Custodian of Evacuee Property, Madras*[1]. Dealing with section 20 of the Administration of the Evacuee property Ordinance, No. XXVI of 1949 which provides that no intending evacuee shall transfer his property without the consent of the custodian, my Lord the Chief Justice referred to the absence of rules indicating on what grounds the transfer should be refused and then observed as follows :—

> " It may be said that the custodian would not ordinarily refuse to approve any transfer unless for proper grounds. But surely that would be gambling on the reasonableness of the custodian. As the section stands, there is nothing to prevent the custodian from most unreasonably refusing to approve of any transfer by an intending evacuee."

As against this the learned Advocate-General relied on *Railroad Commission of Texas* v. *Romen and Nichols Oil Company*[4], *Secretary of Agriculture* v. *Central Roig Refining Company*[5] and certain observations in *Mc Carter and another* v. *Brodie*[6]. In *Railroad Commission of Texas* v. *Romen and Nichols Oil Company*[4], the question was about the validity of the proration order issued by the commission regulating production of oil " on hourly potential basis " with exceptions in cases of wells with low productive capacity called " marginal wells ". Romen and Nichols Oil Company complained that the rules framed by the commission put the owners of the marginal wells in a favoured position and that the restrictions on production crippled the non-marginal owners in the enjoyment of their rights, that those restrictions were unreasonable and amounted to depriving them of their property without due process of law. It was held that certain rules and formulas having been adopted by the commission in a matter requiring special knowledge it was not within the province of the Court to interfere with them.

1. (1951) 2 M.L.J. 1.
2. 118 U.S. 356 : 30 L. Ed. 220,
3. A.I.R. 1951 Cal. 90.
4. 310 U.S. 573 : 84 L. Ed. 1368.
5. 338 U.S. 604 : 94 L. Ed. 381.
6. 80 C.L.R. 432.

"A controversy like this always calls for fresh reminder that Courts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."

and dealing with the contention that there was discrimination in favour of the smaller owners the Court observed :

"Plainly these are not issues for our arbitrament. The State was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field. It has chosen to meet these problems through the day to day exertions of a body specially entrusted with the task because presumably competent to deal with it. In striking the balance that have to be struck with the complicated and subtle factors that must enter into such judgments, the commission has observed established procedure. If the history of proration is any guide, the present order is but one more item in a continuous series of adjustments. It is not for the Federal Courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."

In that case there were definite rules framed with reference to various classes of wells and there was no question of any arbitrary exercise of power. What was decided was only that the Courts were not competent to sit in judgment on the propriety or fairness of the rules which had been duly framed under the statute. In this case no such rules have been framed.

In *Secretary of Agriculture* v. *Central Roig Refining Co.*[1], the validity of certain provisions in the Sugar Act was in question. For the purpose of controlling Sugar market the quota system was adopted. The Secretary of Agriculture was empowered to make allotments after taking into consideration processing, past marketing and ability to market. The Act also fixed an annual quota of refined sugar which may be marketed from the offshore areas but there was no such restriction on the mainland refiners. The validity of these provisions was contested on the ground that fixing 1935 to 1941 as the basic period operated harshly on the new comers and that fixing of quotas only for offshore area refiners and not for the mainland refiners was discriminative and in violation of due process clause. In repelling this contention the Court observed :—

"To fix quotas on a strict historical basis is hard on late-comers into the industry or on those in it who desire to expand. On the other hand, to the extent that new comers are allowed to enter or old timers to expand there must either be an increase in supply or a reduction in the quotas of others. Many other factors must plague those charged with the formulation of policy the extent to which projected expansion is a function of efficiency, or becomes a depressent of wage standards ; the wise direction of capital into investments and the economic waste incident to what may be on the short or the long pull over expansion of industrial facilities ; the availability of a more suitable basis for the fixing of quotas, etc. The final judgment is too apt to be a hodge-podge of considerations, including considerations that may well weigh with legislators but which this Court can hardly disentangle."

and again

"This Court is not a tribunal for relief from the crudities and inequities of complicated economic legislation."

This decision also is similar to the one in *Railroad Commission of Texas* v. *Romen and Nichols Oil Company*[2], and is based upon the same principle.

The learned Advocate-General relied upon certain observations in *McCarter and another* v. *Brodie*[3]. Under a certain transport regulation Act passed by the State of Victoria no commercial vehicle could operate on public highways unless it had licence. There were detailed provisions prescribing qualifications and conditions under which licences could be granted. One of those conditions was the payment of licence fee. It was contended that the imposition of a licence fee was a restriction on the right to trade "absolutely free" conferred by section 92 of the Constitution Act. This contention was rejected and it was held that the Legislature had power to regulate trade and that section 92 was inapplicable to such regulations. In that connection, Latham, C.J., made the following observations on which the learned Advocate-General relied :—

"It has, however, been particularly objected that a power to regulate trade and commerce does not include a power to exclude any person from operations in trade and commerce. But it is obvious

1. 338 U.S. 604 : 94 L. Ed. 381.
2. 310 U.S. 573 : 84 L. Ed. 1368.
3. 80 C.L.R. 432.

that any regulation which imposes conditions upon activities of individuals must exclude from those activities persons who are not prepared, or who are not able for any reason, to satisfy those conditions. In other words all regulation involves some degree of prohibition, and, further, all regulation operates upon persons."

In that case there were elaborate rules prescribed for granting licence and the Court held that the discretion of the Board was not unlimited and arbitrary. In fact the observations quoted above were relied on by the learned Advocate-General only to show that the power to regulate carries with it restriction in some form.

The result of the authorities may thus be summed up. The Legislature can confer on a person or body of persons large powers for the purpose of administering the Act. But it must prescribe the principles on which these powers are to be exercised. If there are no rules for guiding and controlling the exercise of discretion by the person or body of persons, then the power must be held to be arbitrary and unreasonable.

Conformably to the above principles the learned Advocate-General sought to establish that the discretion conferred on the Textile Commissioner under clause 33 (3) is not absolute and that in fact it is subject to reasonable limitations. He referred to the orders relating to Cotton Control Order made in the year 1943; then to the Control Order, dated 29th April, 1944, made under the Defence of India Act; to clause 18-B which corresponds to the present clause 30; to the Control Order of 1945 and to the evolution of All India Yarn Distribution Scheme. He argued that under clause 12, sub-clauses (1) to (3) the year 1944 was taken as the basic period for fixing quotas and it is implicit in clause 33 (3) and clause 30 that the Textile Commissioner should exercise his powers on the basis of the 1944 fixation. But I am unable to read any such limitation or condition in clause 33 (3) and clause 30. Indeed the counter-affidavit takes the position that the orders of the Textile Commissioner are purely administrative and not liable to be questioned in Court. That undoubtedly would be the position in 1948 when the Control Order in question was issued. The British Parliament and the Indian Legislatures acting within the spheres allotted to them possessed plenary powers of legislation and the laws enacted by them could not be questioned in any Court on the ground that they deprived a person of his liberty or of his property. It is only with the Constitution that a change came over the situation. The principle of the American Constitution that it was necessary to safeguard the rights of the citizens against the despotism of the Legislature was adopted and limitations imposed on the powers of the Legislature, the most important of which are those set out in Part III. The subjects have now certain fundamental rights guaranteed to them and it is beyond the competence of the Legislature to override them and if they do, the Courts can declare such legislation bad. Now the Cotton Control Orders were notified under section 3 (1) of Act XXIV of 1946 long prior to the Constitution, under the influence of a different theory and from a different standpoint and it is not, therefore, a matter for surprise that some of these provisions do not fit in with the pattern of the Constitution. Clause 33 (3) and clause 30 are survivals of the benevolent despotism of the pre-Constitution Legislature and they are inconsistent with the fundamental rights guaranteed under the Constitution. The counter-affidavit is in my opinion a frank admission of this. I am, accordingly of opinion that clause 33 (3) is opposed to Article 14 and void.

I shall now deal with clause 12 (4). The petitioner contends that he has a fundamental right to acquire property under Article 19 (1) (*f*) and to trade under Article 19 (1) (*g*) and that clause 12 (4) is an infringement of these rights and is, therefore, void. The point to be decided is whether the clause can be held to be saved by Article 19 (5) and (6) as being a reasonable restriction made in the interest of the general public. That the Control Orders have been made in the interests of the general public cannot be and has not been controverted, but what is urged is that clause 12 (4) absolutely prohibits the acquisition of property and, therefore, cannot be upheld as a restriction, much less reasonable restriction on the rights conferred under Article 19 (1), clauses (*f*) and (*g*). Reliance was placed on the

decision of the Supreme Court in *Chintaman Rao* v. *The State of Madhya Pradesh*[1], where it was held that a prohibition on the manufacture of beedis during agricultural season was void as being unreasonable. It may be conceded that the restrictions contemplated by Article 19 (5) are such as are incidental to regulation of the rights conferred under Article 19 (1) (*f*) and (*g*) and that the total prohibition of the rights is not within its scope. But it must be remembered that the Cotton Textiles Control Order is an emergency legislation introduced for the purpose of regulating supply and demand under abnormal conditions following the termination of the war. It is statedly a temporary measure, its life being extended by successive resolutions of the Legislature having due regard to the conditions of the market.

In judging of the reasonbleness of the prohibition it would be relevant to take into account that it is an emergency legislation of a temporary character. The following observations in *Khare* v. *State of Delhi*[2] would seem to lend support for the view that the prohibition might be valid. In that case the question was whether an order of externment was a reasonable restriction on the right conferred under Article 19 (1) (*d*). In answering this question in the affirmative, Kania, C.J., observed as follows :—

"The further extension of the externment order beyond the three months may be for an indefinite period but in that connection the fact *that the whole Act is* to remain in force up to 14th August, 1951, cannot be overlooked."

Mukherjee, J., observed as follows :—

"It is not disputed that under clause 14 of Article 19 reasonableness of a challenged legislation has to be determined by a Court and the Court decides such matters by applying some objective standard which is said to be the standard of an average prudent man. Judged by such a standard which is sometimes described as an external yardstick the vesting of authority in particular officers to take prompt action under emergent circumstances, entirely on their own responsibilities or personal satisfaction, is not necessarily unreasonable. One has to take into account the whole scheme of legislation and the circumstances under which the restrictive orders could be made."

In view of these observations I should have had considerable difficulty in holding that clause 12 (4) standing by itself would be void. But the matter, however, does not rest there. It is argued on behalf of the petitioner that clause 12 (4) does not stand alone that it must be read along with clause 33 (3) that the latter is invalid as offending Article 14 and that in consequence the former also must be held to be invalid.

I agree with this contention. The prohibition on the right to acquire property enacted under clause 12 (4) and the power to exempt or modify its operation conferred under clause 33 (3) are inseparable parts of a single scheme of control. Is it likely that the authorities would have enacted such an absolute prohibition as is contained in clause 12 (4) if they had not also coupled it with a wide power of exemption such as is conferred under clause 33 (3) ? I find it difficult to believe that they would have . And if an absolute prohibition can be justified under Article 19 (5) only by the existence of a state of emergency, how is that to be reconciled with the grant of such an absolute power of exemption under clause 33 (3) ? If *A* is to be prohibited from acquiring power looms on the ground of national emergency, the prohibition must apply equally to *B* and *C* and all the citizens. There cannot be an emergency as regards one citizen and not as regards others. Nor can an argument be founded on the setting of the two provisions under the Control Order. Clause 33 (3) confers a power to exempt not merely in respect of clause 12 (4), but several other clauses which are all set out in Schedule C. It is as if it were enacted as part of every one of the clauses mentioned in that schedule. The proper view to take of the clauses is to regard them as licensing provisions, providing in substance that properties could be acquired under a licence and that the Textile Commissioner should have the authority to grant such a licence. The validity of clauses 12 (4) and 33 (3) must then be judged by the principles applicable to the power to grant licences and, as already mentioned, such a power will be valid only if it is to be exercised in accordance with rules, and where there are no such rules.

1. (1950) S.C.J. 571. 2. (1950) S.C.J. 328.

it must be declared void as repugnant to Article 14. That being my conclusion, I shall have now to consider what relief should be granted to the petitioner. To prohibit the Textile Commissioner from interfering with any acquisition of power looms by the petitioner generally which is what is prayed for in the petition will be too wide a relief to grant, and will amount to a negation of the power of the State to enact control regulations in the interests of the public. At the same time, to leave the petitioner without any remedy against the refusal of the Textile Commissioner to grant exemption under clause 33 (3) would be to withhold protection against the invasion of fundamental rights in exercise of a naked and arbitrary power. To strike a proper balance between the demands of the State and the rights of the individuals it is desirable that an order should issue that the application of the petitioner for exemption under clause 33 (3) should be heard and disposed of by the Textile Commissioner on principles in consonance with Article 14. It is desirable that proper rules should be framed by the administration prescribing the conditions for granting permission, and if that is done there will be no ground for complaint under Article 14 and this Court will not interfere with the exercise of discretion by the Textile Commissioner, however wide it might be so long as it is within the rules.

The validity of clause 30 may now be considered. This clause also confers absolute and unlimited powers on the Textile Commissioner. The learned Advocate-General relied on the words "with a view to securing proper distribution of cloth or yarn" occurring in clause 30 as imposing a limitation on the exercise of discretion by the Textile Commissioner, but these words only define the object of the control and not the mode and manner in which such object is to be carried out. This clause is of the same character as clause 33 (3) and must for the same reasons be held to be void.

The question is what is the relief which should be granted to the petitioner. The prayer in the petition is that the respondent should allot and supply to the petitioner 400 lbs. of yarn per loom per month. For the reasons given by me (in C.M.P. No. 6181 of 1951) I am of opinion that such a relief could not be granted. But the application of the petitioner for supply of yarn should be directed to be considered by the Textile Commissioner and disposed of on principles consonant to Article 14. I therefore agree that an order should issue in both the applications in forms mentioned in the judgment of my Lord the Chief Justice.

Subsequent to the delivery of the judgments in these applications it was brought to our notice by the learned Advocate-General that on 9th July, 1951, there was a notification by the Central Government under which for clause 30 as it stood before, the following clause was substituted, namely:—

"30. (1) No producer shall sell or deliver any cloth or yarn which has been produced by him except to such person or persons and subject to such conditions as the Textile Commissioner may specify.

(2) Without prejudice to the provisions of sub-clause (1) the Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order direct any manufacturer or dealer or any class of manufacturers or dealers—

(*a*) to sell to such person or persons such quantities of such description of cloth or yarn as the Textile Commissioner may specify;

(*b*) Not to sell or deliver any cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify.

(3) The Textile Commissioner may issue such further instructions as he thinks fit in order to carry out the provisions of sub-clause (1) or any direction under sub-clause (2).

(4) Every manufacturer or dealer, to whom a direction or instruction is issued under this clause, shall comply with any such direction or instruction."

We are of opinion that neither the reasoning nor the conclusion in the judgments just delivered is in any way affected by this substitution.

We certify that the case involves a substantial question of law as to the interpretation of the Constitution and in particular Article 14 and Article 19 (1) (*f*) and (*g*) read with Article 19 (5) and (6).

K.S. *Order issued.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

The Lotus Industrials, Kallai, Malabar by sole Proprietor M. Velayudha Menon and another .. *Petitioners**

v.

The State of Madras represented by the Secretary, Development Department, Madras and others .. *Respondents.*

Cotton Textiles Control Order (1948), *clause* 30—*Distribution of yarn in pursuance of All India Yarn Distribution Scheme—Division of consumers into* (1) *those who were getting yarn from mills during* 1942-1943 *and* (2) *others who purchased from wholesale or retail dealers—Allowing the first category to buy direct from mills—If "discrimination"—Reasonableness and validity of classification of consumers and distribution of yarn to them.*

The division of consumers of yarn for purposes of distribution into two categories (1) "consumer quota holders "(i.e.) consumers who were getting yarn from mills direct during 1942-1943 and (2) others who purchased from wholesale or retail dealers and the preferential treatment accorded to "consumer quota holders", in permitting them to buy yarn direct from the mills, cannot be held to be discriminatory and in contravention of the principles underlying Article 14 of the Constitution of India especially in consideration of the fact that the total bales allotted to "consumer quota holders" is only 1,850 out of the aggregate allotted to the Madras State of about 16,000 to 18,000 bales.

Persons who had discontinued their business for a time during the critical period had properly been removed from the category of "consumer quota holders". Such persons can only be included in the "new comers" to the business.

Petitions praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order in the nature of a Writ of Prohibition directing the Government of Madras to forbear from enforcing any system of rationing of yarn with regard to some only of the consumers and to issue an order of a Writ of Mandamus directing the Government to distribute the yarn allotted to Madras State equally between all the consumers in proportion to the looms employed by them.

D. Narasaraju and *P. C. Kurian* for Petitioners.

The Advocate-General (*V. K. Thiruvenkatachari*) for the State Counsel (*John and Row*) for Respondents Nos. 1 and 2.

K. Umamaheswaram and *Alladi Kuppuswami* for 3rd Respondent.

The Order of the Court was pronounced by

The Chief Justice: C.M.P. No. 5524 *of* 1951.—This is an application for the issue of an order in the nature of a prohibition directing the Government of Madras to forbear from enforcing any system of rationing of yarn with regard to some only of the consumers and to issue an order in the nature of a writ of *mandamus* directing the Government of Madras to distribute the yarn allotted to the Madras State equally between all the consumers in proportion to the looms employed by them. The affidavit in support of this application is filed by one M. Velayudha Menon representing the two petitioners, namely, (1) The Lotus Industrials, Kallai, Malabar, of which he is the sole proprietor, and (2) the Calicut Handloom Owners' Association of which he is the Honorary Secretary.

Distribution of yarn in this State is made under the Cotton Textiles Control Order, 1948, by officers specially appointed for the purpose. Clause 30 of that Order directly relates to the distribution of yarn. It runs as follows :

"The Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order, direct any manufacturer or dealer, or any class of manufacturers or dealers—

(a) to sell to such person or persons such quantities of cloth or yarn as the Textile Commissioner may specify ;

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* C.M.P. No. 5524 of 1951 and W.P. No. 635 of 1951. 5th December, 1951.

(*b*) not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify; and may issue such instructions as he thinks fit regarding the manner in which the direction is to be carried out."

This clause as well as other clauses relating to the acquisition and installation of power looms came up for discussion before this Court in C. M. P. Nos. 6181 and 6182 of 1951.[1] In the latter of these petitions I remarked that there was nothing in the affidavit filed on behalf of the State to give any information as to the principles on which the distribution of yarn is being made. While realising that during periods of acute shortage of essential goods and commodities it is not only desirable but also imperative that the State should take steps to regulate their purchase and sale with a view to an equitable distribution among all the consumers and also that provisions relating to Controls cannot go into the minutest detail of actual distribution, I said as follows :—

" Clause 30 lays down the ultimate end in view, namely, a proper distribution of cloth and yarn. If, in accordance with and in pursuance of this policy, the Textile Commissioner had arrived at a scheme of distribution on a certain and ascertainable basis which is free from any charge of discrimination and he had placed that scheme before this Court and convinced us that the petitioner before us has been allotted the proper quota in accordance with the scheme, then we would have been loth to interfere. Unfortunately, however, and presumably in spite of the efforts of the learned Advocate-General, we have not been informed of any such general scheme. There is no doubt a reference to an All-India Yarn Distribution Scheme in the counter-affidavit filed on behalf of the State, but no particulars of the scheme have been put before us . . . . . . It appears to me that if in the exercise of the powers granted under clause 30, the Textile Commissioner has evolved a proper scheme of distribution which does not offend either against Article 14 or Article 19 (1) (*f*) and (*g*) read with Article 19 (5) and (6), then there is no room for complaint by any person on the ground that his rights have been unlawfully affected to his prejudice."

I am glad to find that in this case a long and elaborate affidavit has been filed on behalf of the State by the Director of Controlled Commodities setting out in detail the provisions of the All-India Yarn Distribution Scheme. The material features of this scheme are as follows :

Under the scheme the Government of India takes over the entire yarn produced in the Indian Union. After permitting various composite mills to retain for the production and consumption of their weaving sections the yarn produced by their spinning sections, out of the balance of yarn the Central Government retains a portion for Government purposes and a portion for export to foreign countries and leaves the balance for internal distribution in the country. Such balance of yarn called "free yarn" is pooled together and distributed to the various States for supplying the consumers in their respective areas. The quotas of yarn for the respective States are fixed by the Textile Commissioner at Bombay. Thereafter the Director of Controlled Commodities at Madras is in charge of the distribution within the State. This distribution is in accordance with the principles laid down in Government Orders issued from time to time. The handloom factories, power loom factories and hosiery factories which were getting supplies of yarn direct from the mills during the previous control period were treated preferentially and they were allowed to continue to get their supplies direct from the Mills. The quantity to be supplied to each consumer is fixed by the Provincial Textile Commissioner. Accordingly consumers of yarn within the State are divided into two main categories for the purpose of distribution, namely, (1) those who were purchasing yarn direct from the mills at ex-mill rates during the last control period, and (2) other consumers purchasing yarn from wholesale or retail dealers. The persons in the first category are called "consumer quota holders." These are given the same quantity of yarn as they were purchasing on an average during the basic period of 1940-42 at ex-mill rates for their own consumption and use. There are about 91 such "consumer quota holders" in the State, including power looms, hosiery factories, handloom factories and master weavers. Old and established dyers in Madras, Madura and Ramnad Districts are given certain bales, but these bales come back to the weavers in the shape of yarn through normal channels of distribution. Miscellaneous consumers requiring small counts like 1 to 2 are given about 120 bales of yarn and the Fisheries Department is allotted about 100

1. (1952) 1 M.L.J. 514.

bales. Out of the balance 36 per cent. is allotted to the Madras Handloom Weavers' Provincial Co-operative Society for distribution to handloom weavers who have joined co-operative societies for the reason that a little more than one-third of the handlooms as originally estimated in 1945 are held by the members of that Society. The balance of 64 per cent. is allotted to the Collectors of the various districts for distribution to the weavers other than those who are members of the Society and other consumers in the districts. During the second half of the year 1950 supplies of yarn became very scarce and it was found that black-marketing was going on as some of the consumers were bogus. In order to ensure a fair distribution of the available yarn to genuine weavers and other consumers at controlled rates, it was found necessary to revise the distribution scheme. Identity cards were issued to genuine consumers. But the consumer quota holders were permitted to obtain their usual supplies direct from the mills at ex-mill rates.

It is frankly admitted in the affidavit filed by the Director of Controlled Commodities that the consumer quota holders are no doubt in a better position, but they were placed in a special class as they were enjoying the privileges during the prior control period. It was submitted that the distribution of yarn was always undertaken on the most fair and equitable basis possible and the classification was a fair and reasonable classification necessitated by the circumstances. It was also explained why the period of 1940-42 was fixed as the basic period. This was because control was introduced in 1945 and the years 1943 and 1944 were years during which conditions were extremely unsettled and it was not possible to get accurate statistics for the period.

The real complaint of the petitioners is against the preferential treatment of the "consumer quota holders" both as regards the quantities of yarn and the favourable price at which they will be able to purchase yarn direct from the mills.

Mr. Narasaraju, learned advocate for the petitioners, raised two main grounds of objection to the classification of the consumers into "consumer quota holders" and others. The first ground was that any classification for purposes of distribution can be made only by the Legislature and not by the executive or administrative authorities entrusted with the task of distribution. The second ground was that the classification must rest on a distinction which had a logical connection with the object and purpose. The first ground does not need much consideration. There is nothing in the Constitution which precludes a classification even by bodies other than the Legislature. The real question is whether the classification amounts to an illegal discrimination. Having regard to the wide definition of "law" in Article 13 (3) as including any rule, regulation and notification having the force of law, it is obvious that any method of distribution which the State adopts in pursuance of a Control Order should not contravene the provisions of Article 14 which guarantees equal protection of the laws to all persons. The reports of the United States Supreme Court decisions contain several examples of classification by executive and administrative bodies and authorities which are subject to judicial review equally with classification made by the Legislature.

In support of the second ground of objection learned counsel relied on the observations in *Chiranjit Lal Chowdhury* v. *The Union of India and others*[1]. The principles laid down in that case have been summarised by His Lordship Fazl Ali, J., in Prohibition case *State of Bombay* v. *Balsara*[2]. The propositions so laid down so far as they are material to this application are as follows :

> "(5) Every classification is in some degree likely to produce some inequality and mere production of inequality is not enough.
>
> (6) If a law deals equally with members of a well-defined class it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.
>
> (7) While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis."

1. (1950) S.C.R. 869 : 1951 S.C.J. 29 (S.C.)
2. (1951) 2 M.L.J. 141 at 153 : 1951 S.C.J. 478 (S.C.).

Bearing these principles in mind, we have to see if there is anything in the classification adopted in the All-India Yarn Distribution Scheme which contravenes these principles. It is true that one way of distribution among several consumers is by adopting the *pro rata* basis. But that basis need not always be the most equitable basis. This basis has been to a certain extent adopted so far as the new entrants are concerned. But consumers of long standing who had, during the normal years and during the first control period, managed to obtain standing contracts directly with the mills and who had been more or less continuously in the trade were apparently considered to deserve a preferential treatment. I do not think that such a view is unfair or discriminatory. Nor can I say that this basis has no reasonable and just relation to the object sought to be attained, namely, a proper distribution of yarn.

I need only refer to one decision of the Supreme Court of United States which throws considerable light on the point under discussion, a decision to which we also referred in the prior applications, C.M.P. Nos. 6181 and 6182 of 1952[1], namely, *Secretary of Agriculture* v. *Central Roig Refining Company*[2]. Under the Sugar Act of 1948 the Secretary of Agriculture was authorised to allot the refined sugar quota of a particular area among those marketing the sugar on the mainland from an offshore area. He was specifically directed to provide a fair distribution of the quota by taking into consideration three factors which included (1) past marketings, and (2) ability to market the amount allotted. An order of the Secretary allotting certain sugar quota among the various refineries of the Island of Puerto Rico was based upon findings that the proper measure as to "past marketing" and "ability to market" was a period preceding the abnormal war years. The constitutionality of the Act was challenged. The Supreme Court held that the Act did not offend the due process clause because of the alleged discriminatory character and the Secretary did not exceed the authority given him by the Act. The following observations made by Frankfurter, J., who delivered the opinion of the Court are most instructive :

"It was evidently deemed fair that in a controlled market each producer should be permitted to retain more or less the share of the market which he had acquired in the past. Accordingly, past marketings were to be taken into consideration in the Secretary's allotments. . . . . . The problem which confronted Congress was not the setting of quotas abstractly considered but so to fix their amount as to achieve approximate justice in the shares allotted to each area and the persons within it. To recognise the problem is to acknowledge its perplexities . . . . . To fix quotas on a strict historical basis is hard on late-comers into the industry or on those in it who desire to expand. On the other hand, to the extent that new comers are allowed to enter or old-timers to expand there must either be an increase in supply or a reduction in the quotas of others . . . . . .

"Suffice it to say that since Congress fixed the quotas on a historical basis it is not for this Court to reweigh the relevant factors and, perchance, substitute its notion of expediency and fairness for that of Congress. This is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons. This Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation."

I am of opinion that in the circumstances set out in the counter-affidavit filed on behalf of the State by the Director of Controlled Commodities, the preferential treatment accorded to "consumer quota holders" cannot be held to be discriminatory and in contravention of the principle underlying Article 14 of the Constitution. I am inclined also to take into consideration the fact that the total number of bales allotted to these "consumer quota holders" which includes consumers of different classes is only 1,850 out of the aggregate allotment to the Madras State of about 16,000 to 18,000 bales.

The application is therefore dismissed with costs. Advocates' fee Rs. 150.

Leave to appeal to the Supreme Court granted under Article 132 (1) of the Constitution, as this involves a substantial question of law concerning the interpretation of the Constitution.

Application dismissed.

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1. (1952) 1 M.L.J. 514.
2. 338 U.S. 604: 94 L.Ed. 381.

Writ Petition No. 635 *of* 1951.—This application is really covered by our decision in C. M. P. No. 5524 of 1951. The petitioners in this case are (1) The Coimbatore District Master Weaver Licensees' Association, Erode, by its President, O. A. Ramaswami and (2) O. A. Ramaswami as proprietor of Sri Murugan Textiles, Chennimalai. A master weaver is a person having a number of weavers possessing handlooms in his employment and working under his supervision. The master weavers were not originally included among the "consumer quota holders," but subsequently they were also so included. There is no necessity, therefore, to examine their case separately. Their position is now exactly similar to that of the other "consumer quota holders."

Mr. Narasaraju, the petitioners' counsel, complained that some of the master weavers, though they were getting supplies direct from the mills during the basic period of 1940-42, were excluded from the list of "consumer quota holders" because they had not been doing business in the first control period. I see nothing unreasonable in this policy of the Government. Persons who had discontinued their business for a time and during the critical period have been, I think, quite rightly, not given the same right and privilege as those who were carrying on business continuously. Such persons ought to be really included among the new-comers.

For the reasons set out in our judgment in C. M. P. No. 5524 of 1951 this application must also be dismissed with costs. Advocates' fee Rs. 150.

K.S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

V. Abdul Azeez and another .. *Petitioners.**

Penal Code (XLV of 1860), *section* 363—*Offence of kidnapping—Ingredients.*

An offence under section 363 of the Penal Code is made out if (i) the person kidnapped was a minor; (ii) the minor was in the keeping of a lawful guardian; (iii) the accused took or induced such person to leave out of such lawful keeping and such taking was done without the consent of the lawful guardian.

Where the evidence established that the victim was a girl under 18 years of age in the keeping of a lawful guardian, her father, and that there was a preconcerted arrangement between the accused and her to leave the house, elope and have a good time the accused thereby instigating the victim to leave her guardian with all her belongings.

Held : the offence of kidnapping a minor girl from lawful guardianship was made out.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, Chittoor division, dated 25th January, 1951, in C.A. No. 49 of 1950 (C.C. No. 216 of 1950, District Magistrate (Judicial), Chittoor.

N. Suryanarayana for *C. R. Krishna Rao* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

The Court made the following

ORDER.—This is a Criminal Revision Petition filed against the convictions and sentences of the learned Sessions Judge of Chittoor division in C.A. No. 49 of 1950 confirming the convictions and modifying the sentences of the learned District Magistrate of Chittoor in C.C. No. 216 of 1950.

The established facts are : The accused are Muslims. They have been living near the house of a Muslim girl P.W. 1 who was under the lawful guardianship of her father P.W. 2. The girl was unmarried at the time of the occurrence and her age was 15 and was living with her father P.W. 2 and brother P.W. 3 in Mangasamudram, a suburb of Chittoor. On account of these accused being Muslims and neighbours they have been frequenting the house of P.W. 2 and have been on friendly terms with P.Ws. 1 to 3. On the evening of 13th July, 1950, at about 5 P.M. the second accused came to the girl P.W. 1 while her parents had gone to another

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*Cr.R.C. No. 74 of 1951. 20th November, 1951.
(Cr.R.P. No. 73 of 1951.)

village and gave her a chit of paper. On seeing P.W. 3 enter the house, P.W. 1 tore off the paper into bits and threw them away. Subsequently these bits have been collected and handed over to the Sub-Inspector and have been pieced together and exhibited as P-1. The second accused then went away. Subsequently at about 7 P.M. both the accused went to P.W. 1 again taking advantage of the absence of P.W. 3 from the house, and gave her another bit of paper Exhibit P-2 inviting her to go with them. P.W. 1 read the paper, threw it down and the second accused had taken it and it has been subsequently recovered from him by the Sub-Inspector. These people had then gone to the village of Yadamarri, six miles away and halted there for the night. I may point out here that when the girl left the place with these accused she had gone with her clothes, jewellery, etc. On the next morning the girl and the two accused got into a bus and went to Paradarami which is 4 or 5 miles away. There they stayed in the house of the second accused's grandmother. Then P.W. 1 and the first accused stayed behind and the second accused came back to Chittoor. In the meanwhile P.W. 3 who returned to the house at 2 A.M. on the night of this girl's departure from the house with the accused, finding her absent contacted his parents and all of them searched for her. Then on information from P.W. 4 who was returning from Gudiyattam to Chittoor that he saw P.W. 1 in the company of both the accused near Yadamarri P.W. 2 gave a complaint at the police station. The second accused was arrested and on information given by him P.W. 7 a Muslim gentleman engaged a car and went to Paradarami and found P.W. 1 and the first accused sitting in a mango tope and brought them to Chittoor. Both the accused were charge-sheeted for an offence under section 363, Indian Penal Code.

The case for the accused persons was a complete denial of the prosecution story. They denied the papers Exhibits P-1 and P-2, the elopement, their journeys and the accused 1 and the girl being brought back by P.W. 7 from Paradarami. In addition the second accused set up an alibi that on the night in question he was working in the Beedi factory and alleged enmity between himself and P.W. 4 whereas the first accused stated that he could not give any reason why the P.Ws. should falsely depose against him.

The accused examined two defence witnesses. D.W. 1 Sundaramma is the grandmother of accused 2 who denied that P.W. 1 and accused 1 came to her house at Paradarami and halted for the night. D.W. 2 is a potter at Santhapet and lives next door to accused 1's house and he testified that on the night in question he and accused 1 attended the film "Gunasundari" in the Premala talkies in the second show which lasted from 10 P.M. to 1 A.M. and that next morning accused 1 was fetched by P.W. 3 from his house and that they came to the bridge and that they were talking to a spectacled gentleman and that they left together to Chittoor and that in the evening he learnt that accused 1 was arrested by the Police and was in remand.

Both the lower Courts have found both the accused guilty of an offence under section 363, Indian Penal Code and whereas the learned District Magistrate sentenced these accused to one year's rigorous imprisonment each, on appeal the learned Sessions Judge our present learned brother Sri Ramaswamy Gounder reduced the punishment to three months each.

The short point for determination before us is whether in this case the offence of kidnapping the girl from lawful guardianship has been brought home beyond reasonable doubt to both these accused persons.

In order to support a conviction for kidnapping a girl from lawful guardianship, the ingredients to be fulfilled are: (i) that the girl was under 18 years of age; (ii) such minor was in the keeping of a lawful guardian; and (iii) the accused took or induced such person to leave out of such keeping and such taking was done without the consent of the lawful guardian.

There is no dispute that on the date in question the girl was under 18 years of age.

There is also no dispute that this minor girl was then in the keeping of her lawful guardian, *viz.*, her father P.W. 2.

About the question whether the accused took the girl out of the keeping of the lawful guardian we have to construe what the word "taking" as used in this section means. The word "take" a girl under 18 out of the possession and against the will of her father or mother, etc., does not imply force actual or constructive; it means, being a party to the father, etc., being deprived of the possession of the girl, her willingness being immaterial (*R.* v. *Manktelow*[1]; *R.* v. *Timmins*[2]). Secondly, the "taking" which constitutes an offence is completed as soon as the girl is removed from the keeping of the lawful guardian. It does not mean continuing or continuous act: see *Nemani Chattoraj* v. *Queen-Empress*[3], *Rekha Rai* v. *King-Emperor*[4] and *Emperor* v. *Tika*[5]. Thirdly, the mere fact that a minor leaves the protection of her guardian does not put her out of the guardian's keeping. If, however, it is proved that a mior had abandoned her guardian with no intention of returning back, she cannot thereafter be deemed to continue in the keeping of the guardian. What will be deemed to be sufficient to constitute an abandonment of a guardian by a minor girl depends upon the facts of a particular case. The following relevant circumstances have been laid down by a long line of decisions and may be usefully borne in mind in considering the particular facts of each case. It is not necessary that the prisoner should be present when the minor quits its home with the intention of abandoning it: *R.* v. *Robb*[6]. It is only necessary that the influence of the prisoner must instigate or co-operate with the inclination of the minor at the time the final step is taken for the purpose of causing it to be taken. This has been laid down in *Hossaini Methar* v. *Emperor*[7] by Henderson and Biswas, JJ., and which definition was accepted and followed in *Mahadev* v. *Emperor*[8], by Beaumont, C.J., sitting with Sen, J. Where the defendant went in the night to the house of the girl's father and placed a ladder against the window by which she descended and eloped with him, this was held to be a taking of her out of the possession of her father, though she had herself prepared the plan. *R.* v. *Robbins*[9]. And so it was held where the girl left her home alone by a preconcerted arrangement with the prisoner and went to a place appointed, where she was met by him, and that they then went off together without the intention of returning; since up to the moment of her meeting with the defendant she had not absolutely renounced her father's protection: *R.* v. *Manktelow*[1]. And it makes no difference that the girl has left her home before the prisoner wished her to do so, if finding that she has left, he avails himself of her position to induce her to continue away from the lawful custody, provided she left her home under the influence of his previous persuasion. If it is shown that such conduct is due to a mere petulent outburst in consequence either of a quarrel with her relations or because of the guardian reprimanding her for her conduct, that will be a relevant question to be considered for deciding whether her conduct was sufficient to put an end to the ties of guardianship: *Valliant* v. *Eleazar*[10]. Even when there is some evidence that the girl at the time when she left the protection of her guardian did not intend to come back to her father's place but the evidence further discloses that but for something which the accused consented to do and did ultimately do the minor would not have, in the natural course of events, left the house of her father then there would be a sufficient taking by the accused in the eye of law for attracting the provisions of section 363, Indian Penal Code: *Abdul Sathar*, In re[11]. It is only in cases where the girl leaves her home without any persuasion or inducement held out to her by the prisoner and leaves the guardian's house with the mental reservation that he or she will not be returning back to be under that guardian so that she has got fairly away from home and then goes to him, although it may be his moral duty

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1. 22 L.J.M.C. 115 : Dears 159.
2. 30 M.J.M.C. 45.
3. (1900) I.L.R. 27 Cal. 1041 at p. 1047 (F.B.).
4. (1927) I.L.R. 6 Pat. 471.
5. (1906) I.L.R. 26 All. 197.
6. 4 F. & F. 59.
7. A.I.R. 1937 Cal. 460.
8. A.I.R. 1943 Bom. 179.
9. 1 C. and K. 456.
10. (1924) 30 Cal. W.N. 215.
11. (1927) 54 M.L.J. 456.

to restore her to her home, yet his not doing so is no infringement of the law, for the statute does not say he shall restore her but only that he shall not take her away. Thus, to sum up, this section has been passed for the protection of parental rights and it is perfectly clear that any disposition of the girl like being over-sexed or animated by a desire to have a good time or any consent or forwardness on her part are immaterial on the question of the prisoner's liability under this section and the only point to be decided is whether he took or induced her coming away from her lawful guardian for the time being.

We have now to apply these principles to the facts of the present case. And applying these principles the offence under section 363, Indian Penal Code, as concluded by both the Courts has been brought home beyond reasonable doubt to these accused persons. The victim in this case was an young, illiterate and apparently over-sexed Muslim girl obviously out for a good time with young men and unversed in worldly matters and without adequately realising the consequences of such conduct. The two accused persons are found to be grown up unmarried lusty young men who were equally out to have a good time with a girl of that description. On account of their being neighbours the accused have managed to worm themselves into the good graces of this young girl. It is obvious that the accused wanted this friendship to ripen into an intimacy. It is easy to deduce from the evidence on record that there was a preconcerted arrangement between P.W. 1 and the accused to leave the house, elope and have a good time. So on 13th July, 1950, this Muslim girl has been contacted by these accused persons on two occasions and the girl had left the house with her clothing, jewels, etc. There can be no doubt that this girl has been taken from her house by these accused persons because it stands to common sense and it is in the probable course of human conduct that such a young girl would not have thought of going to Yadamarri and Paradarami with all her belongings but for the instigation, co-operation and accompaniment of the accused. There is no reason to disbelieve the testimony of this girl about her staying in the house of the grandmother of the accused 2 who naturally comes forward and perjures herself in order to support her grandson. There can also be equally no doubt that P.W. 4 saw this girl with the accused near Paradarami. There can also be no doubt that P.W. 7 who engaged a car and went to Paradarami found P.W. 1 and accused 1 sitting in a mango tope and brought them to Chittoor in the car. It is seen that the girl was traced to Paradarami on account of the information given by accused 2 who had come back to Chittoor to scout and find out how things were developing. The alibis put forward were found to be hopelessly false. It is quite true that the girl wants to put a gloss over this escapade by making herself out as the innocent victim who had been taken round to Yadamarri and Paradarami, against her will whereas when she started from her house the idea was to go to a cinema and the girl also does not speak to intimacy during the escapade. This is natural because any admission of this nature would seriously jeopardise her future and naturally her parents and relatives must be anxious to hush all that portion of this unsavoury episode. This does not mean that the prosecution story spoken to by respectable persons and against whom no motive has been alleged by the accused excepting in the case of P.W. 4 by accused 2 is false.

In the result both the lower Courts have rightly found these accused guilty of the serious offence under section 363, Indian Penal Code and the sentences of imprisonment have been reduced to the minimum possible. There are no grounds to interfere and this revision petition is dismissed and the revision petitioners must serve out the rest of the sentence of imprisonment imposed on them by the lower appellate Court.

V.P.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AYYAR.

C. Sambandam .. *Petitioner**

v.

The General Manager, South Indian Railway, Tiruchirapalli .. *Respondent.*

Constitution of India (1950), *Articles* 310 *and* 311—*Scope—Railway Services (Safeguarding of National Security) Rules—Dismissal of Railway servant under—Necessity to conform to the rules—Interference when another adequate remedy available—Discretion of Court.*

The Government has a right to terminate the services of a civil servant at will and the only restrictions on this power are those expressly enacted in the Constitution. Though a Railway administration has a right to terminate the services of an employee under rule 145 of the Indian Railway Establishment Code that rule does not apply to a case where an employee is dismissed under the Railway Services (Safeguarding of National Security) Rules. In such a case unless the procedure prescribed by those rules had been properly followed the dismissal is wrong. Whether in fact it was a case of termination of services or dismissal is a question of fact to be determined on the circumstances of the case. An order for compulsory retirement falling within rule 3 of the Railway Services (Safeguarding of National Security) Rules cannot be said to be one terminating the services. Where the procedure prescribed in rule 4 of the Rules have not been followed (in that no notice of the final action proposed to be taken was given to the employee) the order of dismissal is illegal and inoperative and must be quashed by a writ of *certiorari.*

The rule that the Court will not ordinarily interfere with an order where there is another adequate remedy available to the party is a rule of discretion for the guidance of the Court and not a limitation on its power.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records and quash the order of the respondent in No. S. 57/3/50 dated 6th September, 1950, and to issue directions to the respondent to allow the petitioner to return to duty, and to award costs of this petition.

K. V. Venkatasubramania Ayyar for *Messrs. Row and Reddi* for Petitioner.

O.T.G. Nambiar for *Messrs. King and Partridge* for Respondent.

The Order of the Court was pronounced by

Venkatarama Ayyar, J.—The petitioner was employed as a wireman in the Marina Department of the South Indian Railway company. On 11th March, 1950, he was served with a notice, dated 27th February, 1950, issued by the respondent under the Railway Services (Safeguarding of National Security) Rules, 1949. The contents of that notice so far as they are material for purposes of this petition are as follows :

"Whereas in the opinion of the 'competent authority' as defined in rule 2 of the Railway Services (Safeguarding of National Security) Rules, 1949, who in your case is the Chief Mechanical Engineer, South Indian Railway, Golden Rock, there are reasonable grounds (which are given below) for believing that you are engaged in subversive activities and that consequently you are liable to have your services terminated under rule 3 of the said rules.

You are hereby required to state within 14 days of the receipt of this notice whether you accept or deny the accuracy of the above allegation. If you do not reply within that period, it will be assumed that you admit the allegation.

In either case, you may, within the same period, submit any representation you wish to make as to why your services should not be terminated under the said rules (copy attached).

If after considering your representation the competent authority decides that no further action should be taken against you, you will be informed accordingly.

If after considering your representation the competent authority considers that there are sufficient grounds for taking further action, the materials on record together with your representation will be referred to the committee of Advisers set up by the Government of India for this purpose.

You are further asked to state whether you wish to be heard in person by me or by the committee of advisers before orders are passed on your case."

Four charges were set out in this notice. On 16th March, 1950, the petitioner sent a written explanation to the several charges. On 6th September, 1950, the respondent passed the following order :

* C.M.P. No. 14078 of 1950. 13th November, 1951.

"I have considered your representation in reply to my letter No. S. 37/3, dated the 27th February, 1950, and am of the opinion that you are engaged in subversive activities in such a manner as to raise doubts about your reliability and am satisfied that your retention in public service is prejudicial to national security. I have decided, with the prior approval of the President that your services should be terminated under rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949.

You are therefore hereby given a month's pay in lieu of notice in accordance with para. 6 of your service agreement, dated 6th February, 1942, and your service will terminate on the 16th September, 1950."

It is the validity of this order that is the subject-matter of this application. The contention of the petitioner is that on a proper construction of the Safeguarding of National Security Rules and of Article 311 of the Constitution he was entitled to a further notice of the action proposed to be taken against him and as none such was given the order of dismissal, dated 6th September, 1950, is illegal. He accordingly prays that a writ might be issued under Article 226 quashing the order, dated 6th September, 1950. The contention of the respondent is that the notice, dated 27th February, 1950, given to the petitioner was a sufficient compliance of the requirements of the law and that further the services of the petitioner were terminated by payment of a month's wages in accordance with the terms of the services and that consequently the order, dated 6th September, 1950, was not open to question under Article 311 of the Constitution. It was also urged that the petitioner had a remedy by way of a suit and that, therefore, the application for the issue of a writ of *certiorari* was not maintainable.

The first question that arises for determination is whether the order, dated 6th September, 1950, is in accordance with the provisions of the Safeguarding of National Security Rules. Rules 3 and 4 which alone are relevant for the present purpose are as follows :

"A member of the Railway service, who in the opinion of the competent authority is engaged in or is reasonably suspected to be engaged in subversive activities or is associated with others in subversive activities in such a manner as to raise doubts about his reliability may be compulsorily retired from service :

Provided that a member of the Railway service shall not be so retired, unless the competent authority is satisfied that his retention in public service is prejudicial to national security, and unless where the competent authority is a head of a department the prior approval of the Governor-General has been obtained.

Where in the opinion of the competent authority, there are reasonable grounds for believing that a member of the Railway service is liable to compulsory retirement under rule 3 it shall—

(*a*) by order in writing require the government servant to proceed on such leave as may be admissible to him and from such date as may be specified in the order ;

(*b*) by notice in writing inform him of the action proposed to be taken in regard to him under rule 3 ;

(*c*) give him a reasonable opportunity of showing cause against that action ; and

(*d*) before passing a final order under rule 3 take into consideration any representation made by him in this behalf."

The contention of Mr. K. V. Venkatasubramania Ayyar, the learned advocate for the petitioner is that before a final order could be passed under rule 3 there must be a notice in terms of rule 4, clause (*b*), informing him of the action proposed to be taken against him and giving him an opportunity under rule 4 (*c*) for showing cause against the proposed action and as that had not been done, the order of dismissal, dated 6th September, 1950, was in contravention of the rules and therefore illegal and he relies on a decision of the Privy Council reported in *High Commissioner for India* v. *I. M. Lall*[1], in support of this proposition.

That was a case in which the validity of an order of the Punjab Government dismissing an officer of the Indian Civil Service came up for consideration. On 2nd September, 1937, the Punjab Government framed a number of charges against one Mr. Lall, a District Judge, belonging to the Indian Civil Service and gave intimation to him that a departmental enquiry would be held in respect of those charges. He

1. (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 : (1948) F.L.J. 23 : 1948 F.C.R. 44 (P.C.).

was asked to furnish a written statement of defence which he did on 9th January, 1938. Then there was an enquiry and acting on the report of the enquiry the Government removed Mr. Lall from service by an order, dated 31st August, 1939. He then filed a suit challenging the validity of the order of dismissal on the ground *inter alia* that no notice had been given to him of the proposed action and no opportunity afforded to show against the same as required by section 240 (3) of the Government of India Act, 1935, and that the procedure was illegal and the order was vitiated thereby. Section 240 (3) is in these terms :

"No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him."

The suit was decreed by the Punjab High Court on the ground that there was no proper enquiry. (Vide *I.M. Lall* v. *Secretary of State*[1].) The matter was taken on appeal to the Federal Court. The learned Judges disagreed with the finding of the High Court that there was no proper enquiry but held by a majority that on a proper construction of section 240 (3) of the Government of India Act, 1935, there must have been a further notice to the civil servant informing him of the order proposed to be passed, that an opportunity should be given to him to make representation against the proposed action and that final order could be passed only thereafter and as that was not done the order was illegal. The learned Judges observed as follows :

"But the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed. That in our judgment involves in all cases where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, that the person concerned shall be told in full, or in adequately summarised form, the results of that enquiry, and the findings of the enquiring officer and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction in rank." (Vide *Secretary of State for India* v. *I. M. Lall*[2].)

Against this decision there is a further appeal to the Privy Council. In affirming the judgment of the Federal Court Lord Thankerton observed that there was a distinction between giving information to the civil servant about "the grounds on which it is proposed to take action" and giving an opportunity of "showing cause against the action proposed to be taken in regard to him"; that the former would be appropriate in a stage anterior to the enquiry the object being to afford adequate opportunity of defending oneself while the latter would arise only after the enquiry was held and punishment decided on ; and further observed

"In the opinion of their Lordships no action is proposed within the meaning of sub-section until a definite conclusion has been come to on the charges and actual punishment to follow is provisionally determined on. Prior to that stage the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the statute gives the civil servant the opportunity for which sub-section (3) makes provision. Their Lordships would only add that they see no difficulty in the statutory opportunity being reasonably afforded at more than one stage. If the civil servant has been through an enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, it would not be reasonable that he should ask for a repetition of that stage, if duly carried out, but that would not exhaust his statutory right and he would still be entitled to represent against the punishment proposed as the result of the findings of the enquiry." (Vide *High Commissioner for India* v. *I. M. Lall*[3].)

In other words in a case governed by section 240 (3) there will be two stages : firstly an enquiry after notice into the charges against the civil servant and this is the rule of natural justice that no person should be condemned without a hearing and secondly after the enquiry is over and a punishment decided on a further notice in terms of sub-section (3) informing the civil servant of the action proposed to be taken and giving him an opportunity to show cause against that action and this is a statutory requirement.

It is argued for the petitioner that this decision will govern the present case because rule (4) (*b*) of the Safeguarding of National Security Rules provides that

1. I.L.R. (1944) Lah. 325.
2. (1945) 2 M.L.J. 270 : 1945 F.L.J. 129 (F.C.).
3. (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 : (1948) F.L.J. 23 : 1948 F.C.R. 44 (P.C.).

the servant should be informed in writing "of the action proposed to be taken in regard to him under rule 3" that "reasonable opportunity of showing cause against that action" ought to be given under rule (4) (*c*) and that, under rule 4 any representation made by him in that behalf should be taken into consideration before final order is passed under rule 3. Mr. Nambiar the learned Advocate for the respondent could not convincingly assail the soundness of this contention but he argued that the notice dated 27th February, 1950, satisfies the requirements of rule 4 (4) because it stated that the petitioner was liable to have the services terminated under rule 3 but this is merely a statement of the effect of rule 3 and not any intimation of a decision by the authorities that the petitioner's services would be terminated.

Reliance was also placed on paragraph 3 of the notice but this must be read along with paragraphs 4 and 4 (*b*) and they clearly show that no action had been decided on. Indeed, when it is remembered that a proper notice under rule 4 (*b*) can only be after an enquiry is held and a punishment tentatively proposed, the notice dated 27th February, 1950, calling upon the petitioner to give his explanation for the charges can in no manner be regarded as falling under rule 4 (*b*). In our opinion the present case falls directly within the principles laid down by the Privy Council in *High Commissioner for India* v. *I. M. Lall*,[1] and the order dated 6th September, 1950, must be held to be illegal.

Mr. K. V. Venkatasubramania Ayyar also argued that in case his construction of rule 4 of Safeguarding of National Security Rules was not accepted he would rely on Article 311 (2) which re-enacts the provisions of section 240 (3) of the Government of India Act, 1935 and contended that the Safeguarding of National Security Rules would be void as against Art. 311 (2). As we have held that rule 4 of the Safeguarding of National Security Rules does not differ from section 240 (3) or Article 311 (2) on this point it is unnecessary to discuss this aspect any further.

A further point was taken by Nambiar that questions relating to the propriety of the notice and the legality of dismissal did not arise in this case because under the rules applicable to railway establishment the services of the petitioner could be terminated on a month's notice; that under the notice dated 6th September, 1950, a month's pay in lieu of notice was given to him, that in substance it was a case of termination of services and not of dismissal or removal and that accordingly Article 311 did not apply. He referred to rule 148 (3) and (4) of the Indian Railway Establishment Code which run as follows:

"(3) Other (non-pensionable) railway servants. The service of other (non-pensionable) railway servants shall be liable to termination on notice on either side for the periods shown below. Such notice is not however required in cases of summary dismissal or discharge under the provisions of service agreements, retirement on attaining the age of superannuation and termination of service due to mental or physical incapacity:—

(*a*) Probationary officers and officers on probation other than those in the medical department. Three months' notice.

(*b*) Officers on probation in the Medical Department. One month's notice.

(*c*) Permanent Gazetted Officers. Six minths' notice.

(*d*) Permanent non-gazetted employees, One month's notice.

(4) In lieu of the notice prescribed in this rule, it shall be permissible on the part of the Railway Administration to terminate the services of a railway servant by paying him the pay for the period of notice".

It is common ground that the petitioner is a permanent non-gazetted employee falling within clause (*d*) of rule 3 and it is accordingly contended that his services could be validly terminated under that rule and must be taken to have been in fact so terminated. Reliance was also placed on Article 310 of the Constitution which generally enacts that civil posts under the Union or State are held on pleasure and it is argued that rule 148 is in accordance with Article 310 and is, therefore, valid.

1. (1948) 2 M.L.J. 55; L.R. 75 I.A. 225: (1948) F.L.J. 23: (1948) F.C.R. 44 (P.C.).

Mr. Venkatasubramania Iyer contends in reply that Article 310 and rule 148 must both be read subject to the statutory rights declared in Article 311; that the respondent took action avowedly only under the Safeguarding of National Security Rules, that the order is one of compulsory retirement under those rules and not a termination of service under rule 148; and that its validity must be judged by the provisions of rule 4 and of Article 311.

Article 310 has a long history behind it. It has its origin in the rule well-established in British Jurisprudence that all public offices are held at the pleasure of the Crown. Two consequences result from this rule. The services of the civil servant can be terminated without assigning any reason and even in the case of wrongful dismissal no action could be maintained at law for damages, the theory being that the King can do no wrong. In *Shenton* v. *Smith*[1], this rule was applied to an appointment made by the Government of Western Australia and it was held that the office was held at pleasure and could be terminated at will and no action for damages would lie for wrongful dismissal. Lord Hobhouse in delivering judgment of the Judicial Committee observed that:

> "Neither principle nor authority has been adduced to show that in the employment and dismissal of public servants the Colonial Government stands on any different footing than the Home Government".

In *Dunn* v. *The Queen*[2], it was held that even if there was a contract of employment for a period and it was terminated before the period without cause, no action for damages will lie. The following observations of Lord Watson in *De Doshe* v. *Reg*[3] were quoted and followed:

> "In the second place I am of opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further I am of opinion that, if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the Crown."

This decision was followed in the matter of the Petitions of Right of Charles Lawrence Hales[4], where there was again a special agreement and this decision was affirmed on appeal in *Hales* v. *The King*[5]. In *Denning* v. *The Secretary of State for India in Council*[6], the plaintiff was employed by the Secretary of State for India on a contract for a period of five years. There was a premature termination of services and there was no misconduct. It was held that the plaintiff could not maintain an action for damages. In *Gould* v. *Stuart*[7], Judicial Committee while affirming the general rule that Crown servants could be dismissed at pleasure held that where there was a statute prescribing terms of services and mode of dismissal that would govern the rights of the parties. The law is thus summed up in Halsbury's Laws of England, Vol. VI, page 608, paragraph 782:

> "Except where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown and all in general, are subject to the dismissal at any time without cause assigned; nor will an action for wrongful dismissal be entertained even though a special contract be proved".

In India, these rules had been applied to offices held under the Government of India. Mr. Ilbert states the law in the following terms: (Vide *Ilbert's Government of India*, 1916 edn.).

The tenure of persons serving under the Government of India or under a Local Government is presumably tenure during the pleasure of the Crown.

This principle has been affirmed in all the statutes relating to the Government of India. Section 96-B (1) of Act of 1919 runs as follows:

> "Subject to the provisions of this Act and of rules made thereunder, every person in the civil service of the Crown in India holds office during His Majesty's pleasure and may be employed in any manner required by a proper authority within the scope of his duty, but no person in that service

1. (1845) A.C. 229.
2. (1896) 1 Q.B. page 116.
3. See F.N. in (1896) 1 Q.B. 116 at 118.
4. 34 T.L.R. 314.
5. 34 T.L.R. 589.
6. 37 T.L.R. 138.
7. (1896) A.C. 575.

may be dismissed by any authority subordinate to that by which he was appointed, and the Secretary of State in Council may (except so far as he may provide by rules to the contrary) reinstate any person in that service who has been dismissed ".

Section 240 (1) of the Government of India Act, 1935, is in these terms. Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

This provision is even more emphatic than section 96-B (1) of the 1919 Act because the qualifying words "And of rules made thereunder" occurring in section 96-B (1) on which it was possible to contend that the power of dismissal at pleasure could be controlled by the rules, have been omitted. Article 310 (1) of the Constitution re-enacts this principle with verbal alterations not affecting the substance of the matter.

It is as follows :

" Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of All-India service holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State holds any civil post under a State holds office during the pleasure of the Governor or as the case may be, the Rajpramukh of the State ".

Thus the rule that civil posts under the Government are held at pleasure is part of the law of this country and it involves the consequence that there can be termination of service at will. Article 310 provides that this rule is subject to the exceptions "Expressly provided by this Constitution." Such exceptions are provided in Article 310 (2) which provides for compensation being paid when a contract for a period is terminated for no misconduct of the civil servant ; in Article 311 (1) which enacts that a person cannot be dismissed by an authority subordinate to that by which he is appointed ; and in Article 311 (2) which prescribes that a particular procedure should be followed before a person is dismissed or removed from service. Subject to these statutory restrictions the general rule embodied in Article 310 (1) that all offices under the Government are held at pleasure will govern the rights of the parties. In *Venkata Rao* v. *Secretary of State for India*[1], the facts were that a civil servant was dismissed without there having been a proper enquiry in accordance with the rules framed under section 96-B of 1919 Act. He filed a suit for damages for wrongful dismissal. It was held by the Judicial Committee that as the office was held at pleasure the breach of the rules would not confer a right of action on the civil servant for damaegs for wrongful dismissal. The decision in *Shenton* v. *Smith*[2] was followed. In *Rangachari* v. *Secretary of State for India*[3] a police officer was dismissed by an authority subordinate to one which appointed him and it was held that the order of dismissal was illegal as being in contravention of the statutory provision enacted in provisos to section 96-B. In *High Commissioner of India* v. *I. M. Lall*[4], already referred to it was held that the dismissal was illegal and inoperative because it contravened the statutory prescription laid down in section 240 (3) of the Government of India Act, 1935.

It will follow from the above that the Government has a right to terminate the services of a civil servant at will and the only restrictions on this power are those expressly enacted in the Constitution. There is accordingly considerable force in the argument of the respondent that he has a right to terminate the services of the employee under rule 148 of the Indian Railway Establishment Code and that there is nothing in the Constitution which restricts such a right.

The question still remains whether this is a case of termination of service under rule 148 of the Indian Railway Establishment Code. The contention of the learned advocate for the petitioner is that the order dated 6th September, 1950, is one passed only under the Safeguarding of National Security Rules and its validity must accordingly be determined with reference to those rules. We think that this con-

1. (1937) 1 M.L.J. 529 : L.R. 64 I.A. 55 : I.L.R. (1937) Mad. 532 (P.C.).
2. (1895) A.C. 229.
3. (1937) 1 M.L.J. 515 : I.L.R. (1937) Mad. 517.
4. (1948) 2 M.L.J. 55 : L.R. 75 I.A. 225 (P.C.).

tention is well-founded. The notice dated 27th February, 1950, is expressly issued under rule 2 of the Safeguarding of National Security Rules, 1949. It purports to follow the procedure prescribed in rule 4. Four charges are framed against the petitioner. He is asked to submit his explanation and he is told that his representations would be referred to a committee of advisers set up by the Government of India for this purpose. The order dated 6th September, 1950, also expressly recites that the services are terminated under rule 3 of the Railway Services (Safeguarding of National Security) Rules. In the counter-affidavit filed by the General Manager it is again expressly stated that action against the petitioner had been taken under the Railway Services (Safeguarding of National Security) Rules, that the procedure prescribed by the rules had been properly followed, and that the rules have not become void, under the Constitution. It is not pleaded anywhere that any action was taken under rule 148 of the Indian Railway Establishment Code. If action was intended to be taken under that rule then there was no need to frame charges, call for explanation and send it for consideration by a special Committee. Even the service agreement of the petitioner has not been produced before us.

It appears to us to be amply clear from the record that the respondent did only what he purported to do under the notice and that was to take action against the petitioner under the security rules. Reliance was also placed by Mr. Nambiar on the fact that a month's salary was paid to the petitioner but under rule 7 of the Safeguarding of National Security Rules, it is provided that compensation should be paid when final orders are passed under rule 3. The payment is, therefore, a solatium offered under the above rules under which the petitioner has been removed from service. Mr. Nambiar relied on the following observations occurring in *Nagpur Electric Company* v. *Anand Vishnu*[1]:

"The termination of the contract in due course according to its terms is neither discharge, dismissal or release nor leaving employment".

We agree that when the services of an employee are terminated he cannot be held to have been dismissed. But whether in fact it was a case of termination of services or dismissal is a question of fact and that must be determined on a consideration of the circumstances of the case.

We are of opinion that the order dated 6th September, 1950, is not one terminating services but one of compulsory retirement falling within rule 3 of the Safeguarding of National Security Rules and as the procedure prescribed in rule 4 has not been followed, it is illegal and inoperative.

Mr. Nambiar finally contended that this application is not maintainable as the petitioner can enforce his rights in a regular suit and that where there is another remedy open no relief should be granted in a writ of *certiorari*. It is true that this Court will not ordinarily interfere with an order where there is another adequate remedy available to the party. This, however, is a rule of discretion for the guidance of the Court and not a limitation on its powers. As observed by Das, J., in *Rashid Ahmed* v. *Municipal Board, Kairana*[2], the

"*Existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs*".

In the *King* v. *The Post-Master General (Ex parte) Carmichael*[3] Avory, J., dealing with this very contention observed as follows:

"But even if that remedy is open to her, it is undoubtedly good law that if the application for a *certiorari* is made by a party aggrieved, then it ought to be granted *ex debito justitiæ*, and the Court has not the general discretion which it would have when the application is made by one of the public who is not personally concerned. That was decided long ago in the case of *Reg* v. *Surrey Justices*[4], and on that principle, even although she has the remedy by appeal in this case, I am prepared to agree that the *certiorari* should go, seeing that the application is being made by the applicant as the party aggrieved".

1. A.I.R. 1944 Nag. 66 at 70.
2. (1950) S.C.J. 324: 1950 S.C.R. 556: A.I.R. 1950 (S.C.) 163 at 165.
3. (1928) 1 K.B. page 291.
4. (1870) L.R. 5 Q.B. 466.

The law is thus stated in Halsbury's Laws of England, Vol. 9, page 878, para 1481 :

"Although the writ is not of course it will nevertheless be granted *ex debito justiciae* to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of party applying has not been such as to disentitle him to relief, and this is the case even though *certiorari* is taken away by statute and although there is an alternative remedy ".

As the question involved is one of right procedure to be followed in exercise of the powers conferred under the Safeguarding of National Security Rules and as the rights of the petitioner have been clearly infringed, this is a fit case in which the writ must issue. The order dated 6th September, 1950, is accordingly set aside. The petitioner will be entitled to his costs, advocate's fee Rs. 100/-.

K.S. — *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Abdul Kadir Haji .. *Appellant**

v.

Muhammad and another .. *Respondents.*

Malabar Compensation for Tenants Improvements Act (I of 1900), sections 9, 10 and 15—Cashewnut trees.—Nature of—Mode of valuation.

The enumeration of fruit-bearing trees in section 15 of the Malabar Compensation for Tenants Improvement Act is not exhaustive and cashewnut trees though not mentioned in the section are fruit-bearing trees as understood according to section 9 of the Act and not timber trees as contemplated by section 10 of the Act and have to be valued accordingly.

Appeal against the decree of the District Court, South Malabar, in A.S. No. 559 of 1946, preferred against the decree of the Court of the District Munsif of Manjeri, in O.S. No. 325 of 1945.

M. K. Nambiar and *M. Sekhara Menon* for Appellant.

N. R. Sesha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff who is the appellant in this second appeal was a mortgagor whose suit was for redemption of the mortgage in favour of the first defendant, and the lower Courts in ordering redemption have directed him to pay the value of a large number of cashewnut trees planted on the mortgaged property by the first defendant. The basis of the calculation was on the footing that the cashewnut trees are fruit-bearing trees as understood according to section 9 of the Malabar Compensation for Tenants Improvements Act and not timber trees as contemplated by section 10 of the same Act. Mr. M. K. Nambiar for the appellant contends that in view of the fact that under section 15 (1), (*b*), (ii) of the Act only cocoanut trees, arecanut trees, jack trees and peppervines are mentioned for purposes of determining the amount of compensation to be awarded under the Act as fruit-bearing trees, it should be held that cashewnut trees are not fruit-bearing trees. I am inclined to hold that the enumeration of the trees in section 15 is not exhaustive. What is contemplated is that the Legislature in enacting the provisions of the Malabar Compensation for Tenants Improvements Act laid down certain well known trees as fruit-bearing trees for the purposes of assessing the compensation. Such enumeration is certainly not exhaustive, because in addition to the various kinds of trees mentioned above there are other trees which are admittedly fruit-bearing trees and which add to the value of the holding. For example, a tamarind trees has been held to be such in A. S. No. 118 of 1925[1]. It has also be been held by this Court that graft mango trees which are not useful as timber but produce

* S.A. No. 1231 of 1948. 10th December, 1951.

1. 58 M.L.J. Short Notes, p. 31.

large quantities of fruit should be held as fruit-bearing trees. In addition, we have the provisions of section 7 (4) of the Malabar Tenancy Act as well as section 18 of the Act which lay down that trees of this kind can be termed as fruit-bearing trees. Mr. Nambiar invited my attentioon to the decision in *Ambi* v. *Kunhikavamma*[1], where palmyra trees have been held to be non-fruit bearing trees. There can be little doubt that excepting a very limited category of palmyra trees the rest of them do not yield any fruit and the decision that a palmyra tree should be termed as a timber tree cannot be questioned on that score. It might be that no table showing the method of valuation of cashewnut trees has been prepared under section 15 of the Malabar Compensation for Tenants Improvements Act. But that would not exclude the possibility of the trees other than the three categories mentioned above from being fruit-bearing trees. In order to apply section 9 all that is necessary is that the improvement should not be one to which section 13 applies. There is no doubt whatever that section 13 does not apply to cashewnut trees. I therefore agree with the lower Courts in holding that the cashewnut trees have to be valued on the basis of fruit-bearing trees. The second appeal fails and is dismissed with costs.

No leave.

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Siddi Subba Rao and another .. *Petitioners**

v.

Pukhraj Kocher Ginning and Pressing Factory Firm carrying on business at Chanda, Central Provinces and another .. *Respondents.*

Contract—Purchase of goods according to sample—Despatch to another State—Goods not according to sample—Suit for damages—Proper forum.

Where specific articles like bales of pressed cotton have been shown to the purchaser, inspected and bought at the place of contract, the jurisdiction for entertaining a suit filed by the purchaser, for damages for failure to supply cotton according to the samples shown, will be in the Court of the place of contract and not in the Court in the place to which subsequently the consignment may be sent at the instance of the buyer.

Parthasarathi Gupta v. *The Calcutta Glass and Silicate Works, Ltd.*, (1948) 2 M.L.J. 101, applied ; *J. S. Malu* v. *Haji Ibrahim Kassam Uplitwala*, (1950) 1 M.L.J. 38, distinguished.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Kakinada, dated 30th June, 1950, in C.M.A. No. 19 of 1949 (O.S. No. 19 of 1945, D. M. C., Peddapuram).

P. M. Srinivasa Aiyangar for Petitioners.

V. Rangachari and *K. Mangachari* for Respondent.

The Court delivered the following

JUDGMENT.—There are no merits at all in this Civil Revision Petition as no part of the cause of action in the petitioner's suit for damages arose in this State. The point for consideration is whether both the Courts below went wrong in holding that the District Munsif's Court, Peddapuram, had no jurisdiction to entertain the suit for damages filed against the defendants for supplying them fifty bales of inferior cotton, said to differ much from the sample cotton shown to them before the sale. The contract was admittedly, entered into at Chanda, in Madhya Pradesh, on 25th July, 1943, and the District Munsif's Court, Peddapuram, would have, of course, no jurisdiction, if no part of the transaction arose within its own limits. Both the Courts below held that the delivery of the cotton was to be at Chanda and that the price also was to be paid there, judging from the correspondence.

Mr. P. M. Srinivasa Aiyangar, for the petitioners-plaintiffs, urged that both the lower Courts went wrong in holding that the District Munsif's Court, Pedda-

1. A.I.R. 1929 Mad. 661.

* C.R.P. No. 1723 of 1950. 18th January, 1952.

puram, had no jurisdiction, as it was a sale by sample, and the 50 bales of cotton, sold as per sample, were to be despatched by the vendors, the defendants, from Chanda to Pittapuram (*via*) Waltair, and were received at Waltair and carted to Pittapuram and examined only there by the plaintiffs. If that had been so, no doubt, both Courts would have been wrong in holding that the suit should have been filed only in Madhya Pradesh, as it could have been filed also at Peddapuram. But the lower Courts have not gone on that footing, but on the footing that the sale was not merely by sample but after showing the 50 bales of cotton, the specific goods as per sample, at Chanda itself, to P.W. 2, the plaintiffs' agent who examined it and bought it. So, it is a case of sample being shown first, and the specific goods next, not at all an uncommon thing in India. It is a common experience in any shop in India for a buyer to be shown a sample of rice and then a bag of rice said to correspond to it. It is also possible for the bag shown later on not to correspond with the sample shown earlier though it is shown at that very place and is accepted by the buyer under a misapprehension that it corresponds to the sample. But where specific goods are shown, inspected and bought the cause of action would arise only at the place of sale. See *Parthasarathi Gupta* v. *The Calcutta Glass and Silicate Works, Ltd.*[1].

Paragraph 6 of the judgment of the trial Court shows that the defendant's contention was that the plaintiffs' agent, P.W. 2, was shown at Chanda itself the 50 bales of cotton which were sold to the plaintiffs, and that he agreed to buy that cotton at Rs. 180 per bale, and that new Chandabani cotton was selling at Rs. 400 per bale at that very time. Whether the plaintiff's agent, P.W. 2, was deceived into believing that the 50 bales of cotton shown to him at Chanda and bought by him was of the same quality as the sample shown to him prior to his being shown the bulk, or not, need not be discussed here. For the purpose of jurisdiction, even if he was so deceived, the suit ought to be filed only in Madhya Pradesh, where he saw that articles in bulk and bought them, though the bales were subsequently despatched to Waltair for taking them by cart to Pittapuram, and though the alleged fraud was actually discovered only on inspection at Pittapuram. Mr. Rangachari, for the defendants, urges that they were got despatched to Waltair only at the instance of P.W. 2, who had been shown the fifty bales and had accepted them on behalf of the plaintiffs, and that the showing of the sample before is immaterial, and that the ruling in *J. S. Malu* v. *Haji Ibrahim Kassaim Uplitwala*[2], will not apply. I agree. Mr. P. M. Srinivasa Iyengar says that it would be very difficult for anybody to inspect the quality of pressed cotton kept in bales, and that for that reason because there was no good chance of reasonable inspection for P.W. 2, Pittapuram, where the bales were ultimately received and opened and examined and found to be of inferior quality, would be the place where part of the cause of action arose, as a reasonable inspection could be had only there, and so the suit could be filed in the District Munsif Court, Peddapuram. I cannot agree. In modern times of complicated machinery and manufacture, it is not reasonable to expect that all articles sold or bought would be in their elementary process or stages, and buyers, are expected to be competent enough to deal with articles in various stages of manufacture or processing and judge their quality before buying. Thus, a man buying a car need not have the engine and other parts dis-membered and shown to him, and pressed cotton bales need not be unpressed and shown to him. If he chooses to buy the things after seeing them, the suit will only lie at that place. P.W. 2's inexperience or folly or guilibility cannot change the jurisdiction. Where the specific articles purchased have been shown to the purchaser at the place of contract, as here to P.W. 2, the jurisdiction will only be in the Courts of that place, and not in Courts in the place to which the articles may be subsequently consigned, at the instance of the buyer. So, the Courts below were right.

In this view, this petition deserves to be and is hereby dismissed with costs. Time given to the plaintiffs till the 1st of March, 1952, for presenting the plaint to the proper Court.

K.C. —— *Petition dismissed.*

1. (1948) 2 M.L.J. 101.
2. (1950) 1 M.L.J. 38.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

C. Devanugraham .. *Petitioner.**

Criminal Procedure Code (V of 1898), section 403 and Constitution of India (1950), Article 20 (2)—Conviction set aside as the sanction for prosecution was found to be invalid—Subsequent prosecution for the same offence after obtaining proper sanction—If barred by section 403, Criminal Procedure Code or Article 20 (2) of the Constitution of India.

A prosecution launched without a valid sanction is a nullity and section 403 (1) of the Criminal Procedure Code is no bar to the institution of a fresh prosecution against the accused for the same offence on the same facts as in the former prosecution in which his conviction was set aside on the ground of the invalidity of the sanction. Nor does Article 20 (2) of the Constitution take away the right to institute a second prosecution when the first is found to be a nullity by reason of want of sanction, a pre-requisite for the maintaining of the prosecution.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court to revise the order of the Sixth Presidency Magistrate, Egmore, Madras, dated 29th May, 1951, in C.C. No. 8583 of 1950.

V. Rajagopalachari for *R. V. Raghavan* for Petitioner.

The State Prosecutor (*S. Govind Swaminathan*) for the State.

The Court made the following

ORDER.—This is a Criminal Revision Petition filed against the order made by the learned Sixth Presidency Magistratr, Egmore, Madras, in C.C. No. 8583 of 1950.

The facts are : The petitioner was employed as a Food Inspector in the service of the Corporation of Madras. He was charged by the Special Branch Police for an offence under section 161, Indian Penal Code, in that he received a sum of Rs. 50 from K. Sarangapani Naicket, a milkman as illegal gratification. The case was tried before the Fifth Presidency Magistrate in C.C. No. 1137 of 1949. The petitioner was convicted and sentenced to six months rigorous imprisonment and to pay a fine of Rs. 300 or in default to suffer rigorous imprisonment for three months. The petitioner preferred an appeal to the High Court in Criminal Appeal No. 728 of 1949 and this was disposed of by Panchapagesa Sastry, J.

The relevant portion of the judgment of Panchapagesa Sastry, J. is as follows :

" It is conceded by the State Prosecutor that if the sanction granted is illegal then, the conviction cannot stand. The ground of objection urged against the validity of the sanction is that the facts relating to the alleged offence were not placed before the sanctioning authority or rather that there is no evidence on behalf of the prosecution that the facts were so placed. Reliance was placed on the decision of the Judicial Committee reported in *Gokulchand Dwarkadas* v. *The King*[1].

The learned Judge accepted this contention and concluded:

" It follows that it is not proved that the sanction accorded is legal. If so, the conviction cannot stand. In this view it is unnecessary to deal with the question as to whether the offence is brought home to the appellant ; nor is it necessary to refer to the other contentions raised by the learned advocate for the appellant. In the result the conviction and sentence are set aside and the appellant is acquitted. Fine, if paid, will be refunded."

Subsequently the Special Branch Police after rectifying the defect mentioned above has charge-sheeted the petitioner and it has been taken on file and numbered as C.C. No. 8583 of 1950 on the file of the Sixth Presidency Magistrate, Egmore.

The preliminary objection taken by the petitioner was that he having been acquitted by the High Court a second trial was barred under section 403, Criminal Procedure Code and that in any case Article 20 (2) of the Constitution of India prohibited a second trial.

The learned Sixth Presidency Magistrate went into the question thoroughly and overruled this objection and hence this Criminal Revision Petition.

*C.R.C. No. 525 of 1951.
(C.R.P. No. 520 of 1951). 25th January, 1952.

1. (1948) 1 M.L.J. 243 : L.R. 75 I.A. 30.

In my opinion the two points taken relating to section 403, Criminal Procedure Code and Article 20 (2) of the Constitution of India are without any substance.

Point 1.—It is an elementary proposition that to bar a fresh trial under section 403, Criminal Procedure Code, the Court by which the accused was first tried should be competent to try the offence. Therefore where the sanction or complaint by a particular person or authority is necessary under the law for the trial of a person, the question arises whether in the absence of such sanction or complaint a Court which tries him is a Court of competent jurisdiction. On this question there was conflict of decisions. The majority of the High Courts have held that the Court could not be deemed to be a Court of competent jurisdiction in such cases because the trial without a proper complaint was void under section 530 and therefore a judgment of acquittal which ensued was also void and so there was nothing which the accused could compel a Court to recognise in support of a plea of previous acquittal. These conflicts have been happily set at rest by a decision of the Privy Council in *Usufalli* v. *King Emperor*[1]. Their Lordships of the Privy Council have held that where there was no valid sanction for the prosecution of the accused the prosecution was a nullity and the order of the Magistrate acquitting the accused (or convicting as the case may be) was without jurisdiction and could only operate as an order of discharge ; the accused had not been tried by a Court of competent jurisdiction and accordingly section 403 (1) of the Criminal Procedure Code was no bar to the institution of a fresh prosecution against the accused for the same offence on the same facts as in the former prosecution. The view of the Federal Court in *Basdeo Agarwalla* v. *King Emperor*[2], that a prosecution launched without a valid sanction is a nullity was approved. It was finally held that under the common law a plea of previous acquittal or previous conviction could only be raised where the first trial was before a Court competent to pass a valid order of acquittal or conviction and that unless the earlier trial was a lawful one which might have resulted in a conviction the accused was never in jeopardy. Leading English cases in *Rex* v. *Bowman*[3], *Rex* v. *Bates*[4] and *Rex* v. *Marsham*: *Pathick Lawrence Exparte*[5], were referred to and *Rex* v. *Simpson*[6] was distinguished. The judgment of the Bombay High Court was affirmed. The present case is in all fours with the Privy Council decision which is now cited and there can be no doubt that beyond taking advantage of the term "acquittal" instead of "discharge" in the judgment of my learned brother Panchapagesa Sastri, J., there are no merits in this contention. Therefore the plea of previous acquittal based upon section 403, Criminal Procedure Code, has no substance.

Point 2.—Turning to the Article 20 (2) of the Constitution of India, the principle underlying this clause is the same as underlies section 403, Criminal Procedure Code, namely double jeopardy. It runs as follows :

"No person shall be prosecuted and punished for the same offence more than once."

The word "prosecuted" is said to have been introduced in the present case in order to make it clear that the power relates to punishment by a Court of law and not to other kinds of punishment besides a judicial penalty for example departmental action in the case of public servants or proceedings under the Legal Practitioners' Act in the case of lawyers. The word "and" has certainly been used in a conjunctive and not a disjunctive sense because to interpret the word "and" as "or" would be reading into the Article something which is not there. The principle that no citizen should be put in jeopardy of his life or liberty more than once is so well known that in almost every Constitution one finds a provision against a person being put to trial in respect of the same offence more than once. Section 403, Criminal Procedure Code, is nothing more than an elaboration of this principle in all its niceties and distinctions. In this background when we consider Article

1. (1949) 2 M.L.J. 461 : L.R. 76 I.A. 158 (P.C.).
2. (1945) 1 M.L.J. 369: (1945) F.L.J. 45 : 1945 F.C.R. 93 (F.C.).
3. (1834) 6 C. and P. 337.
4. (1911) 1 K.B. 964.
5. (1912) 2 K.B. 362.
6. (1914) 1 K.B. 66.

20 (2) it is seen that it is nothing more than a clause only against a fresh prosecution and punishment for the same offence and which was also the law previously. There is absolutely no scope on the wording of the Article to suspect that the framers of the Constitution wanted to unsettle the settled law of the land. What they merely wanted to provide for was a specific thing, namely, the non-prosecution of a person who had already been prosecuted and convicted. One should hesitate long before presuming that the law established for decades was sought to be disturbed by the makers of the Constitution, especially when there was nothing in the working of that law, which required or justified such disturbance. Above all, whatever the intention of the framers may be, we are guided only by the intention as expressed in the Article, and that intention, as pointed out by N. R. Raghavachari, in his Constitution of India is perfectly clear. (See page 94). The only consequence of clause (2) not providing for other cases known to the existing law, either with reference to the permissibility of fresh prosecutions or with reference to the non-maintainability thereof is probably this, that the criminal law of the land can hereafter be amended in the ordinary way for the purpose of altering the existing law subject to the provision in clause (2) of Article 20 which being one of the fundamental rights cannot be taken away or abridged or contravened. This shows as already premised that clause (2) uses the conjunction "and" and not the disjunction "or" between the words "prosecuted" and "punished" and this makes it clear that to bar a fresh prosecution for the same offence, the accused should have been both prosecuted and punished. So when an accused is discharged for want of sanction there is no punishment and when a man is punished departmentally, there is no prosecution. Therefore Article 20 (2) of the Constitution of India does not take away the right to institute a second prosecution when the first is found to be a nullity by reason of want of sanction a pre-requisite for the maintaining of the prosecution.

Both the grounds taken by the learned advocate fail and the final point mentioned by him is that the offence alleged was as early as 1949 and that the petitioner has also been removed from service and that it will not be expedient that the case should now be prosecuted after obtaining the necessary sanction. This argument drawn from misery is a good argument for being considered at the end of the case and in the event of this petitioner being convicted and it will then be open to the trial Magistrate to adopt one of many liberal courses open to him under the Code of Criminal Procedure and under the Madras Probation of Offenders Act. This is certainly no ground for not getting along with the trial.

The Criminal Revision Petition is dismissed and the learned Sixth Presidency Magistrate is directed to dispose of the case without further delay.

V.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATARAMA AYYAR.

Palvannam Pillai (since deceased) and others .. *Appellants**

v.

Ganapathy Ayyar *alias* Salavady Ayyar and others .. *Respondents.*

Highways—Right of members of the public to take out a procession—Distinction, if any, between religious and funeral processions—Civil Procedure Code (V of 1908), section 91.

It is the inherent right of every member of the public to take out a procession whether it be religious, social or political along public streets and pathways so long as the rights of others to use the public pathways similarly are not infringed. There is no reason why a distinction should be made between a religious procession and a funeral procession in this respect. A suit to declare the right of the plaintiffs to take out a funeral procession along a public road to restrain the defendants from interfering with the user of the plaintiffs is not barred by section 91, Civil Procedure Code.

Case-law exhaustively discussed.

* S.A. No. 922 of 1947. 1st February, 1952.

Appeal against the decree of the Court of the Subordinate Judge of Tirunelveli in A.S. No. 68 of 1946 preferred against the decree of the District Munsif Court, Tirunelveli in O.S. No. 504 of 1943.

K. S. Desikan for Appellants.

S. V. Rama Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—This Second appeal raises a question of some novelty and importance about the rights of members of the public to take funeral procession through public streets and path-ways. The plaintiffs are the appellants. They are residents of a hamlet called Puthukudy Kallur which is attached to the village of Kodaganallur. The defendants are residents of this latter village. To the west of the hamlet of Puthukudy Kallur there is a road running north to south, marked Road No. 9-G in the plaint plan, Exhibit P-1. At a point in the said road marked X in Exhibit P-1 there is a branch road running east and that is marked X.Y.Z. in the plan. This road passes through the streets in the village of Kodaganallur between the points X-1 to E E X-6 and at the point Y it turns southwards and leads on to the cremation ground on the banks of the river Tamaraparni marked "Z" in the plan. The plaintiffs allege that the main road 9-G and the branch road X. Y. Z. are public roads belonging to the District Board, that they are entitled to use these roads for carrying the dead for cremation at the place "Z" and that the defendants are unlawfully obstructing the plaintiffs in exercise of these rights. They accordingly pray for a declaration that they are entitled to use these roads "for all purpose inclusive of taking or leading funeral processions" and for an injunction restraining the defendants from interfering with such user by the plaintiffs. The suit is laid in a representative capacity on behalf of the villagers of Puthukudy Kallur and the defendants are sued as representing the villagers of Kodaganallur.

The defendants admit that the road, 9-G is a public pathway but they contend that a portion of the branch road marked, X and X-1 is a private road belonging to the owners of adjacent lands and that, therefore, the plaintiffs are not entitled to pass along that portion of the road. They also contend that even if the road is a public pathway the plaintiffs have no right in law to take funeral processions through it as that was not the customary route. Lastly it is argued that the suit is barred under section 91, Civil Procedure Code. The learned District Munsif rejected all these contentions. He held that X. X-1 was a public road; that the plaintiffs as members of the public were entitled to use public pathways for funeral processions and that section 91, Civil Procedure Code, was no bar to the maintainability of the suit. The suit was accordingly decreed. On appeal the learned Subordinate Judge reversed this decree and dismissed the suit. He agreed with the District Munsif that the road X. X-1 was a public one and that the action was not barred by section 91, Civil Procedure Code, but he held that the right to use public roads for funeral processions was not an ordinary user and that the plaintiffs could not claim it as a matter of right. In the result he allowed the appeal and dismissed the suit. The plaintiffs prefer this second appeal.

In view of the concurrent findings of the Courts below that the road X. Y. Z. is a public pathway the only question that arises for determination is whether the plaintiffs as members of the public are entitled to take funeral processions through the road, X. Y. Z. The right of members of the public to take processions along a public road or street has been the subject of judicial consideration for over a century. At one time it was considered that though a person is entitled to pass and re-pass on public highways, he had no right to take processions as that was an extraordinary user and could be justified only by custom or special grant. Thus in an early case reported in "Decisions of the Sadar Adalat" (1856-8) in *Sambalinga Moorthy* v. *Vembarry Govinda Chetti*[1] the Civil Judge of Salem held that a Guru had no right to be carried in a palanquin in procession through the streets of Salem merely on the

1. M.S.D. 1856-8, page 219.

ground that they were public streets and that such a right could be supported only if there was a "Sannad or patent granting it". This was reversed by the Court of Sadar Adalat on the ground that the right to pass in procession in the streets was

"a natural right inherent in every subject of the State not requiring as the civil Judge appears to suppose to be created by a sannad or patent."

In *Parthasarathi* v. *Chinnakrishna*[1] it was held by Sir Charles A. Turner, C.J. and Muthuswami Aiyar, J., that

"persons of all sects are entitled to conduct religious processions through public street so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the Magistrates may lawfully give to prevent obstruction of the thoroughfare or breaches of the public peace."

The leading case on the subject is the one reported in *Sadagopachariar* v. *Rama*[2]. Therein it was held by a Bench of this Court that

"the right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others, or cause a public nuisance or interfere with the ordinary use of the streets by the public, and subject to such directions or prohibitions as may be issued by the Magistrate to prevent obstructions to the thoroughfare or breaches of the public peace."

On appeal this decision was affirmed by the Privy Council in *Sadagopachariar Rama Rao*[3]. The question arose again for decision by the Privy Council in the case reported in *Manzur Hasan* v. *Muhammad Zaman*[4]. There the dispute was between two sects of Muhammadans, the Shias and Sunnis as to their respective rights in taking processions during the Muharam. It was held that members of a religious body have the right to conduct religious processions with appropriate observances along the highways. In *Martin and Co.* v. *Syed Faiyaz Hussain*[5], the Privy Council again observed :

"The plaintiffs have the right as members of the public to take part in religious processions in the streets ; subject of course to the rights of other members of the public to pass and re-pass along the same streets and subject to the powers of the appropriate authorities of controlling traffic and preventing disturbance. This right as a normal user of the highway does not originate in custom."

This view had been repeatedly laid down in several decisions of the Madras High Court. Vide *Maunada Mudali* v. *Nallayya Goundan*[6], *Andi Moopan* v. *Muthu Veera Reddi*[7] and *Velan Pakkiri Taragan* v. *Subbayya Samban*[8]. The law is thus well settled that it is the inherent right of every member of the public to take out a procession along public streets and pathways so long as the rights of others to use the public pathways similarly are not infringed.

But it is contended on behalf of the defendants that the decisions which establish this right were all cases of religious processions and that the principle of those decisions cannot be extended to other processions especially funeral processions. The decision in *Sangabasavaswami* v. *Baburao Ganesh*[9] is relied on in support of this position. In that case the Lingayats claimed a right to take out a procession with what was described as Vyasantol. Kania, Acting *Chief Justice*, delivering the judgment of the Bench observed—

"that the general right of the public to take out a procession which was not religious is not supported by law" and that "carrying of Vyasantal in procession was not the taking out of a religious procession with appropriate observances as stated by the Privy Council in *Martin and Co.* v. *Syed Faiyaz Hussain*"[1].

It was on the strength of this decision that the Subordinate Judge negatived the rights of the plaintiffs.

Mr. K. S. Desikan the learned advocate for the appellants argues that there is no basis in law for making a distinction between religious processions and other

1. (1882) I.L.R. 5 Mad. 304.
2. (1902) I.L.R. 26 Mad. 376.
3. (1907) 17 M.L.J. 240 : L.R. 34 I.A. 93 : I.L.R. 30 Mad. 185 (P.C.).
4. (1924) 48 M.L.J. 23 : L.R. 52 I.A. 61 : I.L.R. 47 All. 151 (P.C.).
5. (1944) 1 M.L.J. 474 : L.R. 71 I.A. 25 : I.L.R. (1944) All. 191 (P.C.).
6. (1909) 19 M.L.J. 467 : I.L.R 32 Mad. 527.
7. (1915) 29 M.L.J. 91.
8. (1918) 36 M.L.J. 79 : I.L.R. 42 Mad. 271 (F.B.).
9. A.I.R. 1946 Bom. 353.

kinds of processions and that the decision in *Sangabasavaswami* v. *Baburao Ganesh*[1] has since been overruled by a Full Bench of the Bombay High Court in the decision reported in *Chandu Sajan* v. *Nyahalchand*[2]. He accordingly contends that on the findings of the Courts below that the streets are public streets the plaintiffs are entitled to succeed. Viewing the question on principle, it is difficult to discover any reason why a distinction should be made between one kind of processions and another. When once it is conceded that the right to take religious processions is inherent in every citizen as a member of the public and not derived from any custom or privilege, it must follow that the right to take any other procession also must, without more be inherent in every member of the public. No reason could be and none has been adduced for recognising a right to take religious processions and refusing the right to take other processions. Nor is there any warrant in the authorities for making any such distinction. The decision in *Sambalinga Moorthy* v. *Vembarry Govinda Chetti*[3] already referred to was the case of a non-religious procession, taking a Guru in a palanquin with music. It was held that such a procession could be taken. In *Sivvappachari* v. *Mahalinga Chetti*[4] it was decided that a marriage procession could be taken along a public highway. In *Sadagopachariar* v. *Rama Rao*[5], reference is made at page 380 to an order that

> " the Thengalais will be protected in the performance of acts which are not illegal in the village of Tiruvendipuram "

and in holding "one Eyal" or funeral procession in the streets. *Velan Pakkiri Taragan* v. *Subbayyan Samban*[6] is a Full Bench decision where the dispute related to the taking of a marriage procession. In *Chandu Sajan* v. *Nyhalachand*[7], the Hindu residents of Sakur claimed a right to take both religious and social processions through public streets. The Mussalman residents resisted the claim and contended on the basis of the decision in *Sangabasavaswami* v. *Baburao Ganesh*[1] that the plaintiffs had no right to take non-religious processions through public streets. The Full Bench decided that the plaintiffs had such a right. Delivering the judgment of the Full Bench, Chagla, C.J. observed :

> " It is difficult to see what is the distinction in principle between the right of conducting a religious procession along a public throughfare and the right of conducting a non-religious procession. The right, it seems, to us depends upon the lawful and reasonable user of a highway. Can it be said that conducting a non-religious procession along a thoroughfare is a less lawful and reasonable user of a highway than conducting a religious procession ?"

After reviewing the authorities and discussing the decision in *Sangabasavaswami* v. *Baburao Ganesh*[1], the learned Chief Justice went on to say

> " The question really, therefore, resolves itself into this. Has a citizen or a community of a section of a community an inherent right to conduct a non-religious procession through a public road ? If he has such a right, and in our opinion he undoubtedly has, then it must inevitably follow that he has also the right to file a declaratory suit without proof of special damages."

An interesting case on the subject is the one reported in *Lowdens* v. *Keaveney*[8]. There a party went in procession through the streets of Belfast playing band, in disregard of police caution not to play in certain streets. The question arose whether the action of the members of the party was unlawful. In holding that going in procession with band was not in itself unlawful but that it would become unlawful only when the user was unreasonable and excessive, Lord O'Brien, L.C.J. gave the instance of a funeral procession and observed as follows :

> "Take as I said, the case of the funeral of some distinguished man—some great Minister of State—some great military commander—some citizen prominent for his civic virtues, or some distinguished ecclesiastic. The funeral may consist of so many thousand persons, that the whole street to use the language of the police sergeant may be swept and the greatest physical obstruction caused—traffic brought absolutely to a standstill. Every one knows that such a funeral is sure to cause a great physical obstruction. It is the natural and probable consequence of the funeral procession moving along the street. I asked, was everyman who took part in such a procession obnoxious to criminal liability for so doing. It would indeed be a very anomalous state of the law if that were so. A funeral

1. A.I.R. 1946 Bom. 353.
2. A.I.R. 1950 Bom. 192.
3. M.S.D. (1856-8), page 219.
4. 1 M.H.C.R. 50.
5. (1902) I.L.R. 26 Mad. 376.
6. (1918) 36 M.L.J. 79 : 42 Mad. 271 (F.B.).
7. A.I.R. 1950 Bom. 192.
8. (1903) 2 Ir. Rep. 82.

may be a most edifying manifestation. A large funeral whose numbers pass beyond the circle of private friendship is often, if not always, the tribute of the living to the conspicuous virtues which had distinguished the dead."

The learned Judge proceeds on to give instances of soldiers' marches, civil pageants and trades processions. He held that all these processions would be lawful unless "the user of the street was an unreasonable one". Gibson, J., observed as follows:

"Processions may use the streets for passage on lawful occasions and for lawful objects; and provided the user is reasonable there is no nuisance and intrinsically a procession with a band is no more illegitimate than a funeral."

Thus the authorities clearly establish that the members of the public have a right to take processions through public streets or pathways whether the processions be religious or social or political. The distinction made by the Subordinate Judge between religious processions and funeral processions must accordingly be rejected as not supported either by principle or authority.

The Court below also held that the user by the plaintiffs of the route, X. Y. Z, would be unreasonable because portions of it were formed only in 1932 and that before that, funeral processions were taken through a different route. But that route lay through nanja lands and had to be resorted to in the absence of a public road. It would be clearly unreasonable to bind the plaintiffs to this inconvenient practice of passing along fields when there are public pathways available.

It was stated by the learned advocate for the respondents that there are temples near this route and that it would result in pollution if corpses are allowed to be taken through it. But the learned District Munsif finds

"that along this newly formed route funeral processions from different streets and portions of the defendants' village are being taken to the cremation ground."

I must accordingly hold that the plaintiffs are entitled to use the pathways in question for funeral processions. It is scarcely necessary for me to add that this user must be reasonable and that it would be subject to all the limitations to which all processions on the public streets are subject.

It remains only to deal with the contention of the respondents that this suit is not maintainable for the reason that the facts alleged in the plaint would amount to a public nuisance and that there being neither special damage nor sanction of the Advocate-General the action would be barred by section 91 of the Civil Procedure Code. In *Velan Pakkiri Taragan* v. *Subbayyan Samban*[1] one of the questions referred to the decision of the Full Bench was

"Can a person or body of persons who claim a right to go in procession along a public highway bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage?"

This was answered in the affirmative. Subsequent to this decision the Privy Council gave a similar decision in *Manzui Hasan* v. *Muhammad Zaman*[2] though it would appear that the Madras decision was not brought to their notice. The same view was also taken in *Andi Moopan* v. *Muthuveera Reddi*[3] and in *Chandu Sajan* v. *Nayahalchand*[4]. The view taken by the Courts below on this question is clearly right and this objection must also be overruled.

In the result the appeal is allowed, the decree of the lower Court is set aside and that of the District Munsif restored with costs throughout. No leave.

V.S. *Appeal allowed.*

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1. (1918) 36 M.L.J. 79 : I.L.R. 42 Mad. 271 (F.B.)
2. (1924) 48 M.L.J. 23 : L.R. 52 I.A. 61 : I.L.R. 47 All. 151.
3. (1915) 29 M.L.J. 91.
4. A.I.R. 1950 Bom. 192.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

C.M.P. No. 2591 *of* 1951.

Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt .. *Petitioner**

v.

The Commissioner, Hindu Religious Endowments Board, Madras. .. *Respondent.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of Prohibition prohibiting the respondent from proceeding with the scheme in C.A. No. 471 of 1950 on his file.

W.P. Nos. 379 *and* 380 *of* 1951.

Marimuthu Dikshithar representing the Podhu Deekshithars of Sri Sabhanayagar Temple, Chidambaram, South Arcot District .. *Petitioner**

v.

The State of Madras represented by the Secretary to Government, Rural Welfare Department, Madras and another .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (*XIX of* 1951), *sections* 20, 21, 25 (4), 26, 28, 29, 30 (2), 31, 53, 54, 55 (2), 56, 58 (3), 59, 63 *to* 69, 70 (2), (3) *and* (4), 76, 89 *and* 99—*If and to what extent* ultra vires *the Madras State Legislature.*

Constitution of India (1950), *Articles* 14, 15, 17, 19, 26, 27 *and* 28—*Scope and effect.*

Practice—Writ of Prohibition—Right to issue of when alternative remedy is open.

Hindu Law—Religious endowments—Maths and temples—Heads and dharmakarthas—Rights of.

The head of the Mutt is not a trustee in the sense in which that word is used in the law of Trusts and his position cannot be brought under any legal label known to English jurisprudence. He is not even a life tenant in respect of the properties permanently vested in the mutt or the religious institution. He has a right to the income but he has no power of disposition over the corpus unless necessity or benefit is established. He has large powers over the surplus of the income after meeting the demands of the institution such as its maintenance, the maintenance of the disciples and the performance of the daily worship, etc. He has the discretion to use the surplus for spiritual objects and that discretion is unfettered so long as the surplus is not diverted to any immoral or wicked purposes. He has the liberty to accumulate the income. The Padakanikas are at his absolute disposal. If however, it is established that any specific property has been vested as a trustee in the head of the Mutt, to that extent and in respect of that property, he becomes a trustee. In other respects he is not liable to account for the income much less to the Padakanikas. He is a person with manifold rights and duties. He is the spiritual head ; he is the teacher and the guru. He has to carry on the worship of the deity installed in the Mutt, maintain the disciples and propagate the views of the religion of the institution. His life is one of discipline and non-attachment to worldly things and he is expected to meditate and study and further the creed of the Mutt. Such institutions are autonomous bodies governed and controlled by the directions and orders of the head of the Mutt. He is treated almost as a representative of the Godhead by his disciples and followers. He is held in high esteem and the disciples consider any extraneous control over the head as lowering the dignity and the prestige he enjoys as such head. It follows that to some extent he has the beneficial ownership of the properties while in respect of some of the properties he may be a manager. No doubt the management of the properties may bear a secular aspect but the secular and the religious aspects cannot be dissociated as they are inextricably mixed up when it is once established that the property and the income are at the disposal of the Swami for the sole and exclusive purpose of the spiritual welfare of himself and his disciples and followers.

Power under the present Constitution to enact laws with respect to matters enumerated in Item 28 of List III of Schedule VII is conferred upon the State Legislature but subject however to the provisions of the Constitution. The power of the State Legislature it cannot be now contended, is part of any prerogative power or inherent right of the State to control and superintend religious institutions. It is an express power conferred by the Constitution upon the State Legislature.

Article 14 of the Constitution does not prevent the Legislature from taking up one set of institutions (Hindu as in the present case) for legislative consideration at one time and enacting laws in respect of them reserving the other types of institutions for consideration to a future date. The classification of institutions and endowments based on religion as Hindu, Muhammadan or Christian cannot be said to be either arbitrary or unreasonable having regard to the object sought to be attained,

*C.M.P. No. 2591 of 1951 and Writ Petitions Nos. 379 and 380 of 1951. 13th December, 1951.

viz., the better administration and management of such institutions. The Madras Hindu Religious and Charitable Endowments Act does not violate either Article 14 or Article 15 of the Constitution.

The restrictions imposed by the impugned Act are so drastic in scope that they go beyond the object sought to be achieved and it cannot be said that they are reasonable and required in the interests of the general public.

The provisions of the impugned Act vest very large powers in the Commissioner and are certainly calculated to interfere with the practice of religion, *i.e.*, the carrying on of the worship and the propagation of the religion by instructing the disciples and initiating them into the fold of religion. The provisions interfere with the Matadipathis' right freely to practise and propagate religion under Article 25 of the Constitution.

The Shivalli Brahmin Community as a denomination is entitled to protection of the right guaranteed under Article 26 of the Constitution to administer property. The head of the Mutt of such community is a member of the community.

Madras Act XIX of 1951 in so far as it may take away the right to administer the religious and secular affairs of the Mutt must be held to be invalid as infringing Article 26. It is unnecessary that in order to claim the benefit of Article 26 a religious denomination should be capable of holding all the four rights in the four sub-clauses of that Article. Each clause recognises a distinct and separate right. The denomination may exercise all or any of these rights and it is unnecessary that it should own all the rights before it can claim recognition as a religious denomination.

The levy of five percentum of the income of a religious institution provided for in section 76 (1) of the Madras Act XIX of 1951 though called contribution is really a "tax" within the meaning of Article 27 of the Constitution. Such levy offends Article 27 and is unconstitutional and *ultra vires* the State Legislature.

If the dharmakartha of a temple or the head of a Mutt has a beneficial interest in the property and its income, such rights are "property" within the meaning of Article 19 (1) (*f*) of the Constitution.

The Podhu Dikshitars of Chidambaram in whom the management of the temple (Sabanayagar temple) is vested are both the managers and the archakas and they have a substantial beneficial interest in the income. The Dikshitars (250 families of about 1,500 members) are collectively and individually entitled to the beneficial interests in the offerings made to the God and in the collections made for the archanas and other aradhanas.

The Dikshitars who are citizens of India have individual proprietary rights and the notification of the temple under the Madras Hindu Religious Endowments Act abridges their proprietary rights and such notification is an unreasonable restriction on their right to acquire hold and dispose of property. The Podhu Dikshitars who are Smartha Brahmins, form and constitute a religious denomination or in any event, a section thereof. They are even a closed body, because no other Smartha Brahmin who is not a Dikshitar is entitled to participate in the administration or in the worship or in the services of God. It is their exclusive and sole privilege which has been recognised and established for over several centuries. The notification seriously interferes with their right to manage the affairs in matters of religion, to own and acquire moveable and immoveable property and even to administer such property in accordance with law and as such the rights of a denomination are infringed within the meaning of Article 26 of the Constitution. A law which substantially deprives the religious denomination of its right to administer the property of the denomination leaving only a scintilla of the right in the denomination cannot be justified and upheld as an exercise of the power to regulate the administration of the institution. Nor is it reasonable restriction within the meaning of Article 19 (5) of the Constitution.

The procedure to notify a temple under the earlier and the new Acts (Madras Acts II of 1927 and XIX of 1951) is undoubtedly a drastic innovation, which encroaches upon the rights of Dikshitars to manage the property belonging to the denomination. A deprivation of the right to manage by the Dikshitars and vesting it in an executive officer appointed by the Government and the new Act making the administration a Governmental Department is a serious inroad upon the rights of Dikshitars. The vesting of the exclusive jurisdiction to take the serious step of replacing the administration by the Dikshitars by an executive officer, without a power of judicial review of any sort, is to say the least, unreasonable and unjust.

As legislative power should be exercised subject to limitations recognised and embodied in the Constitution, the limitations of the nature contained in Chapter VI of Madras Act XIX of 1951, and Chapter VI-A of the earlier Act cannot but be held to infringe the very fundamental principle of jurisprudence that no man should be a judge in his own cause and is therefore unreasonable and unjust. An abrogation of a right by law is not a regulation by it. It is annihilation and not regulation.

The provision therefore, relating to the notification and the notification actually issued are opposed to the fundamental rights granted to the individual and guaranteed by the Constitution under Article 19 (1) (*f*) and to the denomination under Article 26 and therefore cannot be upheld.

The right to contribution under section 75 of the new Act is unconstitutional as it is opposed to Article 27.

The position of the Dikshitars of Chidambaram labelled trustees of the temple, is virtually analogous to that of a Matathipathi of a Mutt except that the Podhu Dikshitars functioning as trustees

will not have the same dominion over the income of the properties of the temple which the Matathipathi enjoys in relation to the income from the Mutt and its properties.

Sections 20, 21, 25 (4), 26 [to the extent that section 25 (4) is made applicable], section 28 (though it sounds innocuous, it is liable to abuse), sections 29, 30 (2), 31 (because Courts have ample powers to meet these contingencies), sections 54, 55 (2), 56, 58 (3), 59, 63 to 69 in Chapter VI, section 70 (2), (3) and (4), section 76, section 89 and section 99 (to the extent it gives the Government virtually complete control over the Matathipathis and Mutts) are *ultra vires* the Madras State Legislature in so far as they relate to Mutts.

The sections of Madras Act II of 1927 which correspond to the sections of the new Act enumerated above as being *ultra vires* will also be *ultra vires*. Since section 5 of the new Act has repealed the earlier Act II of 1927 it is unnecessary to go into detail in examining which of the provisions of the earlier Act were *ultra vires* the State Legislature tested by the fundamental rights guaranteed by the Constitution of India, 1950.

In deciding the question whether a writ of prohibition should issue or not (in the present case proceeding after notification of a Mutt to frame a scheme under the Act) the existence of an alternative remedy (by way of suit after actual framing of the scheme) is an irrelevant consideration when the complaint is that an inferior tribunal is exceeding its jurisdiction or is assuming a jurisdiction not vested in it by law. It is unnecessary to insist upon a party complaining that he should first suffer and submit himself to the jurisdiction which is being wrongly exercised or is wrongly exceeded and then take advantage of the alternative remedy.

W.P. No. 379 *of* 1951.

Petition praying that in the circumstances stated in the affidavit filed therewith and in C.M.P. No. 12124 of 1951 the High Court will be pleased to issue :

(1) a writ of *certiorari* or a direction or order in the nature of such writ of *certiorari* calling for the record, relating to the proceedings of the second respondent in notification appeal No. 3 of 1951 on his file and quash the order therewith;

(2) a writ of mandamus or an order in the nature of such writ directing the respondents Nos. 1 and 2 from taking further proceedings under Madras Act XIX of 1951; and

(3) a writ of mandamus or a direction in the nature of such a writ directing the respondents 1 and 2 to forbear from giving effect to the order of the second respondent, dated 31st August, 1951, in R.O. No. 5076 (Prayer 2 and 3 added by order, dated 13th December, 1951 and made in C.M.P. No. 12124 of 1951).

W.P. No. 380 *of* 1951.

Petition praying that in the circumstances stated in the affidavit filed in W.P. No. 379 of 1951 and in C.M.P. No. 12124 of 1951 the Court will be pleased to issue:

(1) a writ of *certiorari* or direction or order in the nature of such a writ of *certiorari* against the first respondent calling for the records relating to the notification G.O. No. 894, Rural Welfare, dated 28th August, 1951, published in *Fort St. George Gazette*, dated 4th September, 1951, in the matter of Sri Sabhanayagar Temple, Chidambaram Taluk, South Arcot District and quash the proceedings therein;

(2) a writ of mandamus or an order in the nature of such a writ directing the respondents Nos. 1 and 2 from taking further proceedings under Madras Act XIX of 1951; and

(3) a writ of mandamus or direction in the nature of such a writ directing the respondents 1 and 2 to forbear from giving effect to the order of the second respondent, dated 31st August, 1951, in B.O. No. 5876.

C.M.P. No. 2591 *of* 1951.

K. Bashyam, T. Krishn Rao, K. R. Karanth and *S. Venkatakrishnan* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*), *M. Seshachalapathi* and *T. K. Raman Nambisan* for Respondent.

W.P. Nos. 379 *and* 380 *of* 1951.

K. Umamaheswaram, Alladi Kuppuswami and *C. V. Srinivasachari* for Petitioner.

The Advocate-General (*V. K. Thiruvenkatachari*) with the Government Pleader (*P. Satyanarayana Raju*) for Respondents.

The Court delivered the following

JUDGMENT : *Civil Miscellaneous Petition No.* 2591 *of* 1951*—This and the other connected petitions relating to the Guruvayur temple and the Chidambaram temple were heard together as they all raised the question of the validity of the Madras Hindu Religious Endowments Act, 1926, Act II of 1927 (hereinafter called the "earlier Act"). While these petitions were pending, the Madras Hindu Religious and Charitable Endowments Act, 1951 (Act XIX of 1951) (hereinafter called the "new Act") which repealed the earlier Act was brought into force by the Madras Government on 30th September, 1951, by a notification in the *Fort St. George Gazette*. Leave to amend the petitions was granted to the petitioners and they have been permitted to canvass the validity of the new Act as well. Mr. M. K. Nambiyar who appeared for the trustee of the Guruvayur temple argued his petition first and Mr. Alladi Krishnaswami Ayyar and the learned Advocate-General replied to that petition after which the petition relating to Guruvayur temple was allowed to be withdrawn as the Government agreed to cancel the decision to notify the temple and to permit the trustee to function. The arguments addressed by Mr. Nambiyar were adopted by the petitioners in the remaining petitions and they further supplemented the arguments addressed by Mr. Nambiyar.

It will be convenient to deal with C.M.P. No. 2591 first, as it relates to a mutt and covers a wider field than the petition relating to the Chidambaram temple. Some of the arguments are common to both the petitions, particularly the scope of the Articles of the Constitution relied on in support of the petitions as having been infringed by the earlier and the later Acts and also the effect of the two Acts on the rights of the petitioners.

C.M.P. No. 2591 of 1951 was filed by the Matathipathi of Shirur Mutt in the South Kanara District, praying that this Court should issue a writ of prohibition prohibiting the respondent, *viz.*, the Hindu Religious Endowments Board, Madras, by its President from proceeding with O.A. No. 471 of 1950 to frame a scheme for the administration of the mutt. Under section 103 of the new Act, the Notifications and Orders issued under the earlier Act are treated as notifications or orders made, issued and passed by the appropriate authority under the corresponding provisions of the new Act and as the place of the president, The Hindu Religious Endowments Board, Madras, was taken by the Commissioner appointed under the new Act, the Commissioner, Hindu Religious Endowments Board, Madras, was added as a party in place of the Board by C.M.P. No. 11917 of 1951 with the leave of Court. The relief, therefore, claimed against the Board is treated as a relief against the newly appointed Commissioner of the Hindu Religious and Charitable Endowments, Madras.

Acting under section 62 of the earlier Act, the Board issued the notification dated 6th November, 1950, stating that as the Board was satisfied that the endowments of the Mutt were mismanaged and that in the opinion of the Board a scheme for the administration of the Mutt and its endowments should be settled, 8th December, 1950, was fixed for further enquiry into the matter, and the notice also called upon the trustees and other person interested in the said Mutt to appear and show cause why a scheme of administration should not be settled. The reasons alleged were :

(1) That the trustee of the Mutt had been borrowing moneys without necessity and spending them without taking the sanction of the Board on major constructions for which there was no approved estimates or plans. He has thus involved the institution into further debts and has utterly disregarded the directions issued to him in Memo. No. 75887/46, Adt., dated 13th March, 1947.

(2) Properties belonging to the Mutt have been leased out on low rents and against the interests of the institution.

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*[As this is the leading Judgment in which the whole question is discussed and as this Judgment is referred to in the connected petitions, this Judgment is reported first—*Ed.*]

(3) The trustees of the Math have, in many cases, acquiesced in the alienation of Mulgeni transfers containing forfeiture clauses against further alienations; owing to his neglect, properties comprised in Patta No. 2437 in Uppur have been alienated.

(4) The Manager has not been allowed to carry on his duties and the power-of-attorney granted to him has been cancelled without reference to the Board.

On the 24th January, 1951, the Board issued a notice under section 63 (1) of the earlier Act to the head of the Math intimating that in the interests of the proper administration of the Math and its endowments, a scheme of administration should be settled and that further enquiry would be held on 15th February, 1951, at 2 P.M., at the office of the Board in Madras and asking the trustee and other persons having any interest in the said Math to make any representations in writing which they might wish to make in the said matter. To this notice a draft scheme was also attached. As the Board had decided to frame a scheme, the petitioner filed two applications on 12th February, 1951, the present C.M.P. No. 2591 of 1951 and another C.M.P. No. 2592 of 1951 and obtained stay of further proceedings and this Court issued a rule *nisi* in C.M.P. No. 2591 of 1951. C.M.P. No. 2592 of 1951 was filed for the issue of writ of *certiorari* to call for the records and quash the order of the Board, dated 24th January, 1951, deciding to frame a scheme. This application was dismissed, as there was no order of the Board, but there was only a notice and the petitioner was unable to produce a copy of the annexure in which the Board gave its reasons for the decision which they had reached. The petitioner was given an opportunity by this Court to get a copy of the order but the Board somewhat surprisingly seems to have refused to give a copy of the order on the ground that it was confidential. In support of this view of the Board, however, no rule or notification treating the annexure as confidential was referred to us. The petition was ultimately dismissed as withdrawn on 26th February, 1951. The object of the present petition, therefore, is to prohibit the Commissioner of Hindu Religious and Charitable Endowments, Madras, from taking further steps in the matter of settling a scheme for the administration of the Math and its endowments.

The petitioner's Math is known as the Shirur Mutt and is situated in Udipi, a small municipal town in the South Kanara District. The town is celebrated for its sanctity as there exists Sri Krishna Mutt with which is associated the name of Sri Madhwacharya, the well-known propounder of Pluralistic Theism of the Hindu religion. Sanctity is attached to the idol of Sri Krishna which was made of Saligramam stone as it is reputed to have been made by Arjuna and worshipped by Sri Rukmini Devi at Dwaraka. The image was reputed to have been miraculously obtained by Swamiji from a vessel wrecked on the coast of Tuluva. It was carried by him, and later, after removing the *gobichandana* which was wrapped round it, it was installed at Udipi in the 12th Century A.D. There are also three saligrams in the Sri Krishna Temple, which, it is claimed, were presented to Sri Madhavacharya by Vyasa when he took his commentary on Sree Bhagavat Gita for the approval of Vyasa at Badrinath. Besides the Sri Krishna Mutt the Swamiji also established eight Mutts at Udipi each presided over by a Sanyasi or Swami. There is no matathipathi for the Sri Krishna Mutt but the Swami of each of the eight Mutts in turn presides over the temple of Sri Krishna for a period of two years in every 16 years. At every change of a Swami at the end of two years, a festival known as Paryayam is celebrated on a very grand scale. These eight Mutts are Palimar, Admar, Krishnapur, Puttige, Shirur, Sode, Kaniyur and Pejavar. The Mutts are linked together into four groups of two each as Dvandwa Mutts as the two Mutts linked together should co-operate in all matters. The South Kanara Manual, Vol. I, page 148 refers to the fact that the periodical change of the Swami presiding over the temple of Sri Krishna is the occasion of a great festival known as Paryayam when Udipi is filled to overflowing by a large concourse of devotees not only from the district but from distant parts especially Mysore State. The Paryaya Swami is under an obligation to feed the pilgrims at this festival, and he has to meet the expenses of feeding from the income of the temple of Sri Krishna, from the income of his Mutt and from contributions. The rest of the expenditure is met

either from the accumulations of the income already made or by borrowing funds. It seems to be almost a usage that every Paryaya Swami has necessarily to borrow large amounts to meet the expenditure of the Paryaya as he would always be unable to meet it from the income. This information can be gathered from the South Kanara Manual, Vol. I, pages 147 and 148 and from the decision of the Judicial Committee in *Vibhudapriya* v. *Lakshmindra*[1] on appeal from *Lakshmindra* v. *Vibhudapriya*[2]. The present Swami is the 29th disciple of the line of succession starting from the first head who was a direct disciple of Sri Madhavacharya. Shivalli Brahmins who are the followers of Sri Madhavacharya claim this as their exclusive Mutt. These Brahmins are Tulu speaking Brahmins of the Smartha sect and are followers of Dwaita Philosophy founded by Sri Madhavacharya. The headquarters of these Brahmins is at Shivalli, a few miles away from Udipi, though some of them had migrated to other places in and outside the State. Sri Madhavacharya was born at Udipi but he also resided for sometime at Shivalli where he composed his 37 spiritual works—*see* the Manual at page 148 and also Thurston on Castes and Tribes, Vol. I, page 378, where he describes the Shivalli Brahmins.

The petitioner was installed as Matathipathi in the year 1919 during his minority, and he assumed management only in 1926 when he attained majority. At that time, the Mutt was heavily indebted, the then income of the Mutt being only Rs. 18,000 per year as estimated by the petitioner. During 1926-30, the indebtedness was reduced by the efforts of the Swami and also fresh acquisitions of property were made. 1931, however, was again a troublesome year. It was a period of his paryayam, and he had to meet heavy expenditure of feeding the Brahmins on that occasion which swelled the debt to about Rs. 85,000. This was followed by a period, 1932 to 1946, when by his efforts there was again a reduction in the debt. Then came the second paryayam at a time when the necessary commodities were controlled by the State, and the price of food stuffs were very high. The Swamiji naturally was obliged to run into further debts. At this juncture, the Board in exercise of the powers vested in it under section 61 (*a*) of the earlier Act, required the Swami to appoint a competent person as Manager and to report the name of the person so appointed to the Board. Ultimately, one Sripathachar was appointed as agent under a power-of-attorney, dated 24th December, 1948. The petitioner's complaint is that this action of the Board was instigated and goaded by one Mr. A. Lakshminarayana Rao, an advocate of Udipi, who was anxious to obtain a controlling hand in the affairs of the Mutts. The agent, it is alleged, had his own way of management of the affairs of the Mutt without reference to the Swami and he even failed to submit the accounts to the Swami. Paragraph 11 of the affidavit gives particulars of the various charges of the Swamiji against his agent. Finally the Swami by registered notice, dated 26th August, 1950, terminated the management of the said agent and cancelled his power-of-attorney. He called upon the agent to submit the accounts and also to return the other documents in his possession and custody. On the 28th September, 1950, the agent sent a reply through his advocate Mr. A. Lakshminarayana Rao stating that the cancellation of the power-of-attorney was illegal as according to its terms, it could not be cancelled and he declined to hand over to the Swamiji the accounts and other documents. This was followed by a suit instituted by the Swami on 4th October, 1950, O.S. No. 280 of 1950 in the Sub-Court, South Kanara, for recovering possession of the accounts, documents and other movables. It would appear however that a day prior to the institution of the suit on the 3rd October, 1950, the agent perhaps anticipating the contemplated suit by the Swami, filed a petition before the Board under section 18 of the earlier Act, bringing to the notice of the Board the wrongful termination of his appointment and demanding a reply. On the succeeding day, 4th October, 1950, the Board immediately issued a notice to the Swami proposing to enquire into the matter on the 24th October, 1950, at 2 P.M. at Madras and requesting the Swami to appear either in person or by pleader.

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1. (1927) 53 M.L.J. 196 : L.R. 54 I.A. 228: I.L.R. 50 Mad. 497 (P.C.).
2. (1923) 44 M.L.J. 187.

To this notice, the Swami filed a reply on 21st October, 1950, inviting the attention of the Board to the fact of the institution of the suit which raised the same questions as before them and enclosing a copy of the plaint for the perusal of the Board. He complained also that on account of the absence of the accounts and the papers which were wrongfully withheld by the agent, he was not in a position to sufficiently answer the charges levelled against him by the agent in the petition. Without proceeding with that enquiry and without even waiting for the result of the suit, the Board *suo motu* initiated proceedings under section 62 of the earlier Act on the 6th November, 1950, for framing a scheme and for that end issued a notice to the petitioner to show cause why a scheme should not be framed setting out in the notice the reasons in support of the proposed action which were stated earlier in this judgment.

The notice was served by affixture on the Swami, and the enquiry into the matter of framing a scheme was posted by the Board at Madras on the 8th December, 1950, on which date at the request of the counsel for the Swami it was adjourned to 21st December, 1950. On the 18th December, 1950, an application was filed on behalf of the Swami with a request to the Board to issue a direction to the agent to hand over the accounts and other documents in order to enable the Swami to file his objections. As the counsel for the Swami, Mr. K. R. Karanth was ill, the matter was again adjourned to 10th January, 1951. The Swamiji was not ready with his objections even on the 10th as his advocate was still ill and a telegram was sent on the 9th requesting the Board to adjourn the matter further. This request was not granted and as no explanation was filed by the Swami, the enquiry was closed and orders reserved on the 10th. Mr. Srinivasan, an advocate of Madras filed on behalf of the Swami on the 11th January, 1951, a memo requesting the Board to re-open the matter which was declined. Thereafter, the Swami sent on the 13th January, 1951, his written explanation to the Board which was admittedly received by the Board on the 15th. The notes paper shows that an order was passed directing the framing of a scheme by the Board, which does not however bear any date. From the subsequent notice issued bearing date 24th January, 1951, it may be assumed that the order was passed on that date. The notice issued thereafter to the Swamiji required him to state his objections for the proposed action of the Board. The order of the Board which was given as annexure was attacked by the petitioner in these proceedings on the merits and also on the ground that it contravened and infringed and abridged the fundamental rights regarding religious liberty of individuals and denominations guaranteed by the Constitution. It was claimed that the Mutt belongs only to the Madhwa section of the Hindu community and particularly of Shivalli Brahmins.

A counter-affidavit was filed on behalf of the Board by its secretary traversing the material allegations and justifying the action of the Board on legal grounds and also on merits. A preliminary objection was also raised that the application was premature as the final orders settling the scheme were not passed and that in any event the petitioner had a remedy by way of suit after the scheme was framed and so this application should not be entertained.

The Articles of the Constitution relied on by the petitioner as having been contravened by the impugned legislation are Articles 14, 15, 19 (1) (*f*), 25, 26, 27 and 30. In the course of the arguments, the extreme contention that the Mutt was not a public Mutt was for the first time raised. On the merits the order was attacked on the grounds :—

(1) that the Board acted with bias and this was founded on some allegations made in the affidavit supported by other affidavits against the President of the Board and one of the Commissioners who it was alleged were hand in glove with Mr. A. Lakshminarayana Rao and Sripathachar when they visited Udipi on occasions;

(2) that no mismanagement was established and indeed could not be established as the Swami was not in management for over 2 years but the management was exclusively with the agent ;

(3) that the grounds were vague and indefinite and that no reasonable opportunity was given to the petitioner to show cause;

(4) that the order was perverse as it was solely based on the fact of removal of the Manager Sripathachar without any enquiry into the charges levelled against him by the Swamiji and even without waiting till the disposal of the suit in which the charges were bound to be considered;

(5) that the order was perverse on various other grounds.

To these questions may be added the preliminary objection raised on behalf of the respondent that as there was another remedy open to the petitioner after the scheme was framed by way of suit, this Court should not interfere by issuing a writ of prohibition and that the application was also premature.

It is not possible to determine whether any of rights of the Matathipathi had been infringed, abridged or taken away without first ascertaining what those rights are. The material throwing light on the origin and the history and the functions of these mutts in the Hindu Polity is very meagre. The juristic relationship of the Matathipathi to the properties of the Mutt and its income has nowhere been precisely defined, as the rights and duties of the Matathipathi and the succession to the headship is governed solely by usage and not by any code of legal principles. These rights, therefore, have to be deduced to a large extent from the judicial decisions by no means altogether reconcilable and the opinions of text-writers.

"Mutt" used as a transitive verb means literally "to dwell" or to inhabit. "Mata" noun means hut, a small building inhabited by an ascetic or devotee, a monastery, a college.

"In its original and narrow sense, then, the term Mutt signified the residence of an ascetic or Sanyasi or Paradesi"—see *Giyana Sammanda Pandara Sannadhi* v. *Kandaswami Tambiran*[1]."

From very ancient times, the Sanyasis had no fixed abode but were wandering from place to place receiving such lodgings and food as were provided by devotees. Even now to a large extent the same practice obtains except in cases where such Sanyasis are attached in a Mutt. When Buddhism was in its ascendancy in India and when Buddhistic monks became popular, Sri Jagadguru Adisankaracharya gave a new orientation and infused fresh blood into Hinduism and stemmed the tide of the rapid spread of Buddhism in India. He established the Adwaita or Vedantic system of philosophy with which his name is always associated. He was the first, so far as tradition goes, to establish Mutts for the propagation of his philosophy and the reclamation of Hinduism. Tradition has it that after conquering the rival faiths he established Adwaita system of philosophy and founded four Mutts or seats of learning in the four corners of this vast sub-continent—Sringeri (Sharada Peeta) in Mysore in the south with which, it is familiar knowledge, the name of that great and erudite scholar and philospher Vidyaranyaswami is associated; Badrinath in the Himalayas in the north; Jagannath or modern Puri in the east, and Dwarka in the Bombay Presidency, in the west. In each of these Mutts as their heads, he installed his principal disciples, and he himself assumed the headship of Sarvanga Peeta or the central seat of knowledge at Kanchi, the modern Conjeevaram. This central peetam was first shifted to Tanjore and then to Kumbakonam from where it continues to function even in the present day. Following the lead of Sankara, the founder of Visishtadwaita, and others also founded Mutts with similar objects and for similar purposes. Nanguneri in the Tinnevelly district also known as Vanamamalai Mutt and the Ahobila Mutt were founded, so goes tradition, by the disciples of Sri Ramanujacharya. As adverted to already, the dwaita Mutts at Udipi were founded by Sri Madvacharya. Ahobila Mutt was established for the spiritual instruction and benefit of the Vaishnava Brahmins of the Vadakalai sect. *Rangachariar* v. *Yegna Dikshatur*[2] relates to this Mutt. Besides these, there are Saiva Mutts of the Sudras and the Vira

1. (1887) I.L.R. 10 Mad. 375.

2. (1890) I.L.R. 13 Mad. 524.

Saiva Mutts of the Lingayats. Of the Sudra Mutts perhaps the Dharmapuram Mutt is the largest.

"The origin of these associations", to quote Muttuswami Ayyar, J., in *Giyana Sammanda Pandara Sannadhi* v. *Kandasami Tambiran*[1] "their constitution and development form part of the history of the establishment and spread of the Brahminical systems of religious doctrine among the Sudra communities in Southern India (referring to the Sudra Mutts). Originally, the ascetic who renounce the world and devoted himself to religion, confined his attention to the study of theology, to imparting religious instruction to his disciples, and to complying with the ordinances prescribed for the guidance of his order."

In the well-known case of *Vidyapurna Thirthaswami* v. *Vidyanidhi Tirtha Swami*[2] Subramania Ayyar, J., referring to these Mutts described the object with which they were established as follows :

"Now there can be no doubt that institutions of the class under consideration were established as centres of theological learning and in order to provide a line of competent teachers with reference to the established Hindu creeds of the country. If any proof of this statement were necessary, that is furnished by the unquestionable connection which exists between some of the more important of this class of institutions and the leading exponents of the tenets of those creeds. As pointed out in Mr. Ghose's Hindu Law, page 80, no less than seven Mutts being among the most celebrated, owe their origin to the great adwaita philosopher Sankaracharya. Other Mutts not less numerous or important following the tenets of the Visishtadwaita system of Ramanujacharya are traceable to that teacher. The well-known eight Mutts at Udipi, the centre of the Dwaita system of thought are on all lands admitted to have been founded by Madhavacharya, the chief expounder of that system. The Sudra Mutts of this Presidency of which those at Dharmapuram and Tiruvaduthurai are the chief, represent what is known as the Saiva Sidhantam."

(The reference to seven Mutts of Sankaracharya seems to be a mistake for five.) The learned Judge refers to the influence exercised by Mutts as centres of learning in the next paragraph in the same page thus :

"The influence exercised by Mutts as centres of learning on the religious and other literature of the country cannot be denied. The varied and well-known contributions made thereto by the famous Vidyaranya Swami of the Sringeri or Sarada Mutt, or under his auspices, are among the most conspicuous examples of this kind. There is scarcely a branch of learning considered by Hindus as important, to which Vidyaranya or the scholars whom he gathered round him, did not make valuable contribution, and it is to his commentaries that the modern world owes its knowledge of the traditional meaning of the oldest of sacred books—the Rig Veda. Nor has the influence of the Mutts at Dharmapuram, Tiruvadhuthurai, etc., on the Dravidian literature been inconsiderable."

To similar effect are the observations of Bashyam Ayyangar, J., in his judgment in the same case. Referring to the Mutts of Southern India, Ammer Ali, J., says in *Vidya Varuthi Thirtha* v. *Baluswami Ayyar*[3] :

"In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of Mutt were founded under spiritual teachers of recognised sanctity."

It is thus evident that the Mutts are centres of theological learning especially for the study, practices and propagation of the cult of each system of philosophy, and to train and equip a line of competent teachers whose duty is to go forth into the land bearing the torch of learning and spreading its light. They must have functioned and indeed in future must continue to function to fulfil the objects with which they were found with foresight by the great teachers of the religion. If they had survived the onslaughts of other religions through centuries, it can only be due to their intrinsic merits and not to adventitious circumstances. It is the learning and piety of the head of the Mutt, the Superior, which attracted disciples and induced even laymen to make munificent gifts of land and other properties placing them at the disposal of the Swami for the time being. It is common knowledge that gifts are offered as *Padakanikas* at the feet of the Swami. There are also permanent endowment of lands and villages made in ancient days by kings and rajas without indicating the particular object for which such properties were endowed. It would perhaps be considered impudence on the part of the donor to impose any conditions or restrictions regarding the use of the income from the properties gifted to a personage whom he held in high religious esteem. The piety of the head to whom

1. (1887) I.L.R. 10 Mad. 375.
2. (1904) 14 M.L.J. 105 : I.L.R. 27 Mad. 435.
3. (1921) 41 M.L.J. 346 : L.R. 48 I.A. 302 : I.L.R. 44 Mad. 831 (P.C.).

the gifts were made was a sufficient guarantee that the corpus and the income would not be frittered away for mundane purposes. These Mutts, in short, are something like colleges established and founded for the study and teaching and for propagating the cult of the religion peculiar to the Mutt.

So much about the functions of these Mutts in Hindu religion. The more difficult question for solution is the juristic relationship of the Superior or the head of the Mutt to the property. The difficulty is enhanced when attempt is made to fit facts to notions borrowed from the English jurisprudence. Viewed from the juristic conception of a trust, it is difficult to infer that the Matathipathi is invariably a trustee of the properties. The properties might have been acquired under different circumstances for various purposes and unless the deed or endowment is forthcoming, it may not be possible to easily infer a trust. The succession, according to the invariable usage if these Mutts, always devolves upon the disciple selected and nominated by the outgoing head or Matathipathi. It is not governed by the ordinary Hindu Law relating to the properties belonging to sanyasi as laid down by Mitakshara. The question was considered in a number of decisions of this Court and also by the Judicial Committee. These decisions may be examined to arrive at a conclusion on the question, as to the real relationship of the Matathipathi to the properties and whether he is a trustee in the sense in which that term is understood in the Trust Act. As Salmond points out in his book on Jurisprudence, 9th edition, at page 349 :

"A trust is a very important and curious instance of duplicate ownership. Trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee, and his ownership is trust ownership; the latter is called the beneficial ownership. The trustee is destitute of any right of beneficial enjoyment of the trust property. His ownership, therefore, is a matter of form rather than of substance, and nominal rather than real. If we have regard to the essence of the matter rather than to the form of it, a trustee is not an owner at all, but a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. In legal theory, however, he is not a mere agent but an owner. He is a person to whom the property of some one else is fictitiously attributed by the law, to the extent that the rights and powers thus vested in a nominal owner shall be used by him on behalf of the real owner. As between trustee and beneficiary, the law recognises the truth of the matter; as between these two, the property belongs to the latter and not to the former. But as between the trustee and third persons, the fiction prevails. The trustee is clothed with the rights of his beneficiary, and is so enabled to personate or represent him in dealings with the world at large."

Though it is elementary knowledge, it is always useful to bear in mind the elements that go to constitute a trust. In *Sammantha Pandara* v. *Sellappa Chetti*[1], Muthuswami Ayyar, J., considered that

"the property of the matam does not descend to the disciples or elders in common; the preceptor, the head of the institution, selects among the affiliated disciples him whom he deems the most competent, and in his own lifetime instals the disciple so selected as his successor, not uncommonly with some ceremonies. After the death of the preceptor the disciple so chosen is installed in the gadi, and takes by succession the property which has been held by his predecessor. The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. *It is in a sense trust property; it is devoted to the maintenance of the establishment, but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution.*" (The italics are mine).

In the next case *Giyana Sammanda Pandara Sannadhi* v. *Kandaswami Tambiran*[2] the learned Judge observed :

"Thus, the ascetic who originally owned little or no property, came to own the Matam under his charge and its endowment, in trust for the maintenance of the Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection with it, according to usage."

According to his view the property is held in trust, the objects of the trust being the maintenance of the Mutt, the support of the head and his disciples and the performance of religious and other charities in connection with the Mutt. The learned Judge, however, added that the Matathipathi had a larger dominion over the property and was not even accountable for its management nor for the expendi-

1. (1878-80) I.L.R. 2 Mad. 175. 2. (1887) I.L.R. 10 Mad. 375.

ture of the income or the property for any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. It will be seen from this conception of the ownership that it is not strictly permissible to apply the notion of a trust to the fullest extent. In *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*[1] the question received a critical examination by the two learned Judges, Subramania Ayyar and Bashyam Ayyangar, JJ. According to their view, the inalienability of the property belonging to the Mutt flows from the fact that the property was given for the maintenance of charities, religious or otherwise, connected with the Mutt. The Swamijis of the Mutts were not mere employees or subordinates in the institution but heads thereof. Their duty was to promote learning and further the interests of the religion and they being ascetics are not prone to be affected by motives incidental to worldly life, requiring less restraint in dealing with property than ordinary men. On this reasoning the learned Judge (Subramania Ayyar, J.) concludes :

"It followed therefore that the law gave them over what remained of the income after defraying the established charges of the institutions, a full power of disposition, while in respect of the corpus it treated the individuals composing the line of succession as in the position of tenants for life."

He differs from some of the observations made by Muthuswami Ayyar, J., in *Sammantha Pandara* v. *Sellappa Chetti*[2]. The precise dual character of the heads of the institutions like the Mutts was compared to that of the temples by the learned Judge. In the case of temples undoubtedly the idol is the ideal person and juristic entity in whom the property is vested and the Dharmakartha or the manager for the time being had no sort of beneficial interest in the property which is entrusted to his care and management, but he being undoubtedly in a fiduciary position his liability is strictly that of a trustee, though he is not a trustee himself and he is not a trustee because the property does not vest in him. How does the position stand regarding the Mutts. The learned Judge deals with this question at page 442 and adverts to the fact that invariably in the Mutts there are idols connected with the worship, which is a secondary matter "the principal purpose" to quote the learned Judge,

"of such an institution being the maintenance in circumstances likely to command due respect and estimation of a line of competent religious teachers, who, as already shown, are given for the welfare of the foundation itself, a real and so to speak, beneficial interest in the usufruct, the restrictions governing the disposition whereof by them being of the nature of a mere moral obligation."

The learned Judge goes on to observe :

"Having regard to these facts it is obvious that the correct view to be taken is that in the case of Mutts the ideal person is the office of the spiritual teacher Acharya, which, as it were, is incarnate in the person of each successive Swami who, for the time, is a real owner and not a mere trustee."

In the same case, Bashyam Iyengar, J., expressed the definite opinion that the head of a Mutt as such is not a trustee in the sense in which that term is generally understood in the law of Trusts and that the principles regulating the appointment of new trustees or by analogy derived therefrom should not be invoked in determining the legal position of a Matathipathi with reference to his properties. He contrasts the position of the head of a Mutt. At page 451 he pointed out that in the case of debutter property such as property belonging to devasthanams or temples which have been established for the spiritual benefit of the Hindu community in general or for that of particular sects or sections thereof, the management of such institutions is usually vested in one or more persons variously described as Dharmakarthas, Panchayats, Uralans, etc., but referred to in the Acts as trustees, managers, or superintendents. He says :

"Their office is either hereditary or for life and, as a general rule, they have beneficial interest in the endowments or their income. As already stated, the worshippers are beneficiaries only in a spiritual sense, and the endowments themselves are primarily intended for spiritual purposes, though indirectly and incidentally a good number of people derive material or pecuniary benefit therefrom as office holders, servants or objects of charity. In the decisions above referred to at length, the presiding idol is treated as a juristic person in whom the properties constituting the endowments are vested. The question has not been suggested or considered, whether the community itself for whose spiritual benefit the institution was founded and endowed may not more appropriately be

1. (1904) 14 M.L.J. 105 : I.L.R. 27 Mad. 435.

2. (1878-80) I.L.R. 2 Mad. 175.

regarded as a corporate body forming the juristic person in whom the properties of the institution are vested and who act through one or more of the natural persons forming the corporate body—these latter being the dharmakarthas or panchayats, etc., charged with the execution of the trusts of the institution and possession, strictly limited powers of alienation of the endowments, as defined in the cases cited above. Though a fluctuating and uncertain body of men cannot claim a profit *a prendre in alieno solo*, nor be the grantee of any kind of real property (see *Goodman* v. *Mayor of Saltash*[1] yet there is high authority for treating such a community as a corporation or juristic person in relation to religious foundations and endowments."

With reference to the head of the Mutts he observes at page 454 :

"The position of the head of the mutt is thus not the same as or analogous to that of managers or dharmakarthas of devasthanams and temples but resembles more that of Bishops and Archbishops in the Christian system of Europe. In the case of temples, the endowments, whether in the shape of landed property or tasdik allowances, have to be devoted to the carrying out of the specific purposes connected with the temple, *i.e.*, the daily worship and the periodical ceremonies and festivals—purposes defined and settled by usage, and custom and generally recorded in what is known as the dhittam—and the dharmakarthas are mere trustees for the carrying out, or executing of such trust. In the case of mutts, however, such defined and specific purposes immediately connected with the maintenance of the Mutt as an institution, are, in the nature of things, very limited and a large part of the income derived from the endowments of the mutt as well as from the money offerings of his disciples and followers which offerings as a rule are very considerable is at the disposal of the head of the mutt for the time being which he is expected to spend, at his will and pleasure, on objects of religious charity and in the encouragement and promotion of religious learning. His obligation to devote the surplus income to such religious and charitable objects is one in the nature only of an imperfect or moral obligation resting in his conscience and regulated only by the force of public opinion and he is in no way whether as a trustee or otherwise, accountable for it in law. In legal contemplation, therefore, the head of a mutt as such, has an estate for life in its permanent endowments and an absolute property in the income derived from the offerings of his followers, subject only to the burden of maintaining the institution. Over the corpus of the endowment, however, his power of disposition is very limited, as in the case of managers of temples and devasthanams. He cannot alienate or charge the corpus of the income beyond his own lifetime, so as to bind the Mutt and his successors, except for the purposes plainly necessary for the maintenance of the Mutt."

The conclusion of both the learned Judges therefore was that as regards Mutt properties, *i.e.*, the corpus, the Matathipathi has a life estate, but over the income derived from various sources he has full power of disposition limited only to the objects of the institution. The corpus can be alienated only for purposes binding on the institution, *i.e.*, for the necessity or benefit as in the case of dharmakarthas, managers of temples, etc.

There are three decisions which arose out of the same litigation and relate to the Thiruvannamalai Mutt. Two suits O.S. Nos. 1 and 2 of 1905 were instituted in the District Court, Madura, with the consent of the Advocate-General under section 539, Civil Procedure Code, corresponding to the present section 92. The object of the suits was to have it declared that there was no lawful trustee for the Mutt. The object of filing the two suits was, some doubt was felt, whether the head of the Mutt was a trustee within the meaning of section 92, Civil Procedure Code. Therefore in one of the suits a mere declaration was sought. In both the suits there was a common issue whether the first defendant the *de facto* holder of the office was a mere trustee of the Mutt or had a life estate in the Adhinam properties. Both the suits were dismissed by the District Judge on the authority of *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*[2] holding that the Pandarasannidhi, *i.e.*, the head of the mutt, was not a mere trustee and therefore no suit lay under section 539 of the Code. There were appeals to the High Court which came up in the first instance before Munro and Abdur Rahim, JJ., who referred the question :

"Does the head of a Mutt hold the properties constituting its endowment as a life tenant or as trustee ?"

to a Full Bench as the learned Judges doubted the correctness of the decision in *Vidyapurna Tirthaswami* v. *Vidyanidhi Tirthaswami*[2] in view of the earlier decisions in *Sammantha Pandara Sannadhi* v. *Sellappa Chetti*[3] and *Giyana Sammandha Pandarasannadhi* v. *Kandaswami Thambiran*[4]. The matter came up in *Kailasam Pillai* v. *Nataraja Thambiran*[5] before a Full Bench consisting of Sir Ralph Sillery Benson, O.C. J., Wallis and Sankaran Nair, JJ. The question was fully examined

1. (1882) 7 A.C. 633.
2. (1904) 14 M.L.J. 105 : I.L.R. 27 Mad. 435.
3. (1878-80) I.L.R. 2 Mad. 175.
4. (1887) I.L.R. 10 Mad. 375.
5. (1910) 19 M.L.J. 778 : I.L.R. 33 Mad. 265.

by the learned judges, and the answer given by them was that it could not be predicated of the head of a Mutt, as such that he holds the Mutt properties constituting its endowments either as a life tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long continued and well established usage and custom of the institution in respect thereto. The right of the head over the surplus income and his power to utilise it for the spiritual advancement of himself and his disciples or for the public was recognised. Sankaran Nair, J., observed at page 286 :

"His discretion in this matter is unfettered. He is not accountable to any one and he is not bound to utilise the surplus. He may leave it to accumulate. From the nature of the case he cannot be controlled by the Court. In such cases there is no trust. Where the trust is clear the Courts will of course enforce it. But the embarrassment and difficulty that would be caused may be taken into consideration in deciding whether there is a trust. Though the other members may not be entitled to demand that the surplus funds should be applied to any particular purpose, it may be that they have the power to check any expenditure for purposes entirely repugnant to the character of the institution, if it would diminish the fund out of which they have to be maintained and educated and the necessary expenses, payment of Government revenues, etc., have to be incurred."

Of course, the learned Judges also recognised that lands held by the Mutt could not be alienated except for necessary and binding purposes, and that is for the reason not that it is trust property, but that the Mutt is a permanent institution, the head of which for the time being is bound to pass it on to his successor without burdening it except for necessaries. The Matathipathi undoubtedly is under a legal obligation to maintain the Mutt, to support the disciples and to perform the indispensable services from and out of the income in his hands. In view of the answer given by the Full Bench, when the case went back to the Division Bench, the decision of the learned District Judge was reversed and the suits were remanded for ascertaining whether there was any specific evidence to establish that with reference to any particular property, there was a trust created in the manner recognised by law. After remand, the matter was considered by the Subordinate Judge to whom it was transferred and he recorded a finding that there was no evidence to show that the Pandarasannidhi was a trustee and he again dismissed the suits. The matter came up again to the High Court and the decision is reported as *Kailasam Pillai* v. *Nataraja Tambiran*[1]. By this time the Privy Council judgment in *Ram Parkash Das* v. *Anand Das*[2] was pronounced in which there were observations to the effect that the position of a mahant was that of a trustee. Attempt was made therefore to re-open the decision of the Full Bench and to canvass its correctness. But this attempt failed as the Division Bench refused to re-open the question rightly pointing out that the remedy of the aggrieved parties was by way of an appeal against the previous judgment to the Judicial Committee. The correctness of the finding of fact that there was no evidence of a trust, however, was not canvassed before the Division Bench which considered the other questions arising in the appeal regarding the validity of the appointment of the person in possession which is not material for this discussion. This decision was taken in appeal to the Judicial Committee in *Nataraja Tambiran* v. *Kailasa Pillai*[3]. Before the Judicial Committee no attempt seems to have been made to challenge the correctness of the decision in *Kailasam Pillai* v. *Nataraja Tambiran*[4] and the finding that there was no evidence to show that the head of a mutt was a trustee of the mutt or its properties was accepted as correct and on that basis the case proceeded and the only question which their Lordships of the Privy Council were called upon to consider as necessary for the decision of the case was the question relating to the validity of the appointment of the Pandarasannidhi. In the same volume in *Vidya Varuthi Thirtha* v. *Baluswami Ayyar*[5] there is another decision of the Privy Council relating to a Mutt situate in the Mysore State but which owned properties in this Presidency. The point that arose for decision no doubt was one of limitation in a suit to recover properties alienated by the previous head of a mutt and the question debated was whether

1. (1917) 32 M.L.J. 271.
2. (1916) 31 M.L.J. 1 : L.R. 43 I.A. 73 : I.L.R. 43 Cal. 707 (P.C.).
3. (1920) 39 M.L.J. 98 : L.R. 48 I.A. 1 : I.L.R. 44 Mad. 283 (P.C.).
4. (1910) 19 M.L.J. 778 : I.L.R. 33 Mad. 265 (F.B.).
5. (1921) 41 M.L.J. 346 : L.R. 48 I.A. 302 : I.L.R. 44 Mad. 831 (P.C.).

or not the head of the Mutt was a trustee within the meaning of Article 134, Schedule I of the Limitation Act. In considering this point Ameer Ali, J., reviewed the whole question in the light of the law applicable to Hindu and Muhammadan endowments and also considered the effect of the earlier decision of the Board in *Ram Parkash Das* v. *Anand Das*[1]. This decision is important as a considered pronouncement of the Privy Council on the question now under consideration. The observations of the Judicial Committee in *Gireedharee Doss* v. *Nundokissore Doss Mohunt*[2] that the

"only law as to these Mahants and their functions and duties is to be found in custom and practice, which is to be proved by testimony,"

has again been reiterated at page 838. The word "trustee" in the decision in *Ram Parkash Das* v. *Anand Dos*[1], it was explained, was intended to be used only in a general sense as a convenient and compendious expression to convey the general obligations. It was not intended by that expression to define the term or to hold that the word in its specific sense is applicable to the laws and usages in India. The decision of this court in *Vidyapurna Thirthaswami* v. *Vidyanidhi Thirthaswami*[3] and of the Full Bench in *Kailasam Pillai* v. *Nataraja Tambiran*[4] were referred to in the course of the judgment, without any disapproval of the view taken by the Full Bench. In the case of temples,

"the image or the deity of the Hindu Pantheon" observed Amir Ali, J. "is as has been aptly called a juristic entity, vested with the capacity, of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same 'juristic' capacity and gifts are made to them *eo nomine*. . . . When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a trustee in the English sense of the term, although in view of the obligations and duties vested in him, he is answerable as a trustee in the general sense, for maladministration."

After a review of the decisions including *Vidyapurna Thirthaswami* v. *Vidyanidhi Thirthaswami*[3] and *Kailasam Pillai* v. *Nataraja Tambiran*[4] the conclusion is stated at page 847 as follows :—

"From the above review of the general law relating to Hindu and Muhammadan pious institutions it would *prima facie* follow that an alienation by a manager or superior, by whatever name called, cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law. Of course, a Hindu or a Muhammadan may "convey in trust" a specific property to a particular individual for a specific and definite purpose and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term."

Later on it was added that the expression

"'conveyed in trust' is hardly the right expression to apply to gifts of lands or other property for the general purpose of a Hindu religious or pious institution."

It was therefore held that the head of a Mutt was not a trustee within the meaning of Article 134. *Srinivasa Chariar* v. *Evalappa Mudaliar*[5] drew a distinction between the position of a dharmakartha and that of a shebait of a religious institution. At page 581 it is stated :

"The position of a dharmakartha is not that of a shebait of a religious institution or of the head of a mutt. These functionaries have a much higher right with larger power of disposal and administration, and they have a personal interest of a beneficial character. In the very learned judgments delivered in *Vidyapurna Thirthaswami* v. *Vidyanidhi Thirthaswami*[3], the distinction between those functionaries is explained. But a dharmakartha is literally and no more than the manager of a charity, and his rights, apart, it may be in certain circumstances, from the question of a personal support are never in a higher legal category than that of a mere trustee."

To these weighty pronouncements may be added the latest decision of the Supreme Court in *Angurbala Mullick* v. *Debabrata Mullick*[6] where it had to consider

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1. (1916) 31 M.L.J. 1 : L.R. 43 I.A. 73 : I.L.R. 43 Cal. 707 (P.C.).
2. (1889-84) L.R. 11 I. A. 405.
3. (1904) 14 M.L.J., 105 : I.L.R. 27 Mad. 435.
4. (1910) 19 M.L.J 778 : I.L.R. 33 Mad. 265 (F.B.).
5. (1922) 43 M.L.J. 536 : L.R. 49 I.A. 237 : I.L.R. 45 Mad. 565 (P.C.).
6. (1951) S.C.J. 394.

the question whether the Hindu Women's Rights to Property Act XVIII of 1937 as amended by Act XI of 1938, was applicable to the devolution of shebaitship. The Act would apply if the shebaitship is property. The answer given was that it was property within the meaning of that Act. Mukherjea, J., at page 398 summarised the position of a shebait as follows :

"The exact legal position of a shebait may not be capable of precise definition but its implications are fairly well established. It is settled by the pronouncement of the Judicial Committee in *Vidya Varuthi* v. *Baluswami*[1], that the relation of a shebait in regard to debutter property is not that of a trustee to trust property under the English law. In English law the legal estate in the trust property vests in the trustee who holds it for the benefit of *cestique trust*. In a Hindu religious endowment on the other hand the entire ownership of the dedicated property is transferred to the deity or the institution itself as a juristic person and the shebait or mahant is a mere manager,. But though a shebait is a manager and not a trustee in the technical sense, it would not be correct to describe the shebaitship as mere office. The shebait his not only duties to discharge in connection with the endowment, but he has a beneficial interest in the debutter property. As the Judicial Committee observed in the above case, in almost all such endowments the shebait has a share in the usufruct of the debutter property which depends upon the term of the grant or upon custom or usage. Even where no emo uments are attached to the office of the shebait, he enjoys some sort of right or interest in the endowed property which partially at least has the character of a proprietary right. Thus, in the conception of shebait both the elements of office and property of duties and personal interest are mixed up and blended together ; and one of the elements cannot be detached from the other. It is the presence of this personal or beneficial interest in the endowed property which invests shebaitship with the character of proprietary rights and attaches to it, the legal incidence of property. This was elaborately discussed by a Full Bench of the Calcutta High Court in *Manohar Mukherjee* v. *Bhupendranath Mukherjee*[2], and the decision of the Full Bench was approved of by the Judicial Committee in *Ganesh Gunder Dhar* v. *Lal Behary*[3], and again in *Bhabatarini* v. *Ashalata*.[4] The effect of the first two decisions as the Privy Council pointed out in the last case, was to emphasise the proprietary element in the shebaiti right and to show that though in some respects anomalous, it was an anomaly to be accepted as having been admitted into Hindu Law from an early date."

The view taken in *Baluswami Iyer* v. *Venkitsami Naicker*[5] following the decision of the Privy Council in *Ram Parkash Das* v. *Anand Das*[6] does not seem to be correct. It is this decision which went on appeal to the Privy Council in *Vidya Varuthi* v. *Baluswami Ayyar*[1] and was reversed by the Privy Council. It is therefore too late in the day to contend, as was done on behalf of the respondent, that the decision is still good law and it is unnecessary to refer to the other decisions in view of the weighty pronouncements of the Judicial Committee and of the Supreme Court.

From this review of the authorities, it may be taken as established that the head of the Mutt is not a trustee in the sense in which that word is used in the law of Trusts, and his position cannot be brought under any legal label known to English jurisprudence. He is not even a life tenant in respect of the properties permanently vested in the Mutt or the religious institution. He has a right to the income but he has no power of disposition over the corpus unless necessity or benefit is established. He has large powers over the surplus of the income after meeting the demands of the institution such as its maintenance, the maintenance of the disciples and the performance of the daily worship, etc. He has the discretion to use the surplus for spiritual objects and that discretion is unfettered so long as the surplus is not diverted to any immoral or wicked purposes. He has the liberty to accumulate the income. The Padakanikas are at his absolute disposal. If, however, it is established that any specific property has been vested as a trustee in the head of the Mutt, to that extent and in respect of that property, he becomes a trustee. In other respects he is not liable to account for the income, much less to the Padakanikas. He is a person with manifold rights and duties. He is the spiritual head ; he is the teacher and the guru. He has to carry on the worship of the deity installed in the Mutt, maintain the disciples and propagate the views of the religion of the institution. His life is one of discipline and non-attachment to worldly things and he is expected to meditate and study and further the creed of the Mutt. Such institutions are autonomous bodies governed and controlled by the directions and orders of the head

1. (1921) 41 M.L.J. 346 : L.R. 48 I.A. 302: I.L.R. 44 Mad. 831 (P.C.).
2. (1933) I.L.R. 60 Cal. 452 (F.B.).
3. (1936) 71 M.L.J. 740 : L.R. 63 I.A. 448.
4. (1943) 2 M.L.J. 70: L.R. 70 I.A. 57 (P.C.).
5. (1917) 32 M.L.J. 24 : I.L.R. 40 M. 745.
6. (1916) 31 M.L.J. 1: L.R. 43 I.A. 73 I.L.R. 43 Cal. 707 (P.C.).

of the Mutt. He is treated almost as a representative of the Godhead by his disciples and the followers. He is held in high esteem and the disciples consider any extraneous control over the head as lowering the dignity and the prestige he enjoys as such head. These are some of the salient rights and duties of a Matathipathi. It follows that to some extent he has the beneficial ownership of the properties while in respect of some of the properties he may be a manager. No doubt, the management of the properties bear a secular aspect, but the secular and the religious aspects cannot be dissociated as they are inextricably mixed up, when it is once established that the property and the income are at the disposal of the Swami for the sole and exclusive purpose of the spiritual welfare of himself and his disciples and followers.

Before dealing with the various grounds on which the legislation is challenged, it may be useful to briefly review the legislation by which the Government exercised control over Hindu Religious and Charitable Endowments, and to refer to the relevant provisions of the earlier and the new Acts. which have been attacked. In England, from earliest times, the King claimed prerogative right of exclusive jurisdiction over all charities which was exercised through various channels. It is now being exercised through visitors and by the Charity Commissioners under statutory authority. Before Madras Regulation VII of 1817 was enacted, there is evidence that the British Government claimed the power of superintendence and management of the property and affairs of the temples which was exercised through the agency of the Collectors. In 1810 in the Bengal Presidency and in 1817 in Madras Presidency, the Government enacted Regulations by which they assumed control of all public endowments, Hindu and Muhammadan, which were placed under the superintendence of the Board of Revenue. Madras Regulation VII of 1817 related to endowment of land and money granted in respect of mosques, Hindu temples or colleges or other pious and beneficial purposes. Secular charities and non-religious charities such as choultries and chatrams were also included in it. By section 2 of that Regulation, the superintendence over the endowments was vested in the Board of Revenue. Mutts were not specifically included in it. The Board of Revenue was authorised to appoint local agents, the Collector of the District being *ex-officio* one of such agents. The main object of the Regulation was to see that the income from the endowment was properly applied to the purposes for which they were established. The local agents had to keep watch over the endowments in their charge and report to the Board. This system of management continued till about 1842 when owing to the agitation set on foot by Christian missionaries that a Christian Government should not administer Hindu and Muhammadan endowments, the supervision and control were given up by the Board of Revenue and the endowments were handed over to the respective trustees. As a result of relinquishment of the control it was the experience of the Government that there was mismanagement of the trusts which resulted in embazzlement and misappropriation of funds belonging to the various institutions. The Indian Government took up the matter as a result of which Act XX of 1863 known as the Religious Endowments Act of 1863 was enacted. It applied to Hindu as well as Muhammadan endowments and authorised the constitution of committees in every division or district which has to take the place of the local agent provided under Regulation VII of 1817 and the committee was authorised to exercise the powers of the Board of Revenue under that Regulation. Provision was made to appoint a successor to the office of trustee, manager or superintendent whenever there was a vacancy and also to get a manager appointed by application to the Civil Court in cases where succession to the trusteeship was in dispute until such succession was established in a Court of law. Under section 14 a right of suit was given to persons interested in any mosque, temple or religious establishment to sue the trustee, manager or superintendent for any misfeasance, breach of trust or neglect of duty. Even after a few years after this Act came into force, it was felt in Madras that the control exercised by the committees was not adequate. In 1877 when the Civil Procedure Code was enacted in respect of trusts created for public charitable purposes, a right of suit analogous to the right of suit under section 92 was conferred under section 539 which was later enlarged

to suits in respect of trusts for public charitiable and religious purposes by the Code of Civil Procedure, 1882. In 1920 the Central Government enacted the Charitable and Religious Trusts Act of 1920, Act XIV of 1920, with a view to provide more effectual control over the administration of charitable and religious trusts. The provisions of this Act are undoubtedly wider in scope as under the Act power was conferred in the case of trusts for charitable or religious purposes to apply to the District Court to furnish information and to get the accounts of the trust audited. The trustee was empowered by section 7 of the Act to apply for directions to the court whenever necessary. The Civil Procedure Code of 1908 enacted section 92 which replaced the earlier section 539. It enlarged the scope of the suit in respect of trusts created for public purposes of a charitable or religious nature. Under this section in case of breach of trust two or more persons having interest in the trust with the previous sanction of the Advocate-General or Collector of the District were empowered to institute a suit in a court having jurisdiction for removal of a trustee and for appointment of a new trustee and also for directions regarding accounts and enquiries. The Court is also empowered in such a suit to settle a scheme for the administration of the trusts. This section was taken advantage of by many of the worshippers of temples, and representative suits under Order 1, rule 8, Civil Procedure Code, were also instituted. The administration of large number of temples and the conduct of the trustees was made the subject-matter of judicial enquiry in suits instituted in various courts.

The British Government throughout followed a policy of neutrality in matters of religion ever since the date of the Proclamation of 1858 by Queen Victoria. When diarchy came in, the question of undertaking legislation for the administration of religious endowments received serious attention at the hands of the Madras Government. Earlier no doubt several attempts were made to introduce Bills for the better administration of the endowments drafted by very eminent people such as Muthuswami Ayyar, Chenchal Rao, Anandacharlu, and others. In 1925 the Madras Hindu Religious Endowments Act, 1923 (Act I of 1925) was passed by the local Legislature with the object of providing for the better governance and administration of certain religious endowments. The Act divided temples into what are known as excepted and non-excepted temples. It defined "Mutt" as meaning

> "an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution."

A Board of Commissioners was constituted under the Act vested with powers enumerated therein. Temple committees for local areas were constituted. Section 34 made it obligatory on the part of every Mutt and temple to maintain a register showing particulars regarding the past and present trustees, the usages of the institution, the particulars of the endowments, the scheme of administration and the dittam or scale of expenditure and so on. With regard to non-excepted temples, under Chapter V provision was made for fixing the dittam or the scale of expenditure, for the submission of the budget and for settling schemes which could be modified later, on sufficient cause shown or even cancelled by the court on the application of the Board. Mutts and excepted temples however received a different treatment. The Act required trustees of Mutts and excepted temples to submit a budget and an annual statement of actual receipts and disbursements and there was also a power to settle a scheme for their administration. The only power conferred upon the court in settling a scheme under the Act was to associate, if necessary, any person or constitute any separate body for participating or assisting the administration of such endowment along with the trustee or trustees. There were other provisions relating to finance including a power to levy contributions from Mutts and temples not exceeding 1¼ per cent of its income as may be determined by the Board. The operation of sections 92 and 93, Order 1, rule 8, Civil Procedure Code, was excluded in respect of suits claiming any of the reliefs under section 69 (1) of the Act *i.e.*, for appointing

or removing a trustee of a Mutt or excepted temple, vesting any property in a trustee and so on. The suit under section 69 could be instituted by the Board or Committee having jurisdiction over the Mutt or temple or any person having interest with the consent of the Board. Power was also conferred by section 74 to get possession of the property of the trust through court. Immediately after the Act came into force, its validity was challenged in suits instituted for the purpose on the ground that the Act was not validly passed. For this reason, the Legislature enacted the Madras Hindu Religious Endowments Act, 1926, Act II of 1927, repealing Act I of 1925. Some alterations were also made in the provisions of the Act which was repealed and the same were re-enacted. In the case of Mutts and excepted temples, there was no provision for fixing the dittam and the trustee of a Mutt or excepted temple was required only to submit a budget and also a statement of the actual receipts and disbursements of the previous year. The provisions relating to the framing of a scheme were retained. There was no provision to remove a hereditary trustee of a Math or excepted temple except by a suit under section 73 of the Act. The other provisions of the Act were continued, though the numbering of the sections was altered. This Act was amended from time to time. It is unnecessary to refer to the changes introduced later. Suffice it to say that the Act was amended by 1946, by as many as ten Acts, I of 1928, V of 1929, IV of 1930, XI of 1931, XI of 1934, XII of 1935, XX of 1938, XXII of 1939, V of 1944 and X of 1946. A radical change was introduced, however, by Act XII of 1935. The Government was not satisfied with the powers of the Board then existing and they clothed the Board with an important and drastic power by introducing a new Chapter, Chapter VI-A by which jurisdiction was given to the Board to notify a temple for reasons to be given by it. The trustee was to be given an opportunity to show cause against the application of the notification procedure and if the objection was overruled after enquiry, the Board was to issue a notification in the *Fort St. George Gazette* to the effect that it had decided to apply the provisins of the new Chapter. A novel feature of this Chapter is that an appeal against the decision of the Board is provided to the Board itself consisting of the President and all the other Commissioners of the Board sitting together. If no appeal is preferred or if it was preferred and was dismissed, then the local Government would issue a notification in the *Fort St. George Gazette* declaring the temple or endowment to be subject to the provisions of this Act whereupon the Board would be authorised to appoint a salaried executive officer professing the Hindu religion to take over the administration of the temple or the endowments. There is no right of suit and the order of the Government is final. This procedure, it must be noticed, did not apply to Mutts under Act XII of 1935. Act X of 1946 introduced several changes. This Act abolished the distinction between excepted and non-excepted temples and extended the provisions of the Act to religious endowments in the Presidency town also. The definition of religious endowments has been applied so as to give power to the Board over the property or endowments of a defunct temple. The powers of the Board have also been enlarged to a large extent. The provisions of sections 38 and 39 of the Act regarding the preparation of registers of endowments and the annual verification of the register have been made applicable to Maths also. In settling a scheme for temples under section 67 of the Act the Board was empowered to remove an existing trustee or trustees whether hereditary or non-hereditary and the notification procedure was made appliable to temples governed by a scheme previously framed by the Board or settled by Court. So far as Maths are concerned, the power of the Board was enlarged in various respects, the most important of which is the power to appoint a paid executive officer to take charge of the administration of a Math and its endowments. The surplus funds could also be diverted by direction of the Board in the scheme in accordance with the provisions of section 67. The power of removal of an executive officer appointed under the scheme is vested exclusively in the Board. Under new section 61 substituted by Act X of 1946, in the case of Maths, it was required that the budget of every Math should make adequate provision for the dittam or scale of expenditure for the time being in force and the other customary expenses of the Math and for the due discharge of all liabilities in respect of the

debts binding on the Math. The budget may also provide for the discharge of all liabilities in respect of the debts binding on the Math. The budget may also provide for the application of the surplus for such religious or charitable purposes not inconsistent with the objects of the Math. Under section 61-A it was open to the Board to require the trustee of a Math to appoint a competent person as manager for the management of the secular affairs of the Math. The contribution payable by a Math was three per cent of the income which was fixed by the earlier Act of 1944. The power to decide the amount of the income was vested solely in the Board. There were also provision for the audit of accounts and for levying an audit fee. Section 64-A made the provisions of sections 59 and 69 of the Act applicable also to Maths. Section 59 requires that the trustee should furnish accounts to the Board and section 60 provides for the inspection by the President of the Board or any Commissioner or Assistant Commissioner of the movable and immovable properties belonging to and all records, correspondence, etc. Section 79-A provides that the Board should decide any matters mentioned in section 79 and such power shall be exercised by a Committee of not less than two Commissioners including the President and finality is given to the decision of the Board. The matters referred to in section 79 relate to the established usage of a Math or temple or the rights, honours, emoluments and perquisites to which any person may by custom or otherwise be entitled in such Math or temple. The jurisdiction to decide whether an institution is a Math or temple and whether the trustee is a hereditary trustee as defined in the Act or not was exclusively vested in the Board and the jurisdiction of the Court to take cognisance of any such dispute in the exercise of its original jurisdiction is taken away. Appeal however is provided against the decision of the Board by way of application to the Court to modify or set aside such decision and the decision of the Court is made appealable.

Drastic changes of a fundamental character in the law were introduced by Act XIX of 1951 which, as its preamble shows, is intended to amend and consolidate the law relating to the administration and governance of Hindu Religious and Charitable Institutions and Endowments in the State of Madras. The ambit and scope of the Act are extended by making it applicable to charitable institutions as well and the endowments attached to them. Power is conferred by section 2 of the Act to extend the provisions of the Act to religious institutions and endowments of Jains and the Act is to apply to charitable endowments only if a notification extending the provisions is issued by the Government. The system of controlling and supervising the endowments through a statutory body hitherto known as the Madras Hindu Religious Endowments Board has been completely abolished and the administration of the religious and charitable institutions and endowments has been vested in a department of the Government, the Commissioner being the head thereof. Under him there are Deputy Commissioners and Assistant Commissioners and Area Committees. The State is divided into areas, at present three areas, and each area is in charge of a Deputy Commissioner to whom the powers of the Commissioner, which are permissible under the Act, may be delegated. The State is also divided into divisions, and each division will be in charge of an Assistant Commissioner. Below the Assistant Commissioners are the Area Committees for all temples situated in an Assistant Commissioner's division or a part thereof; but in the case of temples falling within section 38, the Area Committees have no jurisdiction *i.e.*, religious institutions whose annual income as calculated for the purposes of the levy of contribution under section 76 is not less than Rs. 20,000. Power is given to the Commissioner under section 18 to call for and examine the records of any Deputy Commissioner, Assistant Commissioner, any Area Committee or any trustee not being the trustee of a Math or of a specific endowment attached to a Math, in respect of any proceeding under the Act not being a proceeding in respect of which a suit or an appeal to a court as provided by this Act to satisfy himself as to the regularity, correctness or propriety or any decision or order. Some of the powers of the Commissioner, Deputy Commissioner and Assistant Commissioner are enumerated in Chapter XIX. Section 6 contains the definitions and a Math is defined as a

"Hindu religious institution with properties attached thereto and presided over by a person whose duty it is to engage himself in imparting religious instruction or rendering spiritual service to a body of disciples or who exercises or claims to exercise spiritual headship over such a body; and includes places of religious worship or instruction which are appurtenant to the institution."

There is an Explanation which is not relevant. A religious institution is defined as meaning a Math, temple or specific endowment and a "religious endowment" means all property belonging to or given or endowed for the support of Maths or temples, or given or endowed for the performance of any charity or service of a public nature connected therewith or of any other religious charity, and includes the institution concerned and also the premises thereof, but does not include gifts of property made as personal gifts to the archaka, service-holder or other employee of a religious institution. A "trustee" is defined as any person or body by whatever designation known in whom or in which the administration of a religious institution is vested, and includes any person or body who or which is liable as if such person or body were a trustee. A perusal of the definition would disclose that the word 'trustee' is used in the Act in a sense totally different from the narrower meaning attached to it in the law of Trusts. It is intended to bring within its purview the *dharmakartha* or the manager of a temple and even Matathipathis in whom the administration of religious institutions is vested. Even if a person is liable to answer in the same manner and to the same extent as if he were a trustee, such a person also would be a trustee within the meaning of the Act. Chapter III contains general provisions applicable to all religious institutions. Section 20 vests the administration of all religious endowments and the general superintendence and control in the Commissioner. The power of superintendence includes within its ambit the power to pass any orders which may be deemed necessary to ensure that such endowments are properly administered and that their income is duly appropriated for the purposes for which they were founded or exist. Section 21 gives the right and authority to a Commissioner, Deputy Commissioner and Assistant Commissioner and such other officers as may be authorised by the Commissioner of the Area Committee in that behalf, the power to enter the premises of any religious institution or any place of worship for the purpose of exercising any power conferred or discharging any duty imposed by or under this Act. If resistance to the exercise of such power is offered in discharge of such duty, police help can be obtained by an application to a magistrate having jurisdiction. The only restriction on this power is a person who is not a Hindu is not entitled even if he be an officer authorised under the Act, to exercise this power. As would be seen, the power is very wide in its scope and does not take into account the religious sentiments and sanctity attached by a religious denomination to a particular institution and irrespective of the fact whether the person exercising the power, though a Hindu, belongs to the particular sect or caste, he is authorised to enter the institution including the *sanctum sanctorum*. Section 23 makes it obligatory on the trustee of a religious institution to obey all lawful orders issued under the provisions of this Act by the Government, the Commissioner, the Deputy Commissioner, the Area Committee or the Assistant Commissioner. Section 24 lays down the standard of care required by the trustee in exercising his powers. Section 25 deals with the preparation of register for all institutions and the particulars which they should contain. The Commissioner is authorised to direct the trustee to make such alterations and omissions or additions in the register as he may think fit. Section 26 deals with the annual verification of the register. Section 27 lays a duty on the trustee to furnish accounts, returns, reports or other information relating to the administration of the institution and its funds etc. Section 28 authorised the Commissioner or any officer or other person deputed by the Commissioner in this behalf to inspect all movable and immovable property belonging to the institution and all records, correspondence, etc. Section 31 deals with the surplus funds and empowers the trustee with his previous sanction in writing of the Deputy Commissioner to appropriate such surplus or any portion thereof for all or any of the purposes specified in section 59 (1) of the Act. Sections 32 to 51 do not apply to Maths or specific endowments attached to Maths. Chapter IV which begins with section 52 deals with Maths. Section 52 provides

for the removal of a trustee of a Math on the grounds specified therein by a suit instituted by the Commissioner or any two or more persons having interest in the Math and having obtained in writing the consent of the Commissioner. If succession to the headship is in dispute or when there is a vacancy which cannot be filled up immediately or when the trustee is a minor, the Commissioner has to make *interim* arrangements for the administration after taking into consideration the claims of the disciples of the Math if any. Section 54 relates to dittams. The trustee is required to submit to the Commissioner proposals for fixing the dittam and the amounts to be allotted to the various objects connected with the institution. The proposals have to be published and after receiving suggestions, if any, the proposals will be scrutinised by the Commissioner and after necessary enquiry from the trustee it would be open to the Commissioner if he thinks that a modification is required to submit the case to the Government who shall pass orders thereon and the orders of the Government are final. Section 55 recognises the right of the trustee to spend at his discretion for purposes connected with the Math pathakanikas; but he is required to keep regular accounts of all receipts and disbursements regarding such pathakanikas. Under section 56 the Commissioner is empowered to call upon the trustee of a Math to appoint a manager for the administration of its secular affairs and to report the name to the Commissioner. In default of such appointment it is open to the Commissioner to appoint a person himself. The manager so appointed is of course subordinate to the trustee of the Math and shall be responsible along with the trustee for the due submission to the Commissioner of the registers, accounts and budget of the Math and also for the performance of the statutory duties imposed upon the trustee by this Act. Chapter V deals with inquiries into various questions connected with the institutions. Section 58 empowers the Deputy Commissioner to frame schemes for temples and Maths as well. In the case of Maths, sub-section (3) to section 58 empowers the Deputy Commissioner while framing a scheme, to appoint a paid executive officer who shall of course be a person professing the Hindu religion, but need not necessarily belong to the same denomination. He is also authorised to determine what the properties of the religious institutions are. The order of the Deputy Commissioner framing a scheme is appealable under section 61 to the Commissioner. The Commissioner's order in appeal may be questioned in a suit instituted under section 62. Section 59 provides for the diversion of the trust funds or funds of the religious institutions under the *cypres* doctrine. Section 62 provides for suits enabling a party aggrieved by orders passed by the Commissioner under section 61 (1) and (2), 57, 58, 60 or under section 57, section 58 or section 60 read with sub-section (1) (*a*), (2) or (4) (*a*) of section 19 or with sub-section (3) or (4) of section 80, within 90 days of the receipt of such order. A further appeal lay to the High Court. Chapter VI deals with notified religious institutions and the Act for the first time, includes within the ambit of that procedure, Maths also. The power can be exercised notwithstanding the fact that the religious institution is governed by a scheme settled under the Act and the power is exercisable by the Commissioner. If the Commissioner decides after hearing objections following the procedure laid down in section 63 that the institution should be notified, the matter is reported to the Government and it publishes a notification in the *Fort St. George Gazette* declaring the religious institution to be subject to the provisions of this chapter. Such notification remains in force for a period of five years. The effect of notifying a religious institution is to take over the administration and vesting it in an executive officer appointed by the Commissioner. The Commissioner is to decide the powers and duties which the executive officer should exercise but subject to the proviso that only such powers and duties as appertain to the administration of the endowments of the religious institution shall be assigned to the executive officer. Chapter VI deals with budgets, accounts and audit. But budget is compulsory in the case of religious institutions and the trustee is enjoined to keep regular accounts which should be got audited by an auditor, the details of which need not be referred. Chapter VIII deals with finance. Section 76 vests in the Government the power to levy an annual contribution not exceeding five per cent. of its income. It is stated that this is levied for services rendered by the Government

and their officers to religious institutions and in the case of certain institutions getting a particular income, there is also a further charge of 1½ per cent. for audit, the contribution being five per cent. What was originally three per cent. has now been increased to five per cent. Chapter IX deals with Tirumalai Tirupathi Devasthanams and Chapter X contain miscellaneous provisions. Section 92 states that nothing contained in this Act shall be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any section thereof by clauses (*a*), (*b*) and (*c*) of Article 26 of the Constitution and suits are barred except to the extent allowed by the Act intended to question the administration of a religious institution. Section 99 vests a revisional jurisdiction in the Government to call for records and examine them to satisfy themselves as to the correctness, legality or propriety of any decision or order passed by any of the authorities. Section 100 contains the rule-making power. Chapter XI deals with transitional provisions. Any reference to the Board or its President should be read as referring to the corresponding authority under the Act and the Hindu Religious Endowments Act of 1926 was repealed. Certain rules made under that Act are validated and continued in force. These are, in short, the provisions having particular reference to Maths.

It is convenient at this stage to deal with two preliminary questions that have been raised in the arguments. Mr. K. Bhashyam, learned advocate for the petitioner, argued that the Math in question is not really a public religious institution within the meaning of section 1 (2) of the Act, and that therefore the Act cannot be applied. He emphasized the fact that Shirur Mutt exists exclusively for the benefit of Shivalli Brahmins and every member of the public is not entitled as of right to enter the Math or to partake either in the religious instruction or in the worship carried on by the head of the Math. Even among the members of the Shivalli Brahmin community, it is not all persons that are entitled to be taken into the inner fold of disciples. The choice of a person to be initiated to be made a disciple rests entirely in the discretion of the head, the Swami and no person has a right to insist that he is entitled to get his initiation from the Swami. It is an autonomous body existing for the spiritual benefit of the followers of the Mutt. It is therefore claimed that it is solely and exclusively a private institution, something analogous to a college run under private management and therefore cannot be treated as a public religious institution. There is no doubt considerable force in this argument, but we are unable to entertain that objection at this stage as it was not raised before the Board and not even in the pleadings in this petition. The question whether an institution is a public institution or a private one has necessarily to be decided on evidence applying the tests recognised and established by decisions to distinguish a public institution from a private one. It is a well-known fact that the extent and nature of the rights and duties and every matter relating to a Math is dependent exclusively upon established usage. If such usage had been established by evidence that the public or a section thereof have no right to enter into the Math and to claim its benefits, it would have been a different matter. The objection, therefore, taken only in the course of the arguments cannot now be entertained.

Mr. Seshachalapathi, learned counsel for the Endowments Board, raised the preliminary objection, that we should not issue a writ of prohibition as the petitioner has his ultimate remedy by way of suit if a scheme were to be framed by the proper authorities under the new Act and that the application is therefore premature. It must be remembered that we are dealing with a writ of prohibition and not *certiorari*. A writ of prohibition lies to prevent an inferior tribunal from exceeding its jurisdiction or even from assuming a jurisdiction which does not vest in it under law. It also lies if a provision of a statute is contravened by the tribunal or even if any principles of law are contravened. In deciding the question, whether a writ of prohibition should issue or not, the existence of an alternative remedy is, in our opinion, an irrelevant consideration when the complaint is that an inferior tribunal is exceeding its jurisdiction or is assuming a jurisdiction not vested in it by law. If the tribunal is permitted to exercise that jurisdiction which is objected to,

f it exercises it wrongly, the mischief would be done, before the alternative remedy s availed of. It is unnecessary to insist upon a party complaining that he should irst suffer and submit himself to the jurisdiction which is being wrongly exercised or is wrongly exceeded and then take advantage of the alternative remedy. In Halsbury, Volume IX, page 822 (Hailsham edition) the position is thus stated :

> "The Court, in deciding, whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction or an appeal lies against such absence or excess. Similarly the fact that an appeal on the merits of the case has already failed, or that the party applying for prohibition has himself initiated the proceedings n the inferior Court, is not material to the decision of the Court, to grant or to refuse the writ."

Decisions in England, as is evident from this passage have gone even to the length of helping a person aggrieved notwithstanding the fact that he was the very person who first initiated the proceedings and invoked the jurisdiction of the inferior court. The objection raised by Mr. Seshachalapathi, in our opinion, has no force and must be rejected as it is not supported by any authority. The analogy of the position n the case of a writ of *certiorari* does not apply here.

We may now examine the Articles of the Constitution which have been relied on as having been contravened by the impugned legislation. The power of the Legislature of the State of Madras to enact the law now challenged is conferred by the Constitution by Articles 245 and 246 and item 28 of the Concurrent list, List III of the Seventh Schedule. Article 245 is made expressly subject to the provisions of the Constitution and Article 246 (2) enables a State Legislature specified in Part A to enact laws with respect to any matters enumerated in list 3 of the Seventh Schedule. Item 28 of that list is :

> "Charities and charitable institutions, charitable and religious endowments and religious institutions."

In the Government of India Act, 1935, item 34 of list II was Charities and Charitable nstitutions, Charitable and Religious endowments. As religious institutions were not specifically mentioned in that item, a question was raised in *Manikkasundara Bhattar* v. *R. S. Nayudu*[1] that the Madras Temple Entry (Authorisation and Indemnity) Act XXII of 1939 was *ultra vires*. The contention however was overruled by the Federal Court. In order to obviate such difficulties in future, in the present Constitution, item 28 expressly includes religious institutions. Power therefore under the present Constitution to enact laws with respect to matters enumerated n item 28 of list III is conferred upon the State Legislature but subject however to the provisions of the Constitution. The power of the State Legislature, it cannot be now contended, is part of any prerogative power or inherent right of he State to control and superintend religious institutions. It is an express power conferred by the Constitution upon the State Legislature. What the imits to that power are is a matter to be determined by reference to the other Articles of the Constitution. We are adverting to this aspect for the reason hat one of the counsel who appeared for the Commissioner attempted to rest he power also on the prerogative right exercised by the British Government before India became independent claimed to have been inherited by the State (*i.e.*) the power to legislate for the better administration and superintendence of religious and charitable endowments and institutions. The Constitution proceeds on the assumption that sovereignty vested in the people of India, and they, through heir accredited representatives in the Constituent Assembly, gave themselves the Constitution. The State Legislature, therefore, has no other independent sovereign ight to legislate apart from what is contained within the four corners of the Constitution. Therefore, what the British Government did earlier may not be very relevant except to consider the extent to which the temples and Mutts allowed hemselves to be subjected to extraneous control and supervision when religious liberty was not guaranteed by any written Constitution.

The power of the State Legislature to enact a law in respect of religious and charitable endowments and institutions being undoubted, it remains to consider

1. (1946) 2 M.L.J. 17 : 1946 F.L.J. 57 : 1946 F.C.R. 67 (F.C.).

whether that power had been exercised within the limits laid down by the Constitution and whether the fundamental rights claimed on behalf of the petitioner have been infringed so as to take away or abridge all or any of them. It is claimed on behalf of the petitioner that the right to equality before the law and the equal protection of laws guaranteed under Article 14 has been denied to him, that there was unreasonable discrimination based solely on religion which offends Article 15, that the right to acquire and hold and dispose of property under Article 19 (1) (*f*) has been unreasonably restricted and that the right to freedom of religion conferred under Articles 25 and 26 has been unduly restricted and circumscribed, practically denying the liberty granted by the Constitution. The levy of contribution under section 76 of the new Act is, it was contended, in the nature of a "tax" within the meaning of Article 27, which is unconstitutional.

The conditions, the violation of which would bring a given legislation within the mischief of Article 14 have now been authoritatively settled by two decisions of the Supreme Court by which we are bound, *viz*., *Charanjit Lal Chowdhury* v. *The Union of India*[1] and *The State of Bombay* v. *Balsara*[2]. In the second of these cases, the principles to be borne in mind when applying Article 14 have been analysed and stated in the form of propositions by Fazl Ali, J., at page 491 as follows :—

"(1) The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.

(2) The presumption may be rebutted in certain cases by showing that on the face of the statute there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class and yet the law hits only a particular individual or class.

(3) The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.

(4) The principle does not take away from the State the power of classifying persons for legitimate purposes.

(5) Every classification is in some degree likely to produce some inequality and mere production of inequality is not enough.

(6) If a law deals equally with members of a well-defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

(7) While reasonable classification is permissible such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis."

In view of this clear pronouncement of the highest authority, it is needless to refer to the authorities so copiously cited at the Bar to illustrate one or the other of the principles enunciated above. The gravamen of the charge is that while the Christian and Muhammadan religious and charitable institutions and endowments were excluded, Hindu religious and charitable endowments and institutions alone were selected for special treatment and that such a discrimination is unwarranted, unreasonable and unjust. The classification of institutions and endowments based on religion, Hindu, Muhammadan or Christian, cannot be said to be either arbitrary or unreasonable having regard to the objects sought to be attained, *viz*., the better administration and management of such institutions. It is not a classification or division made for the first time by the State Legislature. The distinction existed for nearly a century. As the incidents and the nature of the institutions and endowments of different religions differ in several respects, it cannot be said that the classification is based solely on religion as the institutions included in the classification are religious as well as secular and having regard to the object in view, the institutions having several common features are rightly classified under one group. Article 14 does not prevent the Legislature from taking up one set of institutions for legislative consideration at one time and enacting laws in respect of them reserving

1. (1951) S.C.J. 29 (S.C.). (S.C.).
2. (1951) S.C.J. 478 : (1951) 2 M.L.J. 141

he other types of institutions for consideration to a future date. It is impossible o accept the contention that the impugned Act violates either Article 14 or Article 5.

The right to acquire, hold and dispose of property is conferred on the citizen y Article 19 (1) (*f*). This right, however, as many of the fundamental rights numerated in the Constitution can only be exercised subject to reasonable social ontrol in the larger interests of the State and for its welfare. This principle is ecognised by clause (5) of Article 19, which states that the recognition of the right loes not prevent the State from making any law imposing reasonable restrictions n the exercise of the right in the interests of general public or for the protection f the interests of any scheduled tribe. The Constitution embodies the corporate vill of the people and they have expressly elected through their representatives o surrender and forego in the larger interests of the State and for the welfare of the eople, part of their rights to the State. The fundamental rights recognised in he Constitution no doubt to some extent constitute limitations on the powers of he Parliament and the State Legislatures to enact laws and these were intended in he interests and for the benefit of the minorities. To what extent the control hould be permitted and whether the Legislature in enacting a particular law transressed its limits without any justification and whether such transgression is within easonable bounds are matters left open for the courts to decide. Unlike the American Constitution where under the power known as "due process of law" he courts have exercised and have been exercising a greater degree of freedom n declaring a law unconstitutional on the ground of its unreasonableness for deciding which no particular standard had been laid down by the Legislature, under the ndian Constitution, the courts' function is circumscribed and limited to the extent f considering whether the restrictions are reasonable or not.

At the outset in considering Article 19 (1) (*f*) the Court has to be satisfied hat the right claimed by the petitioner is "property" within the meaning of that ub-clause. Property is nowhere defined in the Constitution. It has now been nade clear by the decision of the Supreme Court in *Charanjit Lal Chowdhury* v. *The Union of India*[1] that the relief by way of a writ could be granted only in favour of a erson whose right has been infringed. A person who is not aggrieved and who is ot personally affected cannot set the law in motion. In view of the decision in A. K. *Gopalan* v. *The State of Madras*[2] and applying the reasoning in that case, if a person is deprived of his rights to property under Article 19 (1) (*f*), the proper Article to be considered is Article 31. Article 19 (1) (*f*) applies only so long as a person is not deprived of his property by a law enacted by a competent Legisature. It was contended on behalf of the respondent that trusteeship as undertood in the law of trusts is not property contemplated by the Article. Willis in his ook on Constitutional Law at page 815, in dealing with property that may be aken under the power of eminent domain, says :

> "In general it may be said that any and all property may be taken. Land, buildings, water, n easement as distinguished from general property, a contract, and a franchise may be taken."

Weaver in his book on Constitutional Law at page 374 says :

> "Property is ownership. It consists of the free enjoyment of one's acquisitions without control r diminution save by the law of the land. It consists not merely of ownership and possession but n the unrestricted right of use and disposal. Anything which destroys any of these elements to that xtent destroys the property itself. The right of property is a natural right and neither the Federal Government, nor the State Government can deprive its owner of it or its possession except by the ue process of law.
>
> Property includes not only real estate and personal property, but also incorporeal rights such s patents, copyrights, leases, accounts and choses in action, and every other thing of an exchangeable alue which one may have."

t is not disputed on behalf of the respondent that property includes even incorporeal ights. In *Dwarakadas* v. *Sholapur S. & W. Company*[3] the question was considered

1. (1951) S.C.J. 29 (S.C.). 1950 S.C.R. 88 (S.C.).
2. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : 3. A.I.R. 1951 Bom. 86.

by Chagla, C.J., at page 90 where he expressed the opinion that property used in Articles 19 and 31 need not necessarily be tangible property but may be even intangible property and might include incorporeal rights. The word 'property' occurs in Placitum 31 of the Australian Constitution and Nicholas in his Book on the Australian Constitution at page 201 states that

> "the word 'property' in palcitum (xxxi) is of the widest connotation; it is *nomen generalissimum*. It covered the acquisition for an indefinite period of the exclusive right to use certain vacant land on which the claimant had erected a car park station with the permission of the owner; *Minister of State for Army* v. *Balziel*[1]."

In the case referred to in the above quotation Rich, J., stated at page 285.

> "The meaning of property in such a connection (*i.e.*, S. 51, p. xxxi) must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system or by reference to Sheppard's Touchstone. The language used is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular method, or of particular types of interests or to particular types of property. It extends to any acquisition of any interest in any property."

A trustee in the legal sense is the owner of the property, but has no beneficial interest. The argument is that property is used, in the Articles 19 (1) (*f*) and 31 in the sense of property which can be beneficially enjoyed and which can be validly disposed of, as in clause (*f*) not only the right to acquire, but also to hold and dispose of property is enumerated. As trusteeship even of a hereditary kind could not be alienated under law, it is not property. This was the argument on behalf of the respondent. The manager of a temple who is commonly called *dharmakartha* or some other equivalent name is not a trustee in the sense in which it is understood in the law of trusts, nor is the head of a mutt such a trustee. The decisions in support of this have already been noticed. A dharmakartha very often has no beneficial interest in the property in his possession but his office is hereditary (we are of course not referring here to non-hereditary trustees). We have considered the decisions *in extenso* on the jural relationship of the Matathipathi to the Mutt and its properties. He is not a bare trustee, but he occupies a peculiar position and has beneficial ownership to some extent in the property and the income. The Matathipathi therefore cannot be correctly described as a "trustee" owning no beneficial interest in the property under his management. Even if the argument, therefore, of the respondent were accepted, the Matathipathi satisfied that test and has beneficial interest in the property. Even in the case of a dharmakartha or the manager of a temple, there may be instances where such a dharmakartha is not merely a manager but also has beneficial interest in the property. In such a case also, the test laid down on behalf of the respondent would be satisfied. If there be however an instance where the dharmakartha has no beneficial interest of any sort but is a mere manager with hereditary rights, there is no reason to exclude such a hereditary right of management even from the scope of property; but however it is not necessary to express a final opinion on this. In the judgment of Mukherjea, J., in *Srimati Angurbala Mallick* v. *Debabrata Mullick*[2] already referred to, dealing with the word 'property' in the Hindu Women's Rights to Property Act, reference was made to the decision of Varadachariar, J., in *Umayal Achi* v. *Lakshmi Achi*[3], where the learned Judge took the view that a bare trusteeship with no beneficial or personal interest in the trust property is not property, though for certain purposes as conceded even by the learned Judge, trusteeship may be property. Mukherjea, J., distinguishes shebaitship from trusteeship as shebaitship always carried with it an element of beneficial or personal interest in the properties in his charge. The learned Judge therefore distinguished the case in *Umayal Achi* v. *Lakshmi Achi*[3] from the case before him on this ground. The learned Judge also approved of the decision of this Court in *Suryanarayanacharyulu* v. *Seshamma*[4], where it was held that the office of archaka which is a hereditary religious office in which the holder for the time being is beneficially interested to enjoy the income of the endowed property, is "property" and

1. 68 C.L.R. 261.
2. (1951) S.C.J. 394 (S.C.).
3. (1945) F.L.J. 8: (1945) 1 M.L.J. 108: 1945 F.C.R. 1 (S.C.).
4. (1949) 2 M.L.J. 75: I.L.R. (1950) Mad. 451.

that therefore the decision of the Federal Court was inapplicable. On this reasoning, a Matathipathi's position cannot be worse than that of either a shebait or an archaka of a temple. The view taken by Mukerjea, J., is based upon a Full Bench decision of the Calcutta High Court in *Manohar Mukerji* v. *Bhupendranath Mukerji*[1] which was approved by the Judicial Committee in *Ganesh Chunder Bhar* v. *Lal Behary*[2] and *Bhabatarini* v. *Ashalata*[3]. It may be an anomalous position but as observed by Mukherjea, J., it is an anomaly which has been admitted into Hindu law for a long time from which there is no escape. The addition of the right to dispose of property in Article 19 (1) (*f*) along with the right to acquire and hold is not intended to give a definition of property so as to limit it to disposable property. Property may be inalienable, but yet a person may be entitled to hold it as in the case of inalienable service inams. The person holding such an inam is entitled to enjoy its income so long as he holds it, though he will not be entitled to dispose it of either by will or by gift *inter vivos*; but must allow the property to pass on to the next office holder according to the law of succession governing such property. The argument that, if the headship of a Math is considered to be property, in no case can the Matathipathi be removed even if it is established that he is disqualified from holding the position or proved that he is unworthy to hold it, overlooks the fact that in such an event, Article 31 (1) clothes the Legislature with power to enact a law depriving a person of the property. Of course such a legislation should not contravene or infringe any of the other liberties or fundamental rights recognised by the Constitution. The distinction between Articles 19 (1) (*f*) and 31 (1) is the difference between plucking the feathers of a bird one by one and killing it. In such a case Article 31 (2) does not come into play as it would not be "acquisition" meaning transfer of property from the owner to the State but deprivation of property within the meaning of Article 31 (1). For a further discussion of the meaning of the word 'acquire' reference may be made to the decision of the learned Chief Justice and Venkatarama Iyer, J., in the judgment relating to Rent Reduction Act in *C.M.P. Nos.* 894 *and* 895 *of* 1951.[4]

If Article 19 (1) (*f*) applied, as we hold it does, the next question for consideration is whether the restrictions on the right to property imposed by the impugned legislation are reasonable, and the interests of the general public demand them, there being no question of the protection of any Scheduled Tribes here. The effect of the legislation is practically to reduce the Matathipathi to the position of a servant, subordinate to the Government even in respect of rights relating to property. The executive administration replaces the statutory control by the Board. The Matathipathi is bound to obey all lawful orders emanating from the Government down to the Assistant Commissioner. The premises of the Mutt and the places of worship and meditation are not immune from interference by the Government. All officers of Government have a right to enter any part of the religious institution and place of worship in the discharge of their duties and for the purposes of the Act, and any resistance in the exercise of such power entails penal consequences. The only safeguard is the person so entering must be a Hindu but it is very often ineffective and useless. It is a well-known fact that there are Mutts belonging to different sects and creeds, the Adwaita Mutts, the Visishtadwaita, Dwaita and Saiva Mutts and Smartha Mutts and Zangam or Veerasaiva Mutts. Vaishnavites will not be permitted to enter the premises or at any rate to enter the place of worship in a Veerasaiva Mutt. There are differences even among Vaishnava sects between Vadagalais and Thengalais, and the customs and usages in the Mutts vary. The place where the deity is installed is not allowed to be entered even by the ordinary worshippers. The officer, even if he is a Hindu, may not be believer in the faith of that particular Mutt and may have no respect for it and may even enter the premises in the western style with his shoes on. All these are matters of detail which can be better imagined than described. In the utilisation of the surplus funds,

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1. (1933) I.L.R. 60 Cal. 452 (F.B.).
2. (1936) 71 M.L.J. 740 : L.R. 63 I.A. 448 (P.C.).
3. (1943) 2 M.L.J. 70 : L.R. 70 I.A. 57 (P.C.).
4. Since reported in (1952) 1 M.L.J. 174.

the discretion of the head of the Mutt or Matathipathi is seriously interfered with by the provisions of the Act. In incurring expenditure under section 30 of the new Act for the health, safety or convenience of the disciples, pilgrims or worshippers the voice of the Matathipathi is not final. Surplus funds may be diverted, for other purposes alien to the objects of the institution. While under law he is entitled to use it at his discretion for any purposes which cannot be described as wicked or immoral, his discretion is now taken away. In the application of the funds for the daily expenditure, he has to conform to the dittam, and the opinion of the Commissioner regarding the fixation of the scales of expenditure which has to be submitted to Government who has to pass orders, is final. The routine expenditure in the institution consists usually in the feeding of the disciples and the head, the cost of carrying on the worship of the deity and the feeding of the visitors and others according to the usage of the Mutt. There may be periodical special services or worship and the scale at which the amount has to be spent is usually at the discretion of the head of the Mutt. In this institution it has been the usage to perform the paryayam for example on a large scale as the feeding of the Brahmins on that occasion cannot be avoided; and the Judicial Committee in the case of this Mutt in *Vibhudapriya* v. *Lakshmindra*[1] decided that the Matathipathi was justified in incurring debts for performance of the paryayam. In this view they differed from the narrow view taken by this Court based on economy and upheld the binding nature of the debt. It was observed by two learned Judges of this Court that the expenditure on such a large scale was not justified and one of the learned Judges stated that

"It is idle to pretend that the feeding could have gone on anything like this scale in all the six centuries which these maths existed or even in the earlier year of the last century."

And in support of that view a passage in *Palaniappa Chetty* v. *Sreemath Devasikamany Pandara Sannadhi*[2] was relied on. In considering these observations, Ameer Ali, J., observed at page 506:

"The learned Judge seems to have misappreciated the effect of their Lordships' judgment in *Palaniappa Chetty's case*[2]."

It was further observed that the High Court overlooked the observations of the Privy Council in *Vidya Varuthi* v. *Baluswami Iyer*[3] to the effect that the Superiors have a sole discretion in the application of the funds of the Maths but always subject to certain obligations and duties equally governed by custom or usage. The learned Judge proceeds to observe in the same page:

"These Matathipathis have a difficult task to perform unaided by any established rule they are expected to exercise control over the number of pilgrims, who come to the temple in order to participate in the festivals and share in the food offerings. Even if it were permissible for the Superior to exclude a certain number from being fed, their Lordships doubt whether popular sentiment would sanction his so doing. The obligations under which they labour are regulated by custom, which are of long standing and have been observed for centuries.

What their Lordships have to see in this case is, firstly whether the debts were contracted by the deceased Swami for his own purposes or for the purposes of the temple and in discharge of the duties under which he lay in the performance of the worship and the feeding of pilgrims; and, secondly, whether the moneys so borrowed were legitimately applied for those purposes."

It follows therefore that if there is a customary obligation like the feeding of the Brahmins who visit the Mutt at the time of the paryayam, that obligation cannot be got rid of by the Matathipathi and even if he incurs debts for discharging such an obligation, the debts will bind the Math and so long as these moneys are not applied for the personal use of the Swami nobody can question the extent or the necessity for the large scale of expenditure incurred by the Matathipathi. Customs and usages vary from Mutt to Mutt, and an attempt to apply the axe and cut down the expenditure purely from a secular angle of vision is not to view the matter in the proper perspective. It is the vision, as pointed by the Judicial Committee in the above case, that this Court did not have and the necessity for setting matters right arose before the Judicial Committee. The same mistake and the same error might

1. (1927) 53 M.L.J. 196 : L.R. 54 I.A. 228 : I.L.R. 50 Mad. 497 (P.C.).
2. (1917) 33 M.L.J. 1 : L.R. 44 I.A. 147 : I.L.R. 40 Mad. 709 (P.C.).
3. (1921) 41 M.L.J. 346 : L.R. 48 I.A. 302 : I.L.R. 44 Mad. 831 (P.C.).

be repeated by the Government and the Commissioner under the Act as the decision of the Government in settling the dittam is stated to be final. The power to hold property carries with it the power to enjoy and utilise the income in a manner in which the person holding the property is entitled to spend it under law. This power is unduly and unreasonably restricted by section 54 of the new Act.

Again, take the pathakanikas under section 55. It is common knowledge that they are the property of the Matathipathi. While the Act recognises the Matathipathi's right and discretion to spend it for purposes connected with the Mutt, he is kept under an obligation to keep regular accounts of the receipts and disbursements. Regarding the management of the properties, it is open under the Act to the Commissioner to require and insist that the Swamiji should appoint a manager, and in default, power is given to the Commissioner himself to appoint one. A person is entitled to manage his own property as its incident. There are two other modes by which this right of the Matathipathi to manage his properties can be taken away under the Act. One is by an attempt to frame a scheme as in the present case which enables the Commissioner to appoint a paid executive officer to take over the management; and there is the second and more dangerous one, *viz.*, the power of notification by which without any remedy by way of judicial review the executive is empowered to take the drastic step of depriving a Matathipathi of his right to manage his own affairs. The decision of the Government is final and the notification continues in force for a period of five years. These modes practically leave nothing in the Matathipathi except a vestige of a right to call himself a Matathipathi, with no power to manage the property, to deal with its income, to apply its surplus for the objects of the institution at his discretion and choice, which is a right recognised and established by the decision of the highest tribunal which we have already adverted to. It cannot be seriously contended and indeed, no decision in support of such a serious invasion has been placed before us. It may be suggested that the appointment of the manager or the executive officer paid or otherwise, and the notification procedure relate only to secular affairs of the Mutt and do not trench upon the religious affairs. This argument has been repeatedly urged before us in justification of the drastic provisions of the Act.

In our opinion, a separation of religious affairs from secular affairs of a Mutt in such watertight compartments is not possible. The property of the Math and its income exist for one purpose and only one purpose and that is the religious purpose. It has to be applied and utilised for the maintenance of the Mutt, for carrying on the worship and for the propagation of the religion. It is not merely a question of leasing the lands and realising and paying the income into the hands of the head; but extends to the receipt of the income and the disbursements thereof over which practically the Matathipathi has no control. He has no deciding voice in the Matter of the selection of the various items of expenditure for the purposes of the Mutt and cannot give priority to one over the other. His hands, with reference to the property, are tied completely. It does not stop at merely requiring him to prepare the budget and submit it and the accounts; but goes further and takes over the management itself into the hands of the Government through their appointed agent. It cannot therefore be seriously contended that the restrictions so imposed are reasonable and that they are required in the interests of the general public.

In construing the expression 'reasonable restriction' it has been pointed out by the Supreme Court in *Dr. N. B. Khare* v. *The State of Delhi*[1] that the word reasonable in clause (5) of Article 19 goes with 'restrictions' and not with 'law' and that in deciding the reasonableness or otherwise of the restrictions, the Court need not be confined to an examination of the restrictions in the abstract with reference merely to their duration or territorial extent, but it is open to look into the circumstances under which or the manner in which the restrictions have been imposed. Reasonable restrictions on the exercise of the right conferred by Article 19 may contain substantive as well as procedural provisions. The possibility of the power being

1. (1950) S.C.J. 328.

abused in the hands of the executive may not be altogether irrelevant. In *Chintaman Rao* v. *The State of Madya Pradesh*[1] it was observed at page 528 :

"The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19 (1) (g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

The same reasoning would apply equally to Articles 19 (1) (*f*) and 19 (5). The restrictions imposed are so drastic in scope that they go beyond the object sought to achieved.

Now we come to religious freedom. It is often said that the conception underlying our Constitution is a secular State and that the goal is a welfare State. But it is argued further, as it is a secular State, it should not possess legislative power to control and supervise religious institututions and religious freedom. This argument proceeds on a misconception. America, Australia and the Irish Free State are all secular States and they all guarantee religious freedom subject to limitations and subject to the power to control such liberty for the welfare of the State. Secular State implies that the bond of union is not based on religion but on citizenships as distinguished from a theocratic State. In England there is an established church and the king is considered as the supreme head on earth. He is the head of the Church of England and also the patron of all Archbishops and Bishops within the United Kingdom. The Crown, therefore, enjoys the right of patronage in respect of several churches in the Kingdom. In America and other countries such as Australia and the Irish Free State, the position is different. Under the American Constitution. "a wall of separation between the Church and the State" is recognised, and this was due to the fact that the American people, before the framing of the Constitution, suffered centuries of religious oppression and persecution and as the bitterness of that suffering was still fresh in their memory, the wall of separation was erected. The First Amendment enacted :—

"The Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof."

Unlike Articles 25 and 26 of the Indian Constitution, this Amendment is framed more as a restriction on the legislative power of the Congress rather than from the point of view of the individual. Under the Constitution of the Irish Free State, Article 8 on which Article 26 of our Constitution, was modelled is :

"Freedom of conscience and the free profession and practice of religion are subject to public order and morality guaranteed to every citizen"

(the rest of the Article is omitted).

Article 116 of the Australian Constitution is :

"The Commonwealth shall not make any laws for establishing any religion or for imposing any religious observance or for prohibiting the free exercise of any religion and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

The right to freedom of religion under Article 25 of the Indian Constitution is conferred upon all persons and is not confined to citizens. Article 26 relates to the freedom of a religious denomination to manage its own religious affairs. Under Article 25 the guarantee is of freedom of conscience and the right freely to profess, practise and propagate religion. It is subject to public order and morality and health and Article 26 also is subject to a similar limitation. In Article 25 power is conferred on the State to make any law (*a*) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice and sub-clause (2) (*b*) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Freedom of conscience is the minimum of religious liberty. It is

1. (1950) S.C.J. 571.

intangible as it is subjective and is not capable of legal protection except that a person may not be compelled by law to abandon his belief, creed or opinion. A man may not only hold his religious opinions but may put them to practice and translate them into articulate force by profession, practice and propagation. Unless these are also protected there is no meaning in protecting freedom of conscience. Religion has been defined by Field, J., in *Davis* v. *Beason*[1] as meaning a man's

"view of his relations to his Creator and to the obligations they impose of reverence for His being and character and of obedience to His call. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter."

Profession of religion implies, in our opinion, the right of the person who believes in a religion to state his creed and also to propagate it either by speech or by writing or by any other visible means. The practice of religion is the practical expression of his belief in the particular form of private or public worship. He may himself carry on worship or partake in a worship carried on by others. The exercise of these rights, however, is not altogether free from restrictions. It cannot be doubted that in the public interests and in the interests of and for the welfare of the State, the expression of one's religion should not be allowed to degrade into licentiousness or to perpetrate a crime or endanger public order, morality or health. In other words, to use an expression familiar to American law, it is subject to the police power of the State. Clauses (*a*) and (*b*) of sub-clause (2) of Article 25, reserve also a power to regulate or restrict any economic financial, political or other secular activity associated with religious practice and also in the interests of the social welfare and reform and for throwing open religious institutions to the Harijans. That these restrictions are imperative and are justified is established by a number of decisions of American Courts which illustrate the manner in which and the extent to which social control has been exercised in America, restricting the religious liberty of the citizen. In *Reynolds* v. *United States*[2], polygamy though justified by the tenets of a religious sect, was allowed to be restricted by legislation in the interests of the society. Polygamy was considered meritorious by the Mormon religion. *Davis* v. *Beason*[1] is another instance where a similar law was upheld. In *Cantwell* v. *State of Connecticut*[3], the question was whether a statute prohibiting solicitation to any philanthropic, religious or charitable cause without the approval of the Secretary of the Public Welfare Council offended against the religious liberty. This is one of the cases relating to the Jehova's witnesses. At page 1218 it is stated :

"The Constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed of the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organisation or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the amendment embraces two concepts. Freedom to believe and freedom to act. The first is absolute but in the nature of things the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection.. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a statute may, by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meeting thereon ; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment."

The statute was held unconstitutional. It may be mentioned that so far as the States are concerned, though there is no express provision, as the First Amendment is applicable only to Congress, it has been held that the same liberty is attracted by Amendment 14 of the Constitution which applies to States. This was decided in *Everson* v. *Board of Education*[4] and *Illinois* v. *Board of Education*[5]. The wall of separation between Church and State is attributed to Jefferson as is stated in

1. 133 U.S. 333 : 33 L. Ed. 637.
2. 98 U.S. 145 : 26 L. Ed. 244.
3. 310 U.S. 296 : 84 L.Ed. 1213.
4. 330 U.S. 1 : 91 L. Ed. 711.
5. 333 U.S. 203 : 92 L. Ed. 649.

Everson v. *Board of Education*[1]. In *Murdock* v. *Pennsylvania*[2] it was stated that the power to tax the exercise of a privilege is the power to control or suppress its enjoyment. A fee imposed for the privilege of canvassing or soliciting within a municipality was held to be an unconstitutional invasion of the right of freedom of religion. These are merely illustrations of the kind of control that is permissible.

In the Australian Constitution it has been held that notwithstanding the absolute nature of the prohibition in section 116 preventing the Commonwealth from making any law for establishing any religion, etc., it is open to the Court to consider and determine whether the freedom of religion has been unduly infringed by a particular legislative provision. In justification of this view, the decisions of the American Courts already referred to were relied on. Without such restrictions it might tend to anarchy and make it difficult, if not impossible, to maintain the rule of the law. On this principle it was held that the provisions of the National Security (Subversive Associations) Regulations were not invalid notwithstanding that such regulations prohibited the advocacy of doctrines or principles in pursuance of religious convictions, which are however prejudicial to the prosecution of the war in which the Commonwealth was engaged. The judgment of Latham, C.J., in *Adelaide Company of Jehovah's Witnesses* v. *The Commonwealth*[3] contains a useful and illuminating discussion of the ambit of religious liberty. At page 123 speaking about religion he says :

> "It would be difficult if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and varied religions which exist, or have existed in the world. There are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad. There are others who pay greater attention to religion as involving some prescribed form of ritual or religious observance. Many religious conflicts have been concerned with matters of ritual and observance. Section 116 must be regarded as operating in relation to all these aspects of religion, irrespective of varying opinions in the community as to the truth of particular religious doctrines, as to the goodness of conduct prescribed by a particular religion or as to the propriety of any particular religious observance. What is religion to one is superstition to another. Some religions are regarded as morally evil by adherents of other creeds. At all times there are many who agree with the reflective comment of the Roman poet "*Tantum religio potuit suadere malorum*....". Almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the every day life of the individuals—all these may become part of religion. Once upon a time all the operations of the agriculture were controlled by religious precepts. Indeed, it is not an exaggeration to say that each person chooses the content of his own religion. It is not for a Court, upon some *a priori* basis, to disqualify certain beliefs as incapable of being religious in character."

The picture of religion so aptly drawn applies to the religious beliefs in this country as well. Later on at page 125 the learned Judge catalogues instances of religious practices which are considered by a majority of people as wicked. He says :

> "At all periods of human history there have been religions which have involved practices which have been regarded by large numbers of people as essentially evil and wicked. Many religions involve the idea of sacrifice and the practice of sacrifice has assumed the form of human sacrifice or animal sacrifice as appears in the Old Testament, and in many other sacred writings and traditions. So also religions have differed in their treatment of polygamy. Polygamy was not reproved in the Old Testament; it has been part of the Mormon religion; it is still an element in the religion of millions of Mohammadans, Hindus, and other races in Asia. The criminal religions in India are well-known. The thugs of India regarded it as a religious duty to rob and kill. The practice of Suttee, involving the immolation of the widow upon the funeral pyre of her husband, was for centuries a part of the Hindu religion."

These illustrations show that it is very difficult to separate religious belief and practice from politics or ethics. But in the interests of the State it cannot be contended, at any rate at the present day that such practices cannot legitimately be prohibited by legislation though such legislation might infringe religious liberty. Article 25 uses the word "freely" while Article 116 of the Australian Constitution, used the word 'free'. The illustrations given by Lathan, C.J., at page 127, establish

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1. 330 U.S. 1 : 91 L. Ed. 711.
2. 319 U.S. 106 : 87 L. Ed. 1292.
3. 67 C.L.R. 116.

that the meaning of the word which is vague and indeterminate takes its colour from the context. To quote his words :

"Compare for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law, as was pointed out in *Mc.Arthur's case*[1]. Free love on the contrary means licence or libertinage, though, even so, there are limitations based on public decency and so forth. Free dinner generally means free of expense, and sometimes a meal open to any one who comes, subject, however to his condition or behaviour not being objectionable. Free trade means, in ordinary parlance, freedom from tariffs. Thus there is no dictionary meaning of the word 'free' which can be applied in all cases."

It must always be treated as subject to the law, for there could be no freedom except freedom in accordance with laws otherwise, there will be no ordered society and it would be impossible for society to function. It was pointed out by John Stuart Mill in his Essay on Liberty which is quoted at page 131 of the same report :

"The sole end of which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. It may be going too far to say that self-protection is "the sold end" which justifies any governmental action. But I think it must be conceded that the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community. The Constitution protects religion within a community organised under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organised. This view makes it possible to reconcile religious freedom with ordered government."

The ultimate decision whether a given law infringes religious freedom or not must rest with the Court.

The Matathipathi's right freely to practise and propagate religion, it is contended, has been interfered with by some of the provisions of the new Act. The power to enter the religious institutions under section 21 and the very wide power conferred under sections 23 and 24 of the Act to issue lawful directions to be obeyed, the right to interfere with the dittam or the scale of expenditure under section 54 are stated as instances of such infringement. These provisions undoubtedly vest very large powers in the Commissioner and are certainly calculated to interfere with the practice of religion, *i.e.*, the carrying on of the worship and the propagation of the religion by instructing the disciples and initiating them tinto the fold of religion. The Swamiji's tranquillity and peace of mind which are so essential for deep contemplation may also be distrubed. The holiness and the sanctity of the institutions are destroyed. That the provisions may be abused is not based merely on speculation and imagination but on facts is made clear by the instructions issued by the Board, under the earlier Act. In memorandum dated the 1st October, 1945, the Matathipathi of Daniyoor Mutt was asked to state whether the Board's sanction was obtained to present a japamala to a devotee and a silver kalasa to a Swamiar. It turned out ultimately that the japamala was actually given to a doctor for having treated the Swamiji for asthma during the course of a whole year without fees and the silver kalasa was actually purchased by the Mutt and not presented to anybody. The Swamiji, it will be seen, is not only accountable and answerable to the properties and the income of the Mutt under the provisions of the earlier Act and the new Act but he is also answerable to things he wears on his body such as japamala. Another instance is by an order of 17th October, 1949, the Matathipathis were prevented from presenting clothes and paying bonus to temple servants from out of the funds of the religious institutions for deepavali. In another order of 7th May, 1947, the Board directed that as the wages of labour have increased instead of using human agency for carrying the deity in procession, the authorities of the religious institutions should construct *Sagadams* and use them by engaging very few persons or a pair of bulls to drag them. On 13th March, 1946, instructions were given that in view of the acute food situation expenditure on food grains should be cut down and the rituals and festivals should be reduced to their barest minimum. On 22nd September, 1950, the Board requested the executive authorities in charge of the Hindu religious institutions to use all available tanks for pisciculture unless

1. (1920) 28 C.L.R. 530.

there is a usage or custom in any particular locality against the utilisation of the tanks for such purpose. Then the order was later on modified by restricting it only to tanks which have hitherto been ordinarily used or leased out for fishing. This modification was on 3rd July, 1951. Regarding the application of the surplus funds, the Board gave directions or issued orders to utilise them for various purposes wholly foreign to the objects for which the religious institutions were established *e.g.*, for the Balamandir. On 28th October, 1950, an order was issued that surplus funds within the meaning of section 57 of the earlier Act may be contributed to the support of the Balamandir and if there is no provision in the budget, application may be made to the Board and they were directed to send the contribution to the Honorary Secretary. Rs. 10 was directed to be sent to Sarada Vidyalaya, T. Nagar and also for the Provincial Welfare Fund for Guild of Service and so on. These are instances of the possible "lawful" orders that may be issued by the Commissioner and which the trustees in whatever form the orders may be clothed are bound to treat as obligatory in order to avoid the displeasure of the Commissioner. The contention that the sections of the Act above referred to constitute an infringement of the right under Article 25 seems to be well-founded.

Article 26 which relates to religious denominations is also relied on. It runs as follows:

"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(*a*) to establish and maintain institutions for religious and charitable purposes;

(*b*) to manage its own affairs in matters of religion;

(*c*) to own and acquire moveable and immoveable property; and

(*d*) to administer such property in accordance with law."

The dictionary meaning of the word 'denomination' as given by Webster is,

"of action of naming from or after something; giving a name to, calling by a name; a characteristic or qualifying name given to a thing or class of things; that by which anything is called; an appellation, designation or title; a collection of individuals classed together under the same name; now almost always specifically a religious sect or body having a common faith and organisation and designated by a distinctive name"

There being several religions in India such as Islam, Christianity, Zoroastrianism and Hinduism, it may not be wrong to take Hinduism and the members of that religion as constituting a religious denomination in a larger sense or if it should be taken in a limited sense Advaita, Dwaita, Visistadwaita, Saivites may be another classification and the members of each faith may be treated as members of one denomination. In an Irish case *Mac Laughlin* v. *Campbell*[1], the meaning of 'denomination' was given by Fitz Gibbon, L.J., as only a *Sect Writ Large.* Even taking it in that sense, the division of the members of the Hindu religion based upon a system of philosophy which is adopted by a group of members may be treated as a denomination or sect and any section of that denomination, and a division made either on territorial or sectional basis, may be treated as a section thereof. Every religious sect therefore under the Article has the right to establish and to maintain institutions for religious and charitable purposes and to manage its affairs in the matter of religion. It is also permissible for such a sect to own and acquire moveable and immoveable property and to administer such property in accordance with law. The right to maintain implies the right to continue the institution according to the established usage, to carry on the worship and to make it function in the manner in which it has been functioning according to long established usage. Except on the ground of public order and morality and health, this right cannot be in any manner affected by legislation. The religious sect or denomination considered as an autonomous body has got its unquestioned right to manage its own affairs in matters of religion. Whether an uncertain and fluctuating body could own and acquire property or not, a religious denomination being a definite body is permitted by the Constitution to own and acquire moveable and immoveable property also and to administer such property but in accordance with law.

1. (1906) 1 Ir. Rep. 588.

It is contended that the denomination contemplated is not identical with a religious sect or members of religious persuasion but it must be a close body like a Corporation. This argument however was not supported by any authority, and in view of the clear language of the Article, it is difficult to accept it. It is rather difficult to dissociate the religious affairs of an institution from the property or its secular affairs. The secular affairs are only directed for the purpose of better management of the religious affairs for which alone the institution exists. They are inextricably mixed up. It was however argued that under clause (*d*) of the Article the Legislature has undoubted power to enact a law regulating the administration of the property. The expression 'in accordance with law' must now be understood in the light of the decision in *A. K. Gopalan* v *The State of Madras*[1] as meaning statute law or law enacted by a competent Legislature. The argument, however, did not go to the length of maintaining that this clause would enable a Legislature not only to regulate the administration of the property but even to deprive or to destroy the right. It may well be conceded that the law need not necessarily be the established law such as the law relating to trusts or property as was contended on behalf of the petitioner but may even extend to any statute law that may be enacted by a competent Legislature providing for the regulation or the administration of the properties. But regulation does not mean destruction or annihilation of the right. It is a question of degree whether in a given case the enacted law merely regulates or substantially takes away the right leaving to the denomination a mere vestige of the right. It need not be total deprivation of the right. It would be enough if there was a substantial deprivation of the right to administer the property. In such a case the law, it must be admitted, cannot be upheld.

The difficulty however is whether the Mutt in question can be held to be a Mutt belonging to a religious denomination. The petitioner contends that the Mutt belongs to Shivalli Brahmins as it is for their benefit and for their spiritual enlightenment that the institution exists and that it should be treated as a religious institution established and maintained for the religious benefit of this community. The community has the right to the continued existence of the Mutt for serving the spiritual needs of its members and the head of the Mutt is the person in whom the power to administer the religious affairs and the administration of the property are vested. The Superior is also a member of the community. The Article is concerned with religious institutions and the consideration of the question, whether there is any beneficial ownership in the properties of the institution by the members of the denomination, is irrelevant as it is solely concerned with the institution which exists for spiritual and not for material benefit. There is no difficulty therefore in treating the Shivalli Brahmin Community as a denomination entitled to protection of the right guaranteed under the Article. The right to administer religious and secular affairs has been unduly interfered with as the head may not have even an effective voice in the appointment of persons to carry on the administration under him. The appointment of an agent or manager requires the approval of the Commissioner, and if it was decided to frame a scheme or notify a temple, the Commissioner or the Government as the case may be, has the sole and exclusive right to appoint a paid executive officer. It is a substantial deprivation of the right to administer the property in accordance with law and the impugned Act in so far as it may take away the rights to administer the religious and secular affairs of the Mutt must be held to be invalid as infringing Article 26, sections 18 (2) and (3), 25 (4), 28, 29, 58 (4), 59 and 76. The sections of the impugned new Act which are *ultra vires* will be specified at the end of the judgment.

It is also urged on behalf of the respondent that all the four clauses must be satisfied by a religious denomination which claims a right under Article 26 and as the fluctuating body like the religious denomination cannot hold property under law, it must be inferred that religious denomination means only a closed body

1. (1950) 2 M.L.J. 42: (1950) S.C.J. 174: (1950) S.C.R. 88 (S.C.).

like a Corporation. In the first place the rights of a religious denomination are not like fishery rights. A claim based on lost grant in favour of a fluctuating body was not upheld as in the case of *Raja Braja Sundar Deb* v. *Moni Behara*[1].

In *Simmonds* v. *Eliot*[2], it was assumed that the church of England was a religious denomination. This very Article of the Constitution empowers the denomination to own and acquire property. The objection, therefore, has no basis in view of the clear language of the Article. It is unnecessary in our opinion, that in order to claim the benefit of Article 26 a religious denomination should be capable of holding all the four rights in the four sub-clauses of that Article. Each clause recognises a distinct and separate right. The denomination may exercise all or any of those rights and it is unnecessary that it should own all the rights before it can claim recognition as a religious denomination.

The next point for consideration is, whether section 76 of the new Act (Act XIX of 1951) is *intra vires* the State Legislature or whether it offends Article 27 of the Constitution, and is therefore, unconstitutional. Section 76 runs thus:

"(1) In respect of services rendered by the Government and their officers, every religious institution shall from the income derived by it pay to the Government annually such contribution not exceeding five per centum of its income as may be prescribed.

(2) Every religious institution the annual income of which in the fasli year immediately preceding as calculated for the purposes of levy of contribution under sub-section (1) is not less than Rs. 1,000 shall pay to the Government annually for meeting the costs of auditing its account such further sum not exceeding 1½ per centum of its income as the Commissioner may determine."

Sub-clauses (3) and (4) of section 76 need not be referred to for the present.

Article 27 of the Constitution of India runs:

"No person shall be compelled to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

The first question is, whether the levy of five percentum of the income of a religious institution provided for in section 76 (1) of the new Act is a "tax" within the meaning of Article 27.

After analysing the concept of a tax in Chapter VI, Vol. III of his Principles of Political Economy, Professor Nicholson said at page 264:

"Professor Bastable's definition of taxation sums up in convenient form the principal results of the foregoing analysis. 'A tax is a compulsory contribution of the wealth of a person or body of persons for the service of the public powers'."

It was the same idea cast in different words that found favour with Cooley in his book on Constitutional Limitations. In a footnote at page 986, the learned author observed:

"A tax is a contribution imposed by the Government on individuals for the services of the State. It is a distinct from a subsidy; certain and orderly which is shown in its derivation from Greek, order or arrangement. 'Jacob Law Dictionary; Bouvier Law Dictionary'. The revenues of a State are a portion that each subject gives of his property in order to secure, or to have, the agreeable enjoyment of his remainder. Montesque Spirit of the Laws, b. 12, c. 30. In its most enlarged sense the word 'taxes' embraces all the regular impositions made by Government upon the person, property, privileges, occupations and enjoyments of the people for the purpose of raising public revenue."

Willoughby on the Constitution of the United States, Vol. II, at page 666, adopts Cooley's definition when he says:

"Taxes have been defined by an eminent authority to be 'burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes.' The same author in another work observes that they 'differ from forced contributions, loans and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government'."

No doubt, what section 76 (1) authorised was a levy of contribution, the maximum of which was prescribed at 5 per centum of the income of the religious institution. The section itself left it to the Government to prescribe rules for the levy of this contribution from time to time within the permissible maximum of 5 per centum.

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1. (1951) S.C.J. 363.   2. (1917) 2 K.B. 894.

It is also true that the section itself specifically stated that this levy was in respect of the services rendered by the Government and its officers.

If this levy is tested by the definition given by Professor Bastable, it would appear to satisfy all the known tests of a tax. It is a compulsory contribution. It is an uniform contribution. Section 76 (1) itself directs that every religious institution shall pay the contribution. If any doubt could arise as to the uniformity of the levy, to which every religious institution was made subject by section 76 (1), sub-clause (3) of section 76 should remove it. It says:

"The annual payments referred to in sub-sections (1) and (2) shall be made notwithstanding anything to the contrary contained in any scheme settled or deemed to be settled under this Act for the religious institution concerned."

That this levy of contribution, as it is called by section 76 (1), is 'for the services of the public powers' should also be clear. No doubt every religious institution is entitled to the services of the Government and their officers in accordance with the several sections of the new Act. But the liability of any given religious institution to pay the contribution authorised by section 76 (1) is not fixed with specific reference to the services enjoyed by that institution. As we have pointed out, it is a uniform levy that is contemplated and authorised, a liability imposed alike on every religious institution subject to the provisions of the new Act. Therefore, the expression "in respect of the services rendered by the Government and their officers" as used in section 76 (1) of the Act would really be the same as 'compulsory contribution for the services of the public powers' within the scope of Professor Bastable's definition of tax.

We have already pointed out that item 28 of the Concurrent List, List III of the Seventh Schedule to the Constitution, has given the State Legislature legislative competence to enact laws in respect of religious institutions. Item 47 of the same list gives legislative competence to the State Legislature to enact laws in respect of "fees in respect of any matters in this list, but not including fees taken in any Court." One of the contentions put forward was that the contribution referred to in section 76 (1) was a "fee" within the meaning of item 47 of List III of the Seventh Schedule of the Constitution. Whether it is such a "fee" or a tax within the meaning of Article 27 is the question for determination.

Neither the compulsory nature of the levy nor the uniformity of the levy may each by itself or even cumulatively help in deciding the question whether the contribution upto a maximum of 5 per centum is a tax or is only a fee. The quantum of the levy however is a relevant factor in deciding whether the contribution is a tax or a fee. The old Act, it should be remembered, fixed the maximum of the contribution at 3 per centum of the annual income of the religious institution. The Act fixed the maximum at 5 per cent. We have already pointed out that the levy of contribution is not in direct proportion to the benefit any given religious institution may derive from the services rendered by the Government and their officers within the meaning of section 76 (1). The services of the Government and their officers may not be in direct relation to the income either of any given religious institution. But the contribution bears a fixed proportion to the income of the religious institution. It is the capacity to pay and not the benefit conferred that seems to be the guiding principle of fixing the quantum of contribution a religious institution can be called upon to pay under section 76 (1) of the new Act. That is more in accord with the "contribution" being viewed as a tax rather than as a fee. No real attempt was made by any of the learned counsel for the respondents—the Government, Board and the Commissioner to establish that the contribution of 5 per cent. bore any just relation to the expenses to be incurred by the Government and its officers in exercising the powers conferred on them by the Act. The fee contemplated by item 47 of List III of the Seventh Schedule to the Constitution need not necessarily be nominal. But the element of compulsion which is an integral part of a tax need not always be present in the fee.

Another contention put forward by the respondents was that it is not every tax that is prohibited by Article 27 of the Constitution, but only the taxes

"the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination."

And the learned counsel pointed out that there was no proof of any such appropriation with reference to the contribution authorised by section 76 (1) of the new Act. The argument appears to overlook the provision of the Constitution regulating the method by which the revenues of the State are merged in a consolidated fund, and thereafter appropriated by Appropriation Acts. Article 266 of the Constitution requires that all the revenues received by the State including the loans raised should form into a Consolidated Fund to be entitled the Consolidated Fund of the State and that no moneys out of the Consolidated Fund so constituted should be appropriated except in accordance with law and for the purpose and in the manner provided in the Constitution. Under Article 204, after the grants under Article 203 have been made, a bill has to be introduced to provide for an appropriation out of the Consolidated Fund of the State of all moneys required to meet the grants so made by the Assembly and the expenditure charged on the Consolidated Fund of the States, but not exceeding in any case the amount shown in the statement previously laid before the House or Houses. Without a specific provision in the Appropriation Act, no amount can be spent out of the Consolidated Fund of the State, unless it be under Article 205 of the Constitution. Section 76 (1) of the new Act imposes the liability to pay the contribution on every religious institution. Sub-clause (4) of section 76 provides for the expenditure to be incurred by the Government to pay the salaries, allowances, etc., of the officers and the establishment, the Government has to maintain to give effect to the provisions of the new Act. Section 76 (4) obviously cannot be the appropriation contemplated by Article 204. The payment of the salaries, etc., directed by section 76 (4) will have to be met from out of the Consolidated Fund of the State but only under a specific Appropriation Act.

We have already held that though the levy is called the contribution for services rendered in section 76 (1) of the new Act, it is really a tax. It is not really necessary that the Act imposing the tax should also provide for the appropriation of the proceeds of the tax, before it can be brought within the mischief of Article 27. In fact, such an appropriation is impossible within the scheme of the Constitution. When the Constitution therefore speaks in Article 27 of specific appropriation, it can only refer to the appropriation contemplated by the Constitution and not any other independent or specific appropriation, not permitted or warranted by the Constitution. Sub-clause (1) and sub-clause (4) of section 76 between them, in our opinion, bring the tax within the mischief of Article 27. Sub-clause (4) of section 76 imposes the liability on the Government to meet the expenditure of the service of the Government and its officers referred to in sub-clause (1) of section 76. Section 76 (4) lays therefore a statutory obligation on the Government to provide for the necessary appropriation in the Appropriation Acts to be passed by the Legislature. What section 76 (1) provides for is a tax the proceeds of which are "specifically appropriated"—the appropriation is not the one contemplated by Article 204 of the Constitution—for payment of expenses for the maintenance of Hindu religious institutions. That supervision of the Hindu religious institutions is part of the maintenance within the meaning of Article 27 can admit of no doubt. It is not every item of the expenditure included in the maintenance of religious institutions that need come out of the tax, before a tax can be declared as offending the provisions of Article 27 of the Constitution. That the tax was utilised specifically for meeting a portion of the expenditure of the maintenance of any given religious institution, *i.e.*, for supervision of its affairs, is enough to bring it within the mischief of Article 27.

Section 76 (1) no doubt imposes the liability to pay the tax on the religious institution. What Article 27 guarantees is the freedom of a person against compulsion to pay a tax prohibited by that Article. It is not necessary at present to go into the question whether a religious institution in section 76 (1) of the new Act is a person within the meaning of Article 27. Section 76 (1), as we said, subjects the religious institution to the liability to pay the tax. Section 78 of the new Act provides for the

discharge of that liability by the trustee of the religious institution. The petitioner, the Matathipathi of the Shirur Mutt is certainly a trustee as that expression has been defined in the new Act. The liability to pay the taxes imposed by section 76 (1) on the institution thus falls on the trustee under section 78 of the new Act, and he is certainly a person within the meaning of Article 27.

What we have said above refers only to the tax imposed by section 76 (1) of the new Act. The audit fees prescribed by section 76 (2) stands on a different footing and they cannot be treated as taxes.

In our opinion, the requirements of Article 27 of the Constitution are fully satisfied in the case of the tax imposed by section 76 (1) of the new Act. It offends Article 27. The levy is unconstitutional and *ultra vires* the State Legislature.

Only one other question has to be disposed of under this head. The learned counsel for the respondents urged that the question whether section 76 (1) of the new Act is *intra vires* or *ultra vires* the State Legislature does not arise in this petition because there has been no levy so far. The writ asked for in the petition by the Matathipathi of the Shirur Mutt is, as already pointed out, one to prohibit the Government and its officers from exercising any of the powers vested in them by the new Act. The liability of the Mutt, of which the petitioner is the Matathipathi, to pay the tax which section 76 (1) imposed arose on the very day the Act came into force.

Section 76 (1) leaves no discretion to the Government to impose or refrain from imposing the tax on the Mutt. Section 4 of the new Act does not apply. Once that liability arose, the petitioner, as the Matathipathi of the Mutt, whose will eventually be the liability to pay the tax under the provisions of section 78, is entitled to invoke the powers vested in this Court to declare that the liability under section 76 (1) imposed on the religious institution is unconstitutional and could not be enforced even under section 78 of the new Act. Besides, this petition was heard along with other petitions and it was the entire scheme of the new Act as also the specific sections thereof that came up for discussion; and we cannot, therefore, refuse to deal with the contention that section 76 (1) is *ultra vires* the State Legislature. There is very little substance in the argument that Article 30 comes in aid of the petitioner as the right under that Article is in no way infringed.

Now coming to the merits of the decision of the Board to frame a scheme it is rather difficult to accept the petitioner's contention, that the Board acted with bias when it decided to initiate proceedings to frame a scheme and ultimately decided to frame one. The petitioner filed, in support of the allegation in his affidavit, the affidavits of others suggesting that the President of the Board and one of the Commissioners were hand in glove with Mr. A. Lakshminarayana Rao and Sripadachar when they visited Udipi. It is no doubt true that officers having control and supervision over such institutions should not give room to any reasonable apprehension in the minds of a litigant by moving closely with the persons of the rival party. The allegations made, even if true, would not justify an inference of bias on the part of the Board.

In arriving at a decision that a scheme was necessary the Board failed to take into consideration the objection sent by the Swami by post on the 13th before the Board made up its mind even though it cannot be said, having regard to the dates on which adjournments had been granted from time to time on behalf of the Swami that the Board failed to give a reasonable opportunity to hear the petitioner. When the objections were in fact filed, there was nothing preventing the Board from taking into consideration the statement filed on behalf of the Swami. It must be remembered that Sripadachar was in management as agent of the Swami for a period of two years and the complaint of the Swami was thar he mismanaged and the Swamiji removed him and instituted a suit for recovery of the documents and accounts. The mismanagement on which the decision to frame a scheme was founded must have been partly due to Sripadachar and he cannot altogether be absolved from responsibility. When the complaint of the Swami that Sripadachar acted in defiance of his authority was the subject-matter of a suit

it would have been most appropriate for the Board to have stayed its hands until the result of the suit was known, and until it was established whether the termination of the power-of-attorney by the Swamiji was or was not justified in the circumstances. The Board, it must be remembered, in the first instance initiated proceedings under section 18 to enquire into the matter but for reasons best known to themselves dropped them, perhaps when it became known that a suit was filed, for it was in evidence that the Swamiji sent during the proceedings under section 18 a copy of the plaint to the Board. It was open to the Board to have enquired into the matter first before rushing through the proceedings to frame a scheme initiated after the filing of the suit by the Swamiji. It suggests that it was intended more to stifle the suit than to adjudicate upon the dispute raised by the Swamiji.

That has given rise to the contention that the order of the Board was perverse as it was based mostly, if not solely, on the fact that the services of Sripadachar were terminated and also the further fact that the statement actually filed by the Swamiji before the order was made deciding to frame a scheme was in the hands of the Board and the Board did not consider it. It seems to us that in the circumstances the power exercised by the Board is an abuse of its powers and the decision of the Board is undoubtedly a perverse one. It had been held by this Court in *Ponnambala Desigar* v. *H. R. E. Board, Madras*[1], that a decision which is perverse really amounts to a non-exercise of the jurisdiction entrusted to the authority concerned. For this position, reliance was placed upon the decision in the *Board of Education* v. *Rice*[2]. What happened in the first case was while a scheme for the administration of a temple was in force, the Board initiated proceedings under Chapter VI-A, the notification proceedings under the earlier Act with the object of taking over the management from the hands of the trustee. The reasons given by the Board in support of the procedure adopted were examined by the Court and it was found that there were no valid reasons to justify the action of the Board in taking the drastic step of applying the notification proceedings in Chapter VI-A. The power of notification, it was pointed out, should not be exercised without a grave reason, as it was a drastic step calculated to deprive the trustee or the head of the Mutt of his right to management of the office. It seems to us that the hasty action taken by the Board in disregard of the complaint of the Swamiji and without considering his objections, and even without waiting for a final adjudication by the Court in which proceedings were pending on the matters in controversy between the Swamiji and Sripadachar, is a perverse exercise of the jurisdiction of the Board; and the decision to frame a scheme cannot be supported even on the merits. The order of the Board is without jurisdiction both on the merits and also on the constitutional objections which we have upheld in the course of this judgment.

To sum up, we hold that the following sections are *ultra vires* the State Legislature in so far as they relate to this Mutt and what we say will also equally apply to other Mutts of a similar nature. The sections of the new Act are: sections 20, 21, 25 (4), section 26 (to the extent section 25 (4) is made applicable), section 28 (though it sounds innocuous, it is liable to abuse as we have already pointed earlier in the judgment) section 29, clause (2) of section 30, section 31, section 53 (because Courts have ample powers to meet these contingencies), section 54, clause (2) of section 55, section 56, clause (3) of section 58, section 59, sections 63 to 69 in Chapter VI, clauses (2), (3) and (4) of section 70, section 76, section 89 and section 99 (to the extent it gives the Government virtually complete control over the Matathipathis and Mutts). Since section 5 of the new Act (XIX of 1951) has repealed the earlier Act, the Madras Hindu Religious Endowments Acts (Act II of 1927) and since we are not holding the whole new Act *ultra vires*, it is unnecessary to go into detail in examining which of the provisions of the earlier Act were *ultra vires* the State Legislature, tested by the fundamental rights guaranteed by the Constitution. If a decision were necessary, we should say that the sections in the earlier Act which

1. (1941) 2 M.L.J. 175 : I.L.R. (1941) Mad. 807.

2. (1911) A.C. 179.

correspond to the sections of the new Act, enumerated above as being *ultra vires* will also be *ultra vires*.

The rule *nisi* must be made absolute. The petitioner is entitled to his costs. Advocates' fee Rs. 250.

This is a fit case for appeal to the Supreme Court as it involves important questions regarding the interpretation of the Constitution. A certificate will issue under Article 132 of the Constitution.

Rule nisi made absolute.

Writ Petitions Nos. 379 *and* 380 *of* 1951.

JUDGMENT :—These two petitions relate to the temple at Chidambaram in South Arcot District and were filed for the issue of a writ of *certiorari* or direction or order in the nature of such a writ of *certiorari* against the first respondent, the State of Madras, calling for the records relating to the Notification No. G. O. Ms. 894, Rural Welfare, dated 28th August, 1951, published in the *Fort St. George Gazette* on 4th September, 1951, in the matter of Sri Sabhanayagar Temple, Chidambaram and quashing the said proceedings or in the alternative to issue a writ of mandamus or direction or order in the nature of such a writ of mandamus directing them to rescind the said notification. The second respondent in the petitions as originally filed was the Hindu Religious Endowments Board, Madras. When the Madras Hindu Religious and Charitable Endowments Act (Act XIX of 1951) came into force on 30th September, 1951, the petitioners obtained leave to amend the petitions by substituting the Commissioner, Hindu Religious and Charitable Endowments in place of the Board and also included a prayer for the issue of a writ of mandamus or an order in the nature of such a writ directing the respondents to forbear from taking further proceedings under Act XIX of 1951 and from giving effect to the order of the second respondent dated 31st August, 1951. Leave was granted for the amendments as there was no objection.

The temple at Chidambaram, *Chit* and *Ambalam* (the atmosphere of wisdom), is a public temple of great antiquity sacred to Saivites all over India. According to the South Arcot Manual of the year 1878, the area occupied by the temple is about 39 acres in the centre of the town. Of the five Lingams of Siva, corresponding to the Panchabhuthas earth, water, light, air and akasa (ether) the Lingam in this temple is Akasa Lingam. In fact, no Lingam exists but a curtain is hung before a wall on which some Beejaksharas were written and when people go to worship the curtain is withdrawn to see the "Lingam". Offerings are made before the curtain. This is generally known as *Chidambara Rahasyam*, the secret of Chidambaram. The Manual at page 401 refers to a legend going back to the fifth Manu, one of whose sons Swetha Varma who was a leper and refused to rule over the country, the Kingdom of Gouda allotted to him by his father. Leaving his kingdom, he set on foot on a pilgrimage and came to Conjeevaram where he met a hunter who informed him that there was a famous Rishi nearby with tiger's paws who lived in a jungle near a 'Kovil' where an invisible deity dwelt. Near the Kovil there was also a pool. Swetha Varma out of inquisitiveness met the Rishi who was called Vyagrapada. With his divine foresight the Rishi came to know of the arrival of Swetha Varma and asked him to bathe in the pool. Thereupon, the dreadful disease vanished and his skin obtained a golden hue. In consequence he was known thereafter as Hiranya Varna.

The Dikshidars who live near by are Brahmins having some peculiar customs of their own and the pagoda is practically treated as their property. They claim a divine origin for themselves and the story is that Brahma took them from Tillai (Chidambaram) to perform Yagnam near Benares where they stayed till they were invited by Hiranya Varna to Chidambaram at the suggestion of the deity at Chidambaram. Thillai Muvayirathar or the three thousand men of Thillai, known as the Dikshidars arrived at Chidambaram and to their amazement and distress, it was discovered that their number was less by one. Thereafter the Akasha Vani or the voice of the sky announced that he was the God himself that

was missing *i.e.*, Sabha Nayagar which is the present name of the presiding deity in the temple. Professor Wilson in his glossary says that the Dikshidars are really a branch of the Kanouj Brahmins whose abode is the modern Allahabad.

This temple has many peculiar features which are not common to the other temples in India. The management of the temple all along vested in the Dikshidars of whom there were 253 families at the time of the Manual now reduced to 250. Every married male member of the sect has an equal voice and control in the management of the temple. The right of management does not go by succession, but is acquired by birth and marriage so much so every boy born and married becomes entitled to share the privilege and perquisites incidental to the management which is terminable only at his death. This is an inducement to early marriage of boys even at the age of 5. It is a close community as they do not marry from any outside families but only from among themselves. Hence the proverb noticed in Thurston, Vol. I, Castes and Tribes, page 338, that a "Thillai girl never crosses the boundary line". The management is by turns. They are the Dharmakarthas as well as the Archakas of the temple. They framed rules for the management of the temple, for the custody of the properties particularly the jewels even as early as 1849 and a printed copy of that has been filed as an exhibit in these proceedings. They are generally on duty in the pagoda 20 at a time, and each batch of 20 stays on duty for 20 days. Though every married male is entitled to take part in the management, till he attains 25 he is not considered to be qualified for performing the principal rituals in the shrine when he is initiated in a ceremony called *Diksha*. The temple has five Sabhas or halls called the Chitt Sabha, the Kanaka Sabha, the Deva Sabha, the Nirutta Sabha and the Raja Sabha. There are also the Amman Koil and the Moolasthanam besides a Vishnu Koil and a Pillaiar Koil. The Chitt Sabha is the seat of the presiding deity, Sabhanayaka or Nataraja and unless service is first held in it, according to usage, it cannot be held in any other shrine.

The temple has very little property of its own and the system of providing the necessary material for the various abhishekams, archanas and naivedyams during the seven kalams and for the Brahmotsavam and other Utsavams is somewhat peculiar. The worship in this temple is according to vedic rites and not in accordance with agama sastras as in other temples. The expense of conducting the seven kalotsavams is provided by *podu* Kattalaidars or common Kattalaidars who instead of money, supply the articles necessary for the abhishekam, archana and naivedyam, etc. The seven kalams are: milk naivedya between 6 and 7 A.M. at the principal shrine; *kalasandhi* between 8 and 9 A.M.; *Irandam Kalam* between 10 and 11 A.M.; *Uchi Kalam* 12 noon; *Sayaraksha* 6 P.M.; night *Iroandam Kalam* 8 P.M. and *Arthajamam* 10 P.M. At all the six kalams except the first, abhishekam is done to the Spatika Lingam called Chandramouliswara. Abhishekam to the *Marakatha Murthi* otherwise known as Rathnasabapathi is done only at *Irandam Kalam* between 10 and 11 A.M. No Abhishekams are done to the principal deity, Nataraja Murthi and Sivakamiamman except on special occasions. For all these the *Podu* Kattalaidars provide the materials. There are also the Utsava Kattalaidars whose duty it is to meet the cost of the Utsavams. Besides these the Dikshidars undertake on behalf of religious minded people, to perform an archana or abhishekam on stated days when cooked food is offered in the name of the devotee. The Dikshidar receives for this purpose a sum of money annually. He sends Veebhudi prasadam to the devotees, the food offering being taken by him. The *Podu* Dikshidars have nothing to do with this. It is the individual right of the Dikshitar who carries on the worship on behalf of the devotees. These are individual kattalais. There is yet another kind of kattalai for performing an archana, mainly on Janmanakshatram days or any special days according to the choice of the devotee. Every Dikshidar has got his own clients for this purpose and he carries out the duties in return for which he obtains periodical payments from his clients. With this also the *Podu* Dikshidars have nothing to do. The only property owned by the temple besides the premises of the temple is *Thiruvilaku Manyam*. These manyams

were originally of the extent of about 200 acres distributed in various villages and consisted of wet and dry lands and also topes. Of these, lands of the extent of 100 acres have been resumed by the Government and a beriz deduction of Rs. 330-10-4 is given out of which the *Podu* Dikshidars receive only Rs. 94-14-0 on behalf of the Devasthanam and the balance is paid to other persons. For over a period of 75 years these lands, it is common ground, have been in the possession of tenants from whom collection of melwaram is made on behalf of the temple by the *Podu* Dikshidars either directly or by leasing the right to collect among themselves to the highest bidder.

The Dikshidars have no other emoluments and they combine in themselves the functions of a trustee as well as an archaka. They have no inams and they have to devote their time exclusively to look after the affairs of the temple and carry on the worship in it by an internal arrangement made by them over a century ago as evidenced by the rules which have been framed by them and which are in vogue even at the present day. They are prohibited from taking up any other avocation and therefore they must necessarily depend for their livelihood consisting of as many as 250 families of 1,500 members on what they receive at the temple either as Dakshina or as offerings of food known as pavadai and other offerings made to the deity. They are bound up with the temple and service to God is the only source of their livelihood. These in brief are the usages of the temple obtaining for several centuries. The materials can be gathered from the District Manual at page 400, the decision of this Court in *Natesa* v. *Ganapati*[1] and Thurston's Castes and Tribes, Vol. I, page 238 and from the affidavits filed in the case.

When the Hindu Religious Endowments Act of 1923 (Act I of 1925) came into force, on behalf of the Dikshidars a memorial was submitted to His Excellency the Governor in Council, Fort St. George, in which they referred to the history of the temple and its endowments and the usages obtaining in it. They requested the Government to grant exemption to the temple from the operation of the Act by virtue of the power conferred on the Local Government under section 2 of the said Act. This request of the petitioners was granted by the Government in G.O. No. 3750 L. and M. dated 28th August, 1926, which states that the Government are pleased to exempt the Sri Sabha Nayakar Temple at Chidambaram from the operation of all the provisions of the Madras Hindu Religious Endowments Act (Act I of 1925) except sections 38, 57, 58, 59, 64, 65, 66, 69 and 70. Section 38 dealt with hereditary trustees: section 57 with submission of budgets and annual accounts, sections 58 and 59 related to schemes: sections 64, 65 and 66 to finance and contribution and sections 69 and 70 to the removal of a trustee and costs.

In 1931 some of the worshippers moved the Board to frame a scheme and the Board started proceedings to frame a scheme in O.A. No. 644 of 1931, but owing to some technical defects the proceedings were dropped. On 2nd February, 1932, the Board took up the matter *suo moto* in O. A. No. 73 of 1932 and settled a scheme on 8th May, 1933. The Dikshidars instituted O. S. No. 16 of 1933 in the District Court, South Arcot, questioning the scheme. The District Judge confirmed the scheme with certain modifications by the decree dated 9th September, 1936. There was an appeal to this Court in A. S. No. 306 of 1936 and this Court agreed with the District Judge and confirmed the scheme with a slight modification. The judgment of this Court is dated 3rd April, 1939 and is reported as *Ponnuman Dikshitar* v. *H. R. E. Board, Madras*[2]. The scheme was directed to be enforced from 1st June, 1939.

The main features of the scheme as modified by the District Court are:—the trusteeship is vested in the *Podu* Dikshidars, the active management being vested in a committee of whom six were to be elected by the *Podu* Dikshidars from among themselves and three to be chosen from among the *Podu* Dikshidars by turn or *murai*. The six trustees elected should not stand for re-election for a period of five years from the termination of their office. The Managing Committee was enjoined to appoint a manager subject to the approval of the Board on a salary

1. (1891) I.L.R. 14 Mad. 103. 2. (1939) 2 M.L.J. 11.

basis. The Managing Committee was enjoined to establish *hundials* for the deposit of voluntary and compulsory offerings and also to fix the rates for the performance of archana and special worship. Their duties are defined under the scheme. They were required to lease out temple property invariably by public auction. They are bound to maintain accounts and the Board was authorised to appoint one or more of the worshippers as honorary trustees who shall attend to the inspection of the accounts, ascertain whether the kattalais are being performed regularly and bring to the notice of the Managing Committee any irregularities in such matters. The Committee was required to prepare a list of jewels and submit a copy of the same to the Board. The vacant sites belonging to the temple, it was directed, should be utilised for putting up temporary sheds during the time of festival.

During the pendency of the suit and before judgment of the District Court was pronounced on 28th August, 1936, the exemption granted in 1926 was annulled. The Board attempted to notify the temple by proceedings initiated under Chapter VI-A of the earlier Act on 1st May, 1936. As a result of the observations in the judgment of the High Court, these proceedings were however dropped on the 20th March, 1940. The High Court then observed :

"It seems to us very undesirable that the Board should have taken any steps in regard to the notification of this temple. The procedure in regard to notification ought not to be lightly resorted to, unless and until there is such serious mismanagement of a temple as would justify an ouster of the trustees in charge of a temple from their office. The scheme was framed in 1933 and proceedings relating to its notification were pending in the District Court and the scheme had not been given any fair trial. It could not possibly be said that the scheme was not worked satisfactorily by the trustees and that therefore in the interests of proper administration of the temple it was necessary for the Board to take the drastic step of having the temple notified. We trust and hope that the Board would drop all proceedings in the matter and allow the scheme as modified by us to be given a fair trial and would give the trustees a fair opportunity to carry on the administration in accordance with the scheme."

Again in 1946 the Board seems to have revived the idea of starting proceedings under Chapter VI-A but they were again dropped on 11th August, 1947. In 1950 proceedings under Chapter VI-A which terminated in the notifications now challenged were initiated by the Board and the Board after hearing the objections of the petitioners decided on 21st March, 1951, to notify the temple as they were satisfied that a case for such a step was made out. There was an appeal as provided under the Act to the Full Board and it was disposed of by order of the Board dated 11th July, 1951. This was immediately followed by the notification by a further order of the Board dated 31st August, 1951, appointing an executive officer. The Government approved the proposed action of the Board and issued a notification in the *Fort St. George Gazette*, on 28th August, 1951.

The notification is attacked both on constitutional grounds and also on the merits. The same articles as were relied on in C. M. P. No. 2591 of 1951 (*Shirur Mutt case*)[1] were also relied on in this case.

As we have considered the Articles of the Constitution elaborately in C. M. P. No. 2591 of 1951[1] it is needless to repeat the reasoning and the conclusions reached by us in that case. They are equally applicable to this case. The idol, it is now well established, is a juristic person capable of taking and holding property. The right to possession and management, however, of the property endowed to the idol is in a manager or Dharmakartha or Shebait and the manager represents the idol in all transactions and suits. Usually the Dharmakartha has no beneficial interest and the property is not vested in him. The authority of the manager is analogous to that of a guardian of an infant heir and his liability in respect of his management is analogous to that of a trustee. We have held in C. M. P. No. 2591 of 1951[1] that if the Dharmakartha or the head of a Mutt has a beneficial interest in the property and its income, such rights are "property" within the meaning of Article 19 (1) (*f*) of the Constitution. It is not disputed that the *Podu* Dikshidars in whom the management of the temple is vested are both the managers and the

1. (1952) 1 M.L.J. 557.

archakas and they have a substantial beneficial interest in the income. It was observed in *Natesa* v. *Ganapathi*[1], that the Dikshitars hold both the offices in the institution and the net income of the temple which is derived from general offerings is their recognised means of livelihood—*see* at page 104. The only remuneration for the services rendered by the archakas is the right to share in the joint income and to enjoy the proceeds of the income from individual kattalais which each Dikshitar derives. The income of Rs. 800 from the Tiruvilakkumanyam is utilised for the lighting in the temple and if there is any surplus, it is distributed among the Dikshitars. Except the Tiruvilakkumanyam the temple does not own any other properties from which it derives income and which is received by the Dikshitars. 250 families of about 1,500 members have to be fed and maintained from out of the earning made by the Dikshitars from the temple. The Dikshitars therefore, are collectively and individually entitled to the beneficial interests in the offerings made to the God and in the collections made for the archanas and the other aradhanas. Some of the collections are the joint property of the communities of *Podu* Dikshitars while the others are their individual income. In the light of what has been said in C. M. P. No. 2591 of 1951[2] and in view of the authorities examined therein, it follows that the Dikshitars who are the citizens of India have individual proprietary rights and the question is whether the notification takes away or abridges any of their proprietary rights and whether such notification is an unreasonable restriction on their right to acquire, hold and dispose of property.

Looking at from the point of view, whether the *Podu* Dikshitars are a denomination, and whether their right as a denomination is to any extent infringed within the meaning of Article 26 it seems to us that it is a clear case, in which it can safely be said that the *Podu* Dikshitars who are Smartha Brahmins, form and constitute a religious denomination or in any event, a section thereof. They are even a closed body, because no other Smartha Brahmin who is not a Dikshitar is entitled to participate in the administration or in the worship or in the services to God. It is their exclusive and sole privilege which has been recognised and established for over several centuries. The notification seriously interferes with their rights to manage the affairs in matters of religion to own and acquire moveable and immoveable property, and even to administer such property in accordance with law. A law which substantially deprives the religious denomination of its right to administer the property of the denomination leaving only a scintilla of the right in the denomination cannot be justified and upheld as an exercise of the power to regulate the administration of the institution. Nor is it a reasonable restriction within the meaning of the Article 19 (5) of the Constitution. The procedure to notify a temple under the earlier and the new Acts is undoubtedly a drastic innovation, which encroaches upon the rights of the Dikshitars to manage the property belonging to the denomination. It completely supersedes the machinary of management by the Dikshitars established and regulated from time to time by rules framed by the denomination in 1849 and reprinted in 1900 which have been filed and exhibited in the litigation in which the scheme was questioned. They are also filed as exhibits in this case. The rules cover every detail of the administration of the temple by the *Podu* Dikshitars and it is really surprising how more than a century ago they could have thought of framing detailed rules regarding the administration by them with a view to make it more effective. The notification procedure, as has been pointed out by this Court often should be resorted to only when there has been gross mismanagement in the administration and machinery provided for its management has broken down. This was the situation before the Constitution came into force. A deprivation of the right to manage by the Dikshitars and vesting it in an executive officer appointed by the Government and the new Act making the administration a Governmental Department is a serious inroad upon the rights of the Dikshitars. The Board under the earlier Act when satisfied by its own enquiry that there was mismanagement could exercise the power notwithstanding that the religious institution was governed by a scheme settled by

1. (1891) I.L.R. 14 Mad. 103.   2. (1952) 1 M.L.J. 557.

Court or by the Board even. The power to finally decide the advisability of notifying an institution is vested exclusively in the Board. No doubt, there is a right of appeal to the Full Board provided under the earlier Act and under the new Act even that illusory right of appeal has been abolished. There is no right of suit permitted to question the action of the Board either under the earlier Act or under the provisions of the new Act. The Commissioner's decision is communicated to the Government under the new Act and the Government publishes the notification declaring the institution to be subject to the provisions of Chapter VI. The right of appeal to the Board under the earlier Act and the vesting of the exclusive jurisdiction without any remedy in the Commissioner and the Government to take the serious step of replacing the administration by the Dikshitars by an executive officer without a power of judicial review of any sort, is to say the least, unreasonable and unjust. It is a well established principle that a person cannot be a judge in his own cause. This is a principle recognised by the jurisprudence of all civilised nations. Even in England where the substitution of administrative justice has now become a common feature, this principle has been adopted and applied. Robson in his book on Justice and Administrative Law summarises the position at page 56 as follows :

"Underlying this condition that the judge must be free from certain obvious and crude forms of interest in the case which he is called upon to decide, is the fundamental principle that a man cannot be judge in his own cause. Nor can he be both accuser and judge. 'If there is on a tribunal any one who is an accuser, and who, although he is accuser, acts also as judge' said Charles, J. 'his presence on that tribunal is fatal to its jurisdiction.' It is of no importance that had he been absent the decision would have been the same, His mere presence vitiates the decision. 'The object of the rule', the late Lord Atkin more recently remarked, 'is not merely that the scales be held even ; it is also that they may not appear to be inclined'. This is one of the most deeply rooted ideas in all systems of justice. So essential is it to English legal notions that it has been suggested that not even an Act of Parliament would make a man judge in his own cause and that a Statute would be void if it attempted to do so. Whether that is or is not sound constitutional law is not likely to be put to the test. In modern times the tendency has been rather in the other direction ; and there are several recent measures on the statute book in which Parliament has applied the common law rule to whole departments of State. For example, where a local authority proposed to acquire land compulsorily for housing purposes, and the taking of it was resisted by the owner, the Minister of Health was required by Statute to appoint "an impartial person, not in the employment of any Government department "to inquire whether the land was suitable and whether it could be acquired without undue detriment to the owners and adjoining landowners".

The learned author also gives other examples where this principle has been applied. If that is the position in England where there is no written constitution recognising fundamental rights and the power of Parliament to enact a law is supreme and is subject to no limitations, t cannot be said that where the legislative power should be exercised subject to limitations recognised and embodied in the Constitution, the limitations of the nature contained in Chapter VI of the new Act and Chapter VI-A of the earlier Act cannot but be held to infringe the very fundamental principle of jurisprudence that no man should be a judge in his own cause and is therefore unreasonable and unjust. One has to only peruse the provisions of the notification dated 31st August, 1951 to convince himself that the *Podu* Dikshitars' rights have been unjustly abridged and unreasonably restricted. The executive officer appointed under the notification is given the power and control over the properties and the servants of the temple and is vested with the right to conduct the festivals and other religious rites and rituals, of course, according to custom and usage. He is authorised to establish *hundials* for the collection of the voluntary and other offerings in the temple. He is given the right of suspending, removing or dismissing the servants of the temple and is empowered to receive all the incomes of the devasthanam and make all disbursements on its behalf, which must be brought into account. This provision shuts out to the Dikshitars the only source of their livelihood. No remuneration is provided even for the services which they render in the temple, the only saving clause being that the trustee shall be entitled to receive the customary personal honours which they have been receiving till now from the Devasthanam. The clause is vague and does not in any manner and to any extent clearly and definitely state or save the surplus income and the other individual income which they have been and ought to have been receiving as the

only remuneration for the services rendered by them, It will reduce them, if the income is taken away by the executive officer, to starvation and the 250 families consisting of 1,500 members whom their religious usage renders unfit to pursue any other profession or avocation are doomed to starvation and eternal perdition. Under the guise of the power vested in the Legislature, a law which permits such deprivation cannot indeed be said to be either reasonable restriction on the power to acquire, hold and dispose of property under Article 19 (1) (f) or a valid exercise of a power intended solely for the regulation of the administration of the properties of the temple. An abrogation of a right by a law is not a regulation by it. It is annihilation and not regulation. The provision therefore, relating to the notification and the notification actually issued are opposed to the fundamental rights granted to the individual and guaranteed by the Constitution under Article 19 (1) (f) and to the denomination under Article 26 and therefore cannot be upheld.

The right to contribution under section 76 of the new Act has been held by us in C.M.P. No. 2591 of 1951[1] is unconstitutional as it is opposed to Article 27.

The notification, in our opinion is also bad on the merits. The order of the Board in the first instance deciding to notify the temple and the order of the Full Board on appeal proceeded on grounds which cannot be justified. There is already a scheme framed by the Board and finalised by the Court. It came into force on 1st June 1939. The scheme, it is said, did not help in putting an end to the mismanagement by the Dikshitars and certain provisions of the scheme have not been given effect to, notwithstanding the directions of the Board. It is also stated among the reasons that a register of jewels was not maintained and was not made available for the inspection of the officers of the Board; that the temple was ina bad state of repair; that the Dikshitars did not take steps to enforce the Podu Kattalais; that no steps were taken to recover the possession of the Tiruvilakkumanyam lands, that chit system for archanas was not introduced; that the vacant sites of the temple were not leased out for the sheds; that the electrical lighting arrangements in the temple were insufficient and of a temporary nature; that the drains around the temple and inside the shrines were not kept in a sanitary condition; that the D.C.B. was not maintained and so on which are enumerated seriatum in the annexure to the Board's Order, dated 21st March, 1951. These objections were answered by the Dikshitars. The Full Board and the Board which considered the matter in the first instance agreed in concluding that there were acts of mismanagement established which necessitated a notification of the temple. The appellate order concedes that except the Tiruvilakkumanyam lands, there was no other property which was endowed for the performances of kattalai or services in the temple and the kattalaidars, meaning the Podu Kattalaidars, were not shown to have created any endowments and that therefore they do not come under the definition of specific endowments. At the very early stage of the enquiry, the Dikshitars requested the Board to issue notice to the Kattalaidars as they were necessary parties to the enquiry as the question relating to Kattalaidars was also raised. This request was not granted for the reason that the Kattalaidars have not created any endowments and that there are therefore no specific endowments. There is no complaint at any stage that the kattalaidars defaulted in providing the materials for the carrying on of the worship at the seven *kalams* and the utsavams of the temple. The temple not having owned any lands except the Tiruvilakkumanyam there is no income received by *Podu* Dikshitars from any property. In view of the finding of the Full Board the entire reasoning of the first order of the Board regarding Kattalais seems to us as not justified.

Nor is there necessity to keep elaborate accounts of the income as the kattalaidars do not pay any amount into the hands of the Dikshitars but they themselves provide the necessary material at the time of each worship or aradhana. This is a fundamental fact peculiar to this temple and if this is borne in mind, the foundation for most of the charges falls to the ground. *e.g.* How are the Dikshitars to get large amounts required for the repairs to the temple? They cannot be expected to starve

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themselves and carry out the repairs which require a large outlay. It is not as if the Dikshitars were not alive to the necessity of putting the temple in proper repair. The income from the Tiruvilakkumanyam was only Rs. 800 and on this basis, it was that the Board was levying contribution and therefore that may be taken as the correct income. That would be wholly insufficient to contribute anything for the repairs of the temple. By the efforts of Dikshitars, a Sabha known as Tirumathil Tirupani Sabha was constituted for the collection of subscriptions and donations for the repairs of the temple. It is through their efforts that they were able to find a benefactor to renovate the Pandyanaicken temple in 1948. The first and second Prakarams of the temple were renovated by the benefactions of Nattukottai chettiars. It is to such benefactors that the Dikshitars and the temple must look for the major repairs and for renovation wherever necessary. There are no other means of getting large income to the temple and to encroach upon what the Dikshitars receive for the archanas and worship and which is utilised by them for their sustenance and to require them to contribute from out of it large sums for the repairs and renovations of the temple seems to us wholly unjust. The introduction of the syetem of archana chits and the hundies for collections has been a source of trouble between the Dikshitars and the Board ever since the scheme was framed. No doubt the scheme directed the establishment of the hundials and the introduction of the chit system. But the scheme was not clear as to between whom and in what proportion should these collections be divided. Time and again the Dikshitars pointed out this difficulty whenever the Board insisted upon the introduction of the hundials and the chit system. It must be remembered that this is not a temple like the Tirupati or Palani Temple wherein fulfilment of vows taken by the worshippers, money or other offerings are made in the *hundials*. The scheme referred to voluntary and compulsory offerings for the *hundials*. If however any amount is paid into the hands of *Podu* Dikshitars alone, it was brought into account in cases where it is earmarked as a gift to the God. But where the payment is only for the services rendered, by the Dikshitars either for the Archana or Aradhana, they themselves were appropriating it as that was the only emolument which they are entitled to for the services. On 28th March, 1940, and again in 1946, the Dikshitars sent up memorials to the Board regarding the *hundials* and the introduction of the chit system; but the Board did not then and even up to this date decide to whom the collections should go. The apprehension of the Dikshitars that they will be deprived of their source of living was not unreasonable and unjust. The Board's orders themselves disclose that the income received by them in the temples is the sole source of their livelihood. In 1947 when an attempt was made to initiate notification proceedings on these very grounds, they were immediately dropped when representations were made as stated by the Dikshitars in the affidavit to the then Chief Minister, Sri O. P. Ramaswami Reddiar. Between 1940 and 1945 no directions were given by the Board in this behalf. They left this question in a nebulous state without deciding one way or the other and this is now made the chief ground for the issue of a notification. It was open to the Board to have moved the Court for a modification of the scheme or for themselves to have decided on the complaint made by the Dikshitars from time to time.

Another ground which was strongly relied upon relates to the Tiruvilakkumanyam. It was originally 200 acres of which 100 acres were resumed by the Government and a beriz deduction was given out of which a portion was being paid to the temple. The remaining extent is only 100 acres. This is borne out by the orders of the Board itself. The lands were in the possession of tenants from whom collections were being made by the Dikshitars. Though the title deeds to these lands which are distributed in several villages stand in the name of the deity, it is not known whether the grant consists of melwaram and kudiwaram or of melwaram alone. For over 75 years the tenants have been in undisturbed possession of the lands. They have been paying melwaram on the land to the temple. It is therefore not an unreasonable inference to draw that the grant consisted only of melwaram and that the tenants had the kudiwaram interest in the lands and the right

to recover possession might have been barred. It has been represented to us in the course of the arguments that in fact the *Podu* Dikshitars consulted a lawyer who gave the opinion that it would be a sheer waste of money to institute suits for the recovery of possession of lands. This fact, it was stated was represented to the Board and it is alleged in the affidavit filed before us and was not seriously denied. The criticism therefore by the Full Board in their order on appeal that the *Podu* Dikshitars persisted in refusing to take action for recovery of possession and they did not even obtain legal opinion on the advisability of recovering possession of the property and the lands seems to us to be unwarranted. It is needless to state that in those circumstances it would have been wholly inadvisable to have launched the temple in an unnecessary and costly litigation when there is very little chance of success.

Regarding the jewels, there seems to be a misconception on the part of the Board when they state in the appellate order :

"Admittedly no jewel register is maintained and facilities were not given to the officers of the Board to verify and check the jewels with the list given in the section 38 register."

This charge, in our opinion, is not well-founded. A jewel register in triplicate was submitted to the Board by the Dikshitars in 1949. The jewels were got weighed and checked under the personal supervision of the biggest bullion merchants in Chidambaram. Jewels were in fact inspected by the officers of the Board. The Dikshitars in their affidavit stated that they gave full lists in 1940 soon after the scheme came into force and in 1946 a list of all the additional jewels received was also given together with a box. The jewels were again weighed and valued and a fuller list was prepared and given to the Board on 30th July, 1949. The lists are in books which have been produced before us by the Board and we are fully satisfied that not only the lists were complete and exhaustive but that they were also checked by the Assistant Commissioner on 21st October, 1950. We are unable to notice any discrepancies. The selvanam box contains unusable and broken articles such as gold pieces, gems, etc. It is not usually opened but about 35 or 40 years ago out of the materials in the box a makara Kantikai valued at Rs. 75,000 was got made. A list was made of the other broken and unusable jewels and it was given to the Board on 26th September, 1946. This is all borne out by the register which has been produced before us. The charge therefore seems to us to proceed without an appreciation of the true facts. The rules book maintained by the Dikshitars regulates the management of the temple affairs, secular and spiritual and contains specific rules framed as early as 1849 regarding the jewels. Of these, Rule 12 says :

"Two complete lists should be prepared of all the jewels, vessels, clothes and other movable property in the temple out of which one should be kept in the safe room called Asthanthiram of the temple and the other should be in the custody of the turnholders who do pooja."

This rule has got several sub-rules providing for the safe handling of these articles and for their safe custody ; they also lay down varying grades of punishments for loss of jewels by theft or negligence. The 10th Rule in 1849 book is to the following effect :

"Special jewels worn by the deity on occasions of Brahmotsavam, *i.e.* in June and December of each year are provided for in this rule. A meeting of all the Dikshitars is to be convened and the keys have to be produced by keyholders and in the presence of the entire *Podu* Dikshitars two lists are to be prepared, one signed by the Utsava Moraikar should be kept in the safe room and the other should be kept by the Karyakar."

This rule also has got several clauses providing for safe custody and also how loss owing to theft or negligence is to be punished. When the temple was renovated between 1885 and 1892 the safe room was considerably altered and strengthened and the 1900 rules make provision for safe custody of the jewels. Groups of ten Dikshitars have to be in charge of these special jewels for six months ending with the Tamil months of Ani and Margazhi (now, the number is twenty). They get their right by rotation according to the morai list ; each is provided with a different lock and key and the Asthana room is locked with all the locks. Whenever occasion arises for taking out the jewels such as Brahmotsavam or to enable a distinguished visitor to see them, a special meeting of all the Poduvars is convened and the Asthana

Moraikars are directed to assemble at a particular hour with their keys to open the safe room, take out the jewels and after the purpose is over, put them back again. All this has to be done in the presence of the Poduvars. There were also elaborate rules for handing over and taking over charge from one set of turnholders to the other after the months of Ani and Margazhi. The system devised by the Dikshitars is undoubtedly a very safe system making it almost impossible for the jewels to be lost and no one could have devised a better system than that. The elaborate discussion therefore by the Board in the first order and the conclusion of the appellate Board regarding the jewels seems to us unwarranted. There is therefore very little justification for the charge which has been taken as a serious ground for the issue of the notification.

The appellate order refers that indiscriminate payments were exacted from worshippers by the Dikshitars as remuneration for archanas. The only evidence is that Re. 1-4-0 a month is charged for archana and this cannot be said to be indiscriminate or exorbitant. By introducing the chit system and hundi collections under the guise of regulating the worship it really commercialises worship in the temple. It is common knowledge that in most of the temples, it is almost impossible for a man to get darsan if he is not able to pay the required amount. The value of the worship and the spiritual significance are lost when it is treated as a saleable commodity which should be controlled and exploited for the purpose of earning income for a temple.

These are the reasons on which the appellate order was based. It is unnecessary to deal with the grounds elaborately as we are satisfied that the order on which the notification was issued is without any foundation and proceeded on a total misconception of the facts.

These are the facts appearing on the record and it is somewhat surprising that the Board should have taken the serious step, as has been held by this Court, of notifying this temple which procedure ought not to be lightly resorted to unless and until there is such serious mismanagement of a temple as would justify an ouster of the trustee in charge of a temple from his office. In such circumstances it is open to us to issue a writ to quash an order which proceeds on grounds which are so perverse as to amount to a non-exercise of the jurisdiction entrusted to it. The notification therefore must be quashed even on the merits.

In C.M.P. No. 2591 of 1951[1] we have enumerated the sections of the impugned new Act which are *ultra vires* the State Legislature in so far as they are made applicable to Mutts and Matathipathies and to the religious denominations for which those Mutts exist. In the case of Sri Sabhanayakar Temple at Chidambaram with which we are concerned in this petition, it should be clear from what we have stated earlier in this judgment, that the position of the Dikshitars, labelled trustees of this temple, is virtually analogous to that of a Matathipathi of a Mutt, except that the *Podu* Dikshitars of this temple, functioning as trustees, will not have the same dominion over the income of the properties of the temple which the Matathipathi enjoys in relation to the income from the Mutt and its properties. Therefore the sections which we held *ultra vires* in relation to Mutts and Matathipathies will also be *ultra vires* the State Legislature in relation to Sri Sabhanayagar Temple, Chidambaram, and the *Podu* Dikshitars who have the right to administer the affairs and the properties of the temple. As we have already pointed out, even more than the case of the Srivalli Brahmins, it can be asserted that the Dikshitars of Chidambaram form a religious denomination within the meaning of Article 26 of the Constitution.

The rule *nisi* must be made absolute.

The petitioner is entitled to his costs in the petition. Advocate's Fee Rs. 250.

We certify under Article 132 of the Constitution that it is a fit case for appeal to the Supreme Court.

K.S. *Notification quashed.*

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1. (1952) 1 M.L.J. 557.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Public Prosecutor .. *Petitioner**

v.

Kandaswami Mudali .. *Respondent.*

Criminal Procedure Code (V of 1898), section 471—Procedure to be followed where the accused guilty of murder is found to be a lunatic at time of commission of offence.

Where the accused a lunatic is found to be guilty of murder the proper procedure to be followed s to order as follows :—"Having found the accused guilty under section 302, Indian Penal Code, out insane at the time of the commission of the act, I acquit him and direct him to be detained n the Mental Hospital and the action taken by me will be reported to the State Government." [The detention should be in the Mental Hospital, Madras, because the State Government has prescrib- ed in G. O. No. 1096 (Public), dated 29th August, 1913, the Mental Hospitals to which particular criminal lunatics of particular district should be sent, namely, the Mental Hospitals at Madras, Calicut and Vishakapattinam ; and Salem criminal lunatics have to go to the Mental Hospital, Madras.] . After making such order the Sessions Judge should detain the criminal lunatic in the ail and address the Executive District Magistrate for making arrangements for the removal of he criminal lunatic to the Mental Hospital concerned. The subsequent responsibility for removal of the lunatic to the Mental Hospital lies with the Executive District Magistrate, the Medical officer of the Jail and the Police. The Court cannot decide to release the criminal lunatic and entrust im to the safe custody of his relatives. The privilege of deciding whether the accused shall be eleased or not lies with the State Government and not with the Court. On the removal of the unatic to the Mental Hospital it will be open to his relatives to apply to the State Government for he release of the criminal lunatic on conditions.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment, dated 27th November, 1950, in S.C. No. 138 of 1950 on the file of the Court of Sessions of the Salem Division.

The Public Prosecutor (*V. T. Rangaswamy Ayyangar*) in person.

C. Deenadayalu for Respondent.

The Court made the following

ORDER.—This is an application by the learned Public Prosecutor for the correction of an incorrect procedure adopted by the learned Sessions Judge of Salem n S.C. No. 138 of 1950.

The accused Kandaswami Mudali who was tried for an offence under section 302, Indian Penal Code, was found guilty but insane at the time of the commission of the act.

The learned Sessions Judge acquitted him under section 84, Indian Penal Code and made the following order :

> "In order to meet the requirements of section 471, Criminal Procedure Code, the accused will continue on bail on the same sureties who will retain the accused in their safe custody, and produce him before Court as and when required, pending final orders of Government."

The learned Public Prosecutor rightly points out that the procedure followed by the learned Sessions Judge is incorrect. Before the amendment of section 471, Criminal Procedure Code, the Court acquitting a person on the ground of insanity had to report the case for the orders of the Local Government. But clauses (2) and (3) of the section were repealed by Act IV of 1912 mainly with the object of relieving the Local Government from the necessity of dealing with the cases of such persons. The amended section requires only that the action taken by the Sessions Judge should be reported to the State Government. Secondly the words "detained in safe custody" in section 471, Criminal Procedure Code, has been judicially interpreted as not meaning "detained in the custody of friends and relatives". As section 471, Criminal Procedure Code, now stands, it is essential that the accused should be detained in a place. The word 'detained' denotes curtailment of liberty. It is obligatory on the Court to order detention in a place and not with a person. In a case where a Court in issuing an order under section 471 (1), Criminal

*Crl.R.C. No. 118 of 1951.
(Crl. R.P. No. 117 of 1951.)

17th January, 1952.

Procedure Code, ordered the accused to be detained in the custody of his father-in-law and brother, it was held that the order could not be sustained and had to be set aside. (See *Public Prosecutor* v. *Nelliappa Pillai*[1].)

The correct procedure to be followed is as follows and the operative portion of the order of the Sessions Judge should run thus :—

"Having found the accused guilty of murder under section 302, Indian Penal Code, but insane at the time of the commission of the act, I acquit him and direct him to be detained in the Mental Hospital and the action taken by me will be reported to the State Government." [The detention should be in the Mental hospital, Madras, because the State Government has prescribed in G.O. No. 1096 (Public), dated 29th August, 1913, the Mental Hospitals to which particular criminal lunatics of particular district should be sent, namely, the Mental Hospitals at Madras, Calicut, Vishakapattinam ; and Salem criminal lunatics have to go to the Mental Hospital, Madras.]

The learned Sessions Judge after having made this order should have detained the criminal lunatic in the jail at Salem and addressed the Executive District Magistrate of Salem for making arrangements for the removal of the criminal lunatic to the Mental Hospital, Madras. The relevant rules are to be found in Chapter 19, portion (B), of the Criminal Rules of Practice. The subsequent responsibility for the removal of the criminal lunatic to the Mental Hospital, Madras, lies with the Executive District Magistrate, the Medical Officer of the Jail and the Police ; and the rules regarding the escort, etc., are set out in the Standard Orders of the Madras Police so far as the Police are concerned and the Civil Medical Code so far as the Medical Officers are concerned ; and in the Madras Jail and Reformatory Manual, Vol. I, so far as the Magistrates are concerned.

Therefore the order of the Sessions Judge has got to be varied as follows ; namely, that the accused having been found guilty but insane, the Sessions Judge should direct the detention of the criminal lunatic in the Mental Hospital, Madras and in the meanwhile detain him in the local jail at Salem and address the Executive District Magistrate for making arrangements for removal to the Mental Hospital, Madras and finally report the action taken by him to the State Government in the Home Department.

On this criminal lunatic being removed to the Mental Hospital it will be open to his relatives to apply to the State Government for the release of the criminal lunatic on conditions. The privilege of deciding whether the accused shall be released or not lies with the State Government and not with the Court. The State Government has prescribed elaborate rules in regard to the release of these criminal lunatics which are found set out in the Lunacy Manual published by Mr. Galletti, I.C.S., in 1906 and printed by the Superintendent, Government Press, Madras.

This Criminal Revision Case of the learned Public Prosecutor is disposed of accordingly.

K.S. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Gangipati Appayya and others .. *Petitioners.**

Companies Act (VII of 1913), sections 131 (1) and 133 (3)—No general body meeting called within the prescribed period—Prosecution for not placing the balance sheet before the general body meeting—Maintainability.

It is not open to an accused (managing director) to plead in answer to a charge under section 133 (3) of the Companies Act his prior default in respect of the calling of the general body meeting. Where the general body meeting was not called within the prescribed period and no application was made to the Registrar of Joint Stock Companies for condoning the delay and the managing director is prosecuted for an offence under section 133 (3), the accused must be held to be guilty.

It is not open to the other directors who have got their own responsibility to plead innocence on the ground of helplessness and throw the entire blame on the managing director.

Case-law discussed.

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1. (1948) 1 M.L.J. 23.

*Cr.R.C. Nos. 1019, 1020, 1021 of 1950, 283 and 284 of 1951. 17th January, 1952.
(Cr.R.P. Nos. 952, 953 and 954 of 1950, 282 and 283 of 1951.)

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Sessions, Krishna division, at Masulipatam in C.A. No. 91, etc., of 1949 respectively (in C.C. Nos. 178 and 179 of 1949 on the file of the Additional First Class Magistrate, Vijayawada).

D. P. Narayana Rao, C. V. Dhikshitulu and *N. Rajeswara Rao* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Ayyangar*) for the State.

The Court made the following

ORDER.—These are five connected cases filed against appeals filed against the convictions and sentences of the Additional First Class, Magistrate, Vijayawada, in C.C. Nos. 178 and 179 of 1949.

The facts are brief: The petitioners before us are the directors of Sri Gopalakrishna Motor Transport Company, Limited and whose affairs were the subject-matter of investigation till recently on the original side of the High Court. How this company came into existence was as follows :—These directors were originally competing bus owners running a few buses each. The Government of Madras then insisted that groups of 20 buses should be formed into fleets and then only they would be allowed to operate as public transport vehicles. Therefore by reason of this requirement the erstwhile warring competitors were thrown together. It is not too much to say that it was more like a case of a number of wild cats being thrown into a cage and asked to live amicably thereafter. It needed therefore no astrologer to forecast the future of such a company. The company was incorporated under the Indian Companies Act of 1913 as Joint Stock Company, limited, by shares on 20th December, 1944, having its registered office at Vijayawada. Sri Veeramachaneni Seethayya became the Managing Director and the other petitioners became the directors. According to section 131 (1) of the Indian Companies Act the first balance sheet must be placed before the general body meeting not later than 18 months after the date of the incorporation and subsequently the balance sheet should be placed before the general body once in every calendar year. No balance sheet was placed before the general body meeting and not even the first balance sheet in the general body meeting which was managed to be held in 1947. The balance sheets up to and including 14th November, 1945 and from 15th November, 1945 to 31st December, 1945, were prepared in 1948. I may point out for completeness of information that the petitioners became Managing Director and directors from 1st July, 1946 and the first general body meeting was held on 19th June, 1946 and as I just pointed out before, no balance sheet was placed before it. The balance sheet was only adopted by the general body only in 1948. Therefore the Assistant Registrar of Joint Stock Companies, Kistna at Masulipatnam filed a complaint under section 131 (1) of the Indian Companies Act read with section 133 (3) against Seethayya and five others for their failure, being the directors of Sri Gopala Krishna Motor Transport Company, Ltd., Vijayawada, to place the balance sheet before the General Body meeting of the company as required by the Act.

The case for Seethayya is that no offence has been made out against him because, inasmuch as no general body meeting was held within the period prescribed, no question of placing the balance sheet arose and that the charge against him, as it stands, is misconceived and that no offence has been committed by him on that footing. The case for the ordinary directors is that there has been no wilful default on their part and that owing to circumstances beyond their control the placing of the balance sheet could not be done and hence they are not guilty.

The learned First Class Magistrate found all these persons guilty as charged and fined the Managing Director Rs. 500 and fined the other directors Rs. 250 each. On appeal the fines and default sentences were halved by the learned Sessions Judge, Krishna at Masulipatnam.

The two points taken in the lower Court have been taken by the petitioners before me also. There are found to be without any substance. I shall deal wit them one by one.

As regards the case of the Managing Director, it is quite true that a decision of the Bombay High Court relied on by learned counsel for Seethayya (Managing Director) reported in *Emperor* v. *Pioneer Clay and Industrial Works*[1], lends support to the contentions of Seethayya. In that case it is laid down that what is made penal by section 134 (4) is default in complying with the requirements of the section and under section 134 (1) there is no obligation cast upon the company to file three copies of the balance sheet and the profit and loss account if no general meeting has been called. Where, therefore, no general meeting of the company was called and no balance sheet and profit and loss account laid before it, the company and its directors have made no default in complying with section 134 by their failure to file the copies of the balance sheet and the profit and loss account with the Registrar of the companies and they are not guilty under section 134 (4) although they might have committed an offence either under section 76 (2) or under section 133 (3), that is to say, not calling for a general body meeting within the time prescribed. This decision itself was a clear dissent from a Bench decision of the Calcutta High Court reported in *Debendranath Das Gupta* v. *Registrar of Joint Stock Companies*[2]. In that decision on facts practically the same as before the Bombay High Court, the Calcutta High Court took the view that it was not open to an accused to plead in answer to a charge under section 134 his prior default in respect of the calling of the prescribed general meeting and placing before the company at such meeting a duly prepared and audited balance sheet and they relied on a decision of the English Court in *Park* v. *Lawton*[3]. Out of the two decisions I am inclined to follow the latter.

Whatever might have been the facts in the Bombay case of which we have no full account, it is clear here that this accused person Seethayya is relying on his own default and pleads his innocence. There were sufficient opportunities before him for applying to the Registrar of the Joint Stock Companies to condone the delay. In fact in a Madras case reported in *Ramanujam Appalasami*, In re[4], the accused were convicted under section 76 (2) of the Companies Act for not holding a general meeting of the company of which they were the directors within 18 months of the date of the incorporation. They were also convicted under section 131 of the Companies Act for not having laid before the general body within 18 months from the incorporation of the company a balance sheet. It was shown that in reply to a letter from the company the Registrar of Joint Stock Companies had condoned the delay in the following terms:

"The delay in holding the general meetings is condoned and the list of members and summary is filed this time."

Held, inasmuch as the letter of the Registrar condoned the failure of the accused to hold a general meeting they were not liable to be convicted under section 76 (2) of the Companies Act. *Held further*: As the Registrar had condoned the delay in holding the general meeting he should be deemed to have condoned the delay in filing the balance sheet before the general body at its meeting and the accused were not liable to be convicted under section 131 of the Companies Act. In this case it is not the contention of Seethayya that the balance sheet had been prepared at any time or that he had applied for extension of time for holding the general meeting. Therefore this is a clear case where the Managing Director is relying on his own default in order to establish his innocence and this he cannot be permitted to do. The conviction of Seethayya, the Managing Director is correct. But in view of the extenuating circumstances in this case the fine is reduced to Rs. 50.

Turning to the case of the directors their plea is nothing more than an argument drawn from misery that it was impossible for them to hold a general body meeting and place the balance sheet and especially so when it was the Managing Director who was entitled to call this meeting and get the balance sheet placed before the meeting and not they the directors. This kind of plea cannot be entertained in this case for several reasons. These directors had ample opportunities and time to apply

1. A.I.R. 1948 Bom. 357.
2. (1917) I.L.R. 45 Cal. 486.
3. (1911) 1 K.B. 588.
4. (1941) 1 M.L.J. 419.

to the Registrar for extension and they did not do so; secondly, the explanations put forward by them and referred to in paragraph 5 of the judgment of the lower appellate Court are unfounded and which need not be repeated as they were not pressed here; and thirdly, the directors have got their own responsibility and cannot plead innocence on the ground of helplessness and throw the entire blame on the Managing Director. In *Bhagirath* v. *Emperor*[1] the following observations at pages 43 and 44 are instructive :

"If directors, who are responsible for the management of a company and who presumably know the duties imposed upon them by law, make no attempt to see that those duties are carried out there is justification for holding, in my opinion, that they wilfully and knowingly permitted the company to fail to carry out those duties. The suggestion that these various directors were mere figure heads not taking any active part in the control of the company is in my opinion not worthy of serious consideration. They were directors, they attended meetings throughout the period with which we are concerned and they were responsible for the management of the company. But these provisions of the Companies Act have been deliberately enacted to protect shareholders and in some cases to protect the general public and they impose a definite duty upon directors. It is necessary that these duties should be properly carried out and it is necessary, in my opinion, that when directors fail to do so, the penalties provided for in the Act should be imposed and the directors should be substantially penalised."

Therefore the plea put forward by these directors cannot be accepted. The convictions are correct but the sentences can be legitimately reduced in this case in view of the observations of Clark, J., who dealt with this very company on the original side in O. P. No. 261 of 1947 and the judgment of Govinda Menon, J., in O. S. A. No. 12 of 1948. The fines are reduced to Rs. 25 each.

The balance of fine amount if paid will be refunded to the petitioners and their L.Rs. if any.

V.P.S. — *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN AND MR. JUSTICE CHANDRA REDDI.

Masum Vali Saheb and others .. *Appellants**

v.

Illuri Modin Sahib .. *Respondent.*

Mahomedan Law—Transfer by Mahomedan to his wife of immoveable property in satisfaction of her dower debt—Nature of the transaction—Registration—Necessity—Transfer of Property Act (IV of 1882), section 54.

An oral transfer of immoveable property of more than one hundred rupees in value by a Mahomedan husband to his wife in satisfaction or consideration of her dower debt, is a sale within the meaning of section 54 of the Transfer of Property Act and will not be valid unless it is accompanied by a registered instrument.

Case-law fully discussed.

Appeal against the decree of the Court of the Subordinate Judge, Cuddappah, in A. S. No. 87 of 1946, preferred against the decree of the Court of the District Munsiff, Prodattur, in O. S. No. 10 of 1944.

M. V. Nagaramayya for Appellants.

A. Kuppuswami for Respondent.

In the first instance, when the matter came before Mr. Justice Chandra Reddi, on 7th of November, 1950, His Lordship made the following

ORDER :—The main question that arises for consideration in this appeal is whether a conveyance by a Mahomedan in favour of his wife in satisfaction of her mahar debt is a sale within the meaning of the Transfer of Property Act and therefore requires to be in writing duly registered or whether it is a transaction called "Hiba-bil-ewaz" not requiring a registered document. The question arises in this case in the following circumstances.

A suit was instituted by the plaintiff for a declaration of his title to the suit property and for setting aside an order passed by the District Munsiff of Prodattur, as Small Cause Court Judge, in E. A. No. 617 of 1943 in execution proceedings in S. C. No. 54 of 1941. The plaintiff claimed his title to the suit property under

1. A.I.R. 1948 Cal. 42.

* S. A. No. 2071 of 1947. 7th December, 1951.

a sale deed, Ex. P-1, dated 2nd May, 1941, from one Mahaboob Bi, the widow of one Kasim Peeran, for valuable consideration. According to him, Kasim Peeran in order to discharge the mahar debt due to his wife orally conveyed the suit property before his death to her and put her in possession thereof, and later on his widow conveyed her right, title to and interest in the suit property to the plaintiff for consideration. Defendants 1 to 8 are either the children or the widows of one or other of the brothers of Kasim Peeran, who claimed title to the suit property as heirs to Kasim Peeran.

The suit was resisted by the appellant-defendants on the ground that Kasim Peeran did not convey the suit property to his wife as no mahar debt was due to her, and even if there was such a conveyance it did not transfer any right in the property to Mahaboob Bi, as it was not effected by a registered instrument.

The trial Court held that the conveyance in favour of Mahaboob Bi was not valid in law, as it was not evidenced by a registered instrument and that therefore Mahaboob Bi in her turn could not convey any title to the property which she herself did not get from her husband. But at the same time, it found that the widow was entitled to a possessory lien, namely, the right to retention of the property in lieu of her mahar claim in addition to her right as a sharer and that right she could validly convey to the plaintiff under Ex. P-1. On appeal from this decision the lower appellate Court thought that it was unnecessary to go into the question whether the plaintiff acquired the rights of Mahaboob Bi to a possessory lien in the view it took of the nature of the transaction between Mahaboob Bi and her husband. Relying upon a decision of the Allahabad High Court reported in *Mt. Kulsum Bibi* v. *Shiam Sunder Lal*[1], which laid down that such a transaction was technically speaking a gift and not a sale, though its precise legal position would lie midway between gift property so called and sale, it held that the transaction in question was not a sale within the meaning of the Transfer of Property Act and that therefore not required to be evidenced by a registered instrument. In that view of the matter it dismissed the appeal and confirmed the decision of the trial Court.

In this appeal against that judgment and decree the same point, namely, whether the conveyance in favour of Mahaboob Bi by her husband was a sale within the meaning of the Transfer of Property Act and therefore had to be evidenced by a registered instrument was raised. On this question while there is no direct decision of this Court there is a conflict of judicial opinion between the various other High Courts. The High Courts of Calcutta, Lahore, Patna and Nagpur took the view that a transaction of that character is nothing but a sale and therefore where the property is immoveable and has value of Rs. 100 and upwards it must be effected by a registered instrument as required by section 54 of the Transfer of Property Act relating to a sale, while the Allahabad High Court took a different view, namely, that a transfer by a Husband of immoveable property to his wife in lieu of her dower debt is not a sale but a transaction of a true "Hiba-bil-ewaz." The Oudh Court has followed the decisions of the Allahabad High Court.

In view of this conflict and having regard to the frequency with which the matter may arise, I think it is desirable to have an authoritative decision on this point. I therefore direct that the papers be placed before my Lord the Chief Justice for posting the case before a Bench.

In pursuance of the above Order of Reference to the Bench by Chandra Reddi, J., dated 7th November, 1950, this appeal coming on for hearing, the judgment of the Court was delivered by

Chandra Reddi, J.—This second appeal has come before us as it was referred to a Bench by one of us, having regard to the divergence of judicial opinion on the main point involved in the appeal

Defendants 1 to 8 are the appellants in this second appeal. The facts, so far as is necessary to appreciate the question involved in the second appeal, may be briefly stated:

1. A.I.R. 1936 All. 600.

The suit house originally belonged to Khasim Peeran. This was built by him on a portion of a plot of land shown as A, B, C, D, E, F, G in the plan attached to the plaint. In the family division amongst the brothers, the site, on which the suit house is built, was allotted to Khasim Peeran, and, subsequently, he built thereon the suit house. In discharge of a dower debt, Khasim Peeran transferred this house to his wife, Basiri Bibi. Basiri Bibi, in her turn, sold this house to the plaintiff in or about the year 1941 for a consideration of Rs. 250. After the death of Khasim Peeran, a creditor of his filed a suit on the foot of a promissory note, S. C. No. 54 of 1941, on the file of the District Munsiff's Court of Prodattur and obtained a decree thereon. In execution of the decree, 1/4th share in A, B, C, D, E, F, G was sought to be attached. Thereupon, the defendants intervened with a claim petition, Exhibit P-5, which was allowed, with the consequence that what was sold was the site marked C, D, E, F in the plan on which the suit house stood. This was purchased by the decree-holder himself. The defendants once again came forward with a claim petition for re-delivery of the properties, as though they were once in possession and were dispossessed by the auction-purchaser. Evidently, this was not resisted by the auction-purchaser, with the result that the claim was allowed. Since the present plaintiff was not a party to that claim petition, another application, E.A. No. 617 of 1943, which has given rise to this second appeal, was filed by the defendants impleading the present plaintiff as a party, for removal of obstruction and for re-delivery. This application, though it purports to be under section 141 or 151, Civil Procedure Code, seems to be really one under Order 21, rule 100. Despite the opposition of the present plaintiff, the claim petition was allowed by the District Munsiff of Prodattur and the plaintiff was directed to put the defendants in possession thereof. This led the present plaintiff to institute a suit for a declaration of his title to the property based on a sale deed executed by the widow of Khasim Peeran in his favour and also for a declaration that the property was not liable to be re-delivered to the defendants.

The suit was resisted on various grounds, the chief of them being, that the plaintiff had no title to the suit property as the oral conveyance in favour of his vendor by her husband in consideration of her dower debt was not valid.

The trial Court, while holding that the transfer of the suit house in favour of his wife by Khasim Peeran in consideration of the former's dower debt is not valid, as it was not evidenced by an instrument duly registered decreed the suit on the ground that the plaintiff was entitled to a possessory lien till the dower debt of his vendor was discharged. In the result, a decree was granted in terms of the reliefs prayed for in the plaint.

On appeal by the defendants, the Subordinate Judge confirmed the decision of the trial Court, not only on the ground of possessory lien, but also on the additional ground that the transfer by Khasim Peeran of the suit property in favour of his wife, in consideration of her dower debt, was "*hiba-bil-ewaz*" and, therefore, though not evidenced by a registered instrument, was effective with the consequence, the vendor of the plaintiff had a valid title to the suit house, which he could convey to the present plaintiff. The defendants, who were aggrieved by this judgment, have preferred the present second appeal.

The main question that this second appeal raises is one touching the validity of the oral transfer of the suit house by Khasim Peeran to his wife in consideration of her dower debt. On this question, the preponderance of authority seems to be in favour of the view, that such a transaction is a sale within the meaning of section 54 of the Transfer of Property Act and will not be valid unless it is accompanied by a registered document.

The leading case on the subject is *Abbas Ali Shikdar* v. *Karim Baksh Shikdar*[1], which is the foundation of several decisions not only of that Court, but also of other High Courts. There one Shikdar made an oral gift of a portion of his property

1. (1908) 13 C.W.N. 160.

in favour of his wife, both in satisfaction of her dower debt, and a share she would have on his death. The validity of the gift fell to be considered in the suit. When the matter went up in appeal to the High Court, a Bench of that Court regarded the transaction as a *hiba-bil-ewaz* of India, though strictly, it was not a *hiba-bil-ewaz*, and held that it was a sale governed by the provisions of section 54 of the Transfer of Property Act, and not a pure *hiba* or gift.

This was followed in *Sajulal Bhattacharjya* v. *Asiruddin Shaikh*[1] and also in *Sarifuddin Mahammad* v. *Mohiuddin Mahammad*[2].

The same view was adopted by the Patna High Court also. In *Mohammad Usman* v. *Amir Mian*[3], a Bench of that Court held that such a transaction was a sale, falling within the scope of section 54 of the Transfer of Property Act. This principle is affirmed by the Lahore High Court in a number of cases, and it is sufficient to refer to two of them, *Fateh Ali Shah* v. *Muhammad Baksh*[4] and *Gopal Das* v. *Mst. Sakina Bibi*[5]. In *Fateh Ali Shah* v. *Muhammad Baksh*[4], one Shah Muhammad executed a deed, which purported to be a gift to his wife certain of his properties, to which she was to have absolute title, in lieu of her dower debt as well as her right of maintenance. The learned Judges before whom the matter came up in appeal expressed the opinion that though the transaction was described as a gift, it was really a *hiba-bil-ewaz*, which was tantamount to a sale. This was followed by another Bench of that Court in *Gopal Das* v. *Mst. Sakina Bibi*[5].

In *Zainab Bi* v. *Jamal Khan*[6], a Bench of the Nagpur High Court held that a transfer of immoveable property by a Muhammadan husband in favour of his wife, in discharge of her dower debt, was a sale and not a pure *hiba* or gift.

We may now refer to a decision of our High Court in *Bibijanbi* v. *Hazarath Saib*[7]. In that case, under a registered instrument, a Muhammadan husband conferred a life-estate on his wife in some property in consideration of the latter's dower debt and which had to devolve on her death on his heirs. After her death, her grand-daughters claimed that property, under a gift deed from her, on the ground that under the Shafi school of Muhammadan law, a gift for life could not be made, and, therefore, such a gift should be construed as a gift of an absolute estate. Sundara Aiyar and Phillips, JJ., before whom the appeal came on for hearing, thought that it was unnecessary to decide that question as in their opinion it was not a gift but a sale and, therefore, a life-estate could be conveyed under that document. This is what they observe at page 960:

> "It has been decided both by this Court and by other High Courts that a transfer of property to a Muhammadan lady for a term by her husband in consideration of dower must be regarded as a sale—see *Sahiba Begum* v. *G. Atchamma*[8], *Ghulam Mustafa* v. *Hurmat*[9], *Abbas Ali Shaikdar* v. *Karim Baksh Shaikdar*[10] and also Baillie's Digest, p. 122. Such a transfer was regarded as unimpeachable in *Mubarak-un-nissa* v. *Hasan Khan*[11]. There is nothing in the Muhammadan law, so far as we are aware, against the legality of such a transfer."

A different note was struck in some of the decisions of the Allahabad High Court, though the statement of law contained in earlier rulings of that Court is in accordance with the principle stated above in *Faida Ali* v. *Muzaffar Ali*[12]. Mahmood, J., delivering the judgment on behalf of the Bench, held that a transfer of immoveable property by a Muhammadan husband in favour of his wife in consideration of her dower debt was a sale giving rise to a right of pre-emption. The same view was shared by Sulaiman, C.J., and Banerji, J., in *Saiful Bibi* v. *Abdul Aziz Khan*[13]. The learned Judges decided that transfer of property made in lieu of an existing debt in cash would be a transfer for price, so as to bring it within the meaning of section 54 of the Transfer of Property Act.

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1. (1934) 38 C.W.N. 743: I.L.R. 61 Cal. 879.
2. (1927) I.L.R. 54 Cal. 754.
3. (1949) I.L.R. 26 Pat. 561.
4. (1927) I.L.R. 9 Lah. 428.
5. (1934) I.L.R. 16 Lah. 177.
6. I.L.R. (1949) Nag. 426.
7. (1911) 21 M.L.J. 958.
8. (1868) 4 M.H.C.R. 115.
9. (1880) I.L.R. 2 All. 854.
10. (1908) 13 C.W.N. 160.
11. (1910) I.L.R. 33 All. 421.
12. (1882) I.L.R. 5 All. 65.
13. 1931 A.L.J. 951.

But in *Mt. Kulsum Bibi* v. *Shiam Sundar Lal*[1], a Bench of the same High Court, differed from the earlier view and came to the conclusion that a transaction called "*hiba-bil-ewaz*" was not a sale but a gift. The grounds, upon which the learned Judges reached that decision was, that the transaction involved two reciprocal gifts: (1) gift of immovable property by the husband in favour of the wife, and (ii) gift by the wife of her dower debt in favour of the husband and secondly, in *Kamar-un-nissa Bibi* v. *Hussaini Bibi*[2], the Judicial Committee decided that a transfer of immovable property in favour of his wife in discharge of the dower debt was not a sale but a gift.

We shall first refer to the decision of the Judicial Committee in *Kamar-un-nissa Bibi* v. *Hussaini Bibi*[2]. In that case, two issues were raised: (i) whether there was consideration for the transfer of property and (ii) whether the gift was accompanied by delivery of possession of the property. The trial Court held that there was neither consideration for the transfer nor delivery of possession and therefore no title passed to the wife. On appeal, the High Court held that though there was no consideration for the transaction, the gift was valid, inasmuch as the donee was put in possession of the property. On further appeal to the Privy Council, their Lordships of the Judicial Committee held that it was valid, both as a gift for consideration and also as a pure gift, since the gift was accompanied by delivery of property. At page 268 of the report, their Lordships observed that, if the possession was changed in conformity with the terms of the gift, that change of possession would be sufficient to support it, even without consideration. It is thus clear that their Lordships were not considering the question whether the *hiba* was a sale, and, therefore, required registration, or, was merely a gift. All that their Lordships decided was that the transaction was in either way a valid one. Further, it must be remembered that this decision was given prior to the enactment of the Transfer of Property Act. So, we do not see how this decision can lend any support to the view taken by the learned Judges in *Mt. Kulsum Bibi* v. *Shiam Sundar Lal*[1].

As regards the ground that the transaction involved two reciprocal gifts, we do not think there is any basis for the view. It looks to us that there is only one transaction, both the transfer of property and the discharge of the dower debt forming parts of the same transaction. In dealing with the question whether it involved the reciprocal gifts or was only one transaction, Ameer Ali, in his book on Muhammadan Law (4th Edn.), vol. 1, page 162, states:

> "And the rules stated above do not, therefore, apply to what in modern times is called a *hiba-bill-ewaz*, which is a transaction of quite a different nature, and partakes to a certain extent of the second kind of *ewaz* mentioned in the Patwar Alamgiri, *viz.*, where it is stipulated in the contract. In this kind of *hiba-bil-ewaz* the consideration is directly opposed to the object of the gift, both being *in esse*; there is no suggestion of one being subsequent to the contract. The grant and the consideration are parts of one transaction. A *hiba-bil-ewaz*, therefore, is a sale in all its legal incidents. In sale, mutual seisin is not requisite to render the contract valid and the terms in which a contract of this kind is entered into imply "that the articles opposed to each other are present" and that there is no danger of either party suffering from the other's fraud. "I have given you this for that" implies that the consideration is present, and that the person will take care to receive it before parting with his property and the law therefore annexes to it the quality of a sale both with regard to the condition and the effect."

It is thus clear that a transfer of immovable property by a Muhammadan husband in favour of his wife for her dower debt does not involve two reciprocal gifts but is only one contract.

It is not necessary to refer to the various decisions, which have dealt with this question and laid down that both the acts form only one transaction and that they do not involve two reciprocal gifts.

The ruling of the Allahabad High Court in *Mt. Kulsum Bibi* v. *Shiam Sundar Lal*[1], was followed by another Bench of the same Court in *Mt. Kulsum Bibi* v. *Bashir Ahmed*[3]. The reasoning adopted by the learned Judge was in effect the same as

1. A.I.R. 1936 All. 600.
2. (1880) I.L.R. 3 All. 266 (P.C.).
3. I.L.R. (1937) All. 285.

in *Mt. Kulsum Bibi* v. *Shiam Sundar Lal*[1], and it is not therefore necessary to deal with it.

The conflict between the earlier view and the later view of the Allahabad High Court was resolved by a Full Bench of the Allahabad High Court in *Ghulam Abbas* v. *Razia Begum*[2]. In that case, there is a learned discussion of the subject and all the leading cases are collected. The opinion expressed by the Full Bench is in conformity with the view prevailing in the High Courts of Calcutta, Patna, Lahore, Nagpur, etc. The learned Judges overruled the two Bench decisions of the Allahabad High Court in *Mt. Kulsum Bibi* v. *Shiam Sundar Lal*[1] and *Mt. Kulsum Bibi* v. *Bashir Ahmed*[3]. It was laid down there that the dower debt, when ascertained, was a debt the discharge of which will amount to payment of "price" within the meaning of section 54 of the Transfer of Property Act, and therefore the transfer for consideration of such a debt is a sale, which requires a written instrument duly registered.

We shall now turn to the decision of the Lucknow Court, whose view is similar to that taken in *Mt. Kulsum Bibi* v. *Shiam Sundar Lal*[1], and *Mt. Kulsum Bibi* v. *Bashir Ahmed*[3]. We may first refer to the decision of that Court in *Bashir Ahmad* v. *Mst. Zubaida Khatun*[4]. In that case, the question that arose for consideration was whether the transfer of immovable property by a Muhammadan husband in favour of his wife in consideration of her dower debt is subject to the right of pre-emption. The learned Judges held that a Muhammadan wife entitled to property under such a transaction was not entitled to the right of pre-emption as, in their opinion, the transaction was not a sale. This decision is based both on *Kamar-un-nissa Bibi* v. *Hussaini Bibi*[5], and on the dictum that the discharge of the dower debt is not a price within the meaning of section 54 of the Transfer of Property Act. According to the learned Judges, the claim for a debt, being a "chose in action" no payment of money or promise to pay money is involved in the transaction. The learned Judges observe thus :

> "A claim for a debt is a "chose in action" and has well-known legal incidents—See *Byall* v. *Rowles*, and notes under it in White and Tudor's Leading cases, Vol. I, page 98, 8th edition. Where does then payment of money or a promise to pay money come in this transaction? Nowhere."

We do not think that we can agree with the learned Judges in their conclusion that the discharge of an existing debt, which is an ascertained sum does not amount to a price within the meaning of section 54 of the Transfer of Property Act. Suffice it to say that, in a number of cases, the expression "price" came to be judicially interpreted and the opinion expressed by learned Judges in the various cases was that the discharge of a pre-existing liability, if it is an ascertained sum is "price" within the meaning of section 54 of the Transfer of Property Act. Vide *Saiful Bibi* v. *Abdul Aziz Khan*[6] and *Madam Pillai* v. *Badrakali Ammal*[7].

In *Bashir Ahmad* v. *Mst. Subaida Khatun*[4], the learned Judges quote the following passage from Hedaya :

> "If a man marries a woman without settling on her any dower and afterwards settles on her a house as a dower the privilege of *shuffa* does not take place, the house being considered in the same light as if it had been settled on the woman at the time of marriage. It is otherwise where a man 'sells' his house in order to discharge his wife's dower either proper or stipulated ; because, here exists an exchange of property for property."

Then, they posed the question "what difference in principle can it make whether the property is transferred as dower, or, in lieu of dower" We have only to observe that they have overlooked the difference, which is an obvious one. In one case, *i.e.*, where the property transferred is by way of dower, no question of any fixation of price arises because the property itself is given as dower and there is no transfer of any property in exchange for a price, whereas in the other case of dower, the property is exchanged for a price. In the latter case, the price is an ascertained

1. A.I.R. 1936 All. 600.
2. A.I.R. 1951 All. 86.
3. I.L.R. (1937) All. 285.
4. (1925) I.L.R. 1 Luck. 83.
5. (1880) I.L.R. 3 All. 266 (P.C.).
6. 1931 A.L.J. 951.
7. (1922) 42 M.L.J. 410 : I.L.R. 45 Mad. 612 (F.B.).

sum of money, which was payable to the vendee. The decision *Chaudhri Talib Ali* v. *Mst. Kaniz Fatima Begum*[1], followed the earlier decision in *Bashir Ahmed* v. *Mst. Zubaida Khatun*[2]. It may be observed that these two decisions are in conflict with some of the earlier rulings of that Court. In this context, we may quote the observations of the Judicial Committee of the Privy Council in *Hitendra Singh* v. *Maharajadhiraj of Darbhanga*[3]. "Under Muhammadan law, a transfer by way of *hiba-bil-ewaz* is treated as a gift." We may now usefully refer to a passage from Baillee's Digest of Muhammadan law, which is only an abbreviated reproduction of Fatwa Alamgiri :–

> "*Hiba-bil-ewaz* means, literally, gift for an exchange and it is of two kinds, according as the *ewaz* or exchange is, or is not, stipulated for at the time of the gift. In both kinds, there are two distinct acts; first, the original gift, and second, the *ewaz* or exchange. But in the *hiba-bil-ewaz* of India, there is only one act; the *ewaz* or exchange, being involved in the contract of gift as its direct consideration and all are agreed that if a person should say "I have given this to thee for so much, it would be a sale; for the definition of sale is an exchange of property and the exchange may be effected by the word "give" as well as by the word "sell." The transaction, which goes by the name of *hiba-bil-ewaz* in India, is therefore, in reality, not a proper *hiba-bil-ewaz* of either kind, but a sale and has all the incidents of the latter contract. Accordingly, possession is not required to complete the transfer of it though absolutely necessary in gift and what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it, though that cannot be done or by either of the forms of the true *hiba-bil-ewaz*."

On these authorities both judicial and textual, we have come to the conclusions that the *hiba-bil-ewaz* so called in India is a sale within the meaning of section 54 of the Transfer of Property Act and unless made by a written instrument, duly registered, will not convey title to the person, in whose favour such a conveyance is made and an oral conveyance of immovable property worth more than Rs. 100 to the wife by a Muhammadan husband is not valid.

On behalf of the respondents, Mr. Kuppuswami tried to support the judgment of the lower appellate Court that such a transaction is not a sale. The learned counsel adopted the reasoning of the learned Judges in *Mt. Khulsum Bibi* v. *Shiam Sundar Lal*[4] and *Khulsum Bibi* v. *Bashir Ahmad*[5], and the Lucknow cases, which have been referred to. It is not necessary for us to deal with these arguments as we have already disposed of the same, while dealing with the decisions in *Mt. Kulsum Bibi* v. *Shiam Sundar Lal*[4] and the intermediate Allahabad view and the Lucknow view.

In addition Mr. Kuppuswami relied on a decision of this Court in *Madam Pillai* v. *Badrakali Ammal*[6], according to the learned counsel, the ruling in *Madam Pillai* v. *Badrakali Ammal*[6], is authority for the proposition that actual payment of money is necessary to constitute "price" within the meaning of section 54 of the Transfer of Property Act. We do not think we can agree with this argument. All that is laid down in *Madam Pillai* v. *Badrakali Ammal*[6] is :

> "Price includes money only, for if the thing given in exchange for land consists of goods and not money there is no sale but an exchange. A transfer not made in exchange for a money consideration *e.g.*, a transfer made in pursuance of a compromise of a family dispute would not be a sale and might be altogether outside the provisions of the Act."

Far from supporting the contention of the learned counsel, it lays down that price can be the discharge of a pre-existing debt. The observations of the learned Chief Justice at page 617 disposes of this contention of Mr. Kuppuswami :

> "Now, price has a well-defined meaning. It means money but not necessarily money handed over in current coin at the time but includes money, which might be already due or might be payable in the future."

The ruling in *Mahomed Esuph Ravuttan* v. *Pattamsa Ammal*[7], is relied on for substantiating the contention that *hiba-bil-ewaz* is not a sale but a gift. We do not think there is any scope for this contention because nowhere in the decision is any

1. (1927) I.L.R. 2 Luck. 575.
2. (1925) I.L.R. 1 Luck. 83.
3. (1928) 55 M.L.J. 615 : L.R. 55 I.A. 197 : I.L.R. 7 Pat. 500 at 508 (P.C.).
4. A.I.R. 1936 All. 600.
5. I.L.R. (1937) All. 285.
6. (1922) 42 M.L.J. 419 : I.L.R. 45 Mad. 612 (F.B.).
7. (1899) 9 M.L.J. 185 : I.L.R. 23 Mad. 70.

such statement of law made. All that was decided there was that a gift for consideration could be valid even though it was not accompanied by delivery of possession of the property. They described such a transaction as a gift for consideration, which can only mean a sale. The passage in that judgment, which was called in aid by Mr. Kuppuswami is this :

"That in such a case transfer of seisin is unnecessary is clear from the Privy Council case of *Ranee Khajooroonissa* v. *Mst. Roushan Jehan*[1], cited for the respondent. The Muhammadan law rules relating to sales and exchanges, on which the appellant's vakil laid much stress have really no bearing in a case like this."

We do not think this passage can give rise to the contention that *hiba-bil-ewaz* is not a sale within the meaning of the Transfer of Property Act. There, it was decided that though the donee was not put in possession of the property, a valid title passed to the donee. That can only be on the basis that it was not a gift but a transaction supported by consideration, *i.e.*, a sale.

Mr. Kuppuswami next arged that Ameer Ali in his book on Muhammadan Law (4th Edn.) at page 713 said that the decision of Mahmood, J., in *Faida Ali* v. *Muzaffar Ali*[2], is erroneous. The relevant passage at page 713 may be extracted :

"When a property is conveyed to a wife, in discharge of the dower debt, there is also no right of presumption. But when a house is sold to a third person in order to enable the husband to satisfy with the proceeds thereof the dower of his wife, the right of pre-emption comes into operation."

At the footnote is added that the decision in *Faida Ali* v. *Muzaffar Ali*[2], appears to proceed on a wrong interpretation of the law. In this case, it must be remembered that the learned author was dealing with the question whether a conveyance of immoveable property in favour of his wife in discharge of dower debt gives rise to a right of pre-emption. We are not concerned in this case with the question whether such a transaction is subject to the right of pre-emption. So, it is unnecessary for us to consider, which of the two views is correct. The reason of the learned author for the view that such a transaction is not subject to the right of pre-emption is stated in the following words :

"The wife conveying to the husband and *vice versa* do not thereby introduce a stranger among co-sharers or neighbours."

Our decision is confined to the question whether it is a sale within the meaning of section 54 of the Transfer of Property Act.

Next reliance was placed by Mr. Kuppuswami on a passage in Mulla's Transfer of Property Act, at page 297 (3rd Edn.) Referring to the decisions, which have taken the view that such a transaction as involved in this case, is sale within the meaning of section 54 of the Transfer of Property Act, the learned author remarked thus :

"But in some cases such a transaction has been held to be a sale on the ground (submitted to be erroneous) that the extinction of the dower debt is equivalent to the payment of price."

Despite the high authority of the book and the great respect we have for the learned author, we are afraid we cannot agree with the opinion that these decisions are erroneous. In this context we may refer to a passage at page 305 in the same book.

"The transaction called the *hiba-bil-ewaz* of India has been held to be a sale, so that if the property is immovable property of the value of Rs. 100 or upwards, it must be effected by a registered instrument."

At this place, the learned author does not express any opinion of his.

In this situation, we have to reject the contention put forward on behalf of the respondents. It follows that the view of the lower appellate Court that the transaction is valid, despite its not having been evidenced by a registered instrument cannot be sustained. Therefore the suit of the plaintiff, so far as it claims declaration of his title based on the oral sale in favour of the vendor by her husband is concerned, should fail.

1. (1876) L.R. 3 I.A. 291 : I.L.R. 2 Cal. 184 (P.C.).
2. (1882) I.L.R. 5 All. 65.

But this does not dispose of this appeal. We have next to consider whether the order in E. A. No. 617 of 1943 is sustainable, or, has to be vacated. On the findings that the plaintiff and his vendor were in possession of the property throughout, *i.e.*, ever since the transfer of the property to the plaintiff's vendor by Khasim Peeran and that the plaintiff and his vendor have remained in possession of the property, we do not think that the summary order directing the removal of the obstruction, said to have been caused by the plaintiff and the re-delivery of the property is sustainable. We do not understand how the defendants could maintain an application either under Order 21, rule 97 or Order 21, rule 100 of the Civil Procedure Code. It must be remembered that they were never in possession of the suit property. Hence they have no right to maintain an application either under Order 21, rule 97 or Order 21, rule 100, Civil Procedure Code. In this view of the matter, it is unnecessary for us to decide whether even otherwise, E.A. No. 617 of 1943 was not liable to be rejected.

In this second appeal, it is not necessary for us to consider whether the plaintiff is entitled to be in possession of the property till the vendor's dower debt is discharged and whether the plaintiff has got a possessory lien or not. This question may be relevant in other proceedings, *i.e.*, when the defendants seek to dispossess the plaintiff. Consequently, the order of the District Munsiff in E. A. No. 617 of 1943 has to be vacated with the result that the plaintiff is allowed to retain possession of the property till he is dispossessed in other and appropriate proceedings. The decrees of the Courts below will be confirmed subject to the deletion of clause 1 of the trial Court's decree. In view of the fact that the plaintiff has succeeded partially, we think it is desirable that the parties bear their respective costs throughout.

V.S. *Lower Court's decree confirmed subject to modification.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Kumaraswami Padayachi .. *Appellant**

v.

Govindaswami Padayachi .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), section 9-A—Applicability—Mortgagee in possession under usufructuary mortgage with a condition that mortgagee would become owner if mortgage not redeemed within five years.

Where a mortgagee is in possession under a usufructuary mortgage of 1927 containing a condition that in case the mortgage debt was not redeemed within five years, the mortgagee would become the owner, the condition being a clog on the equity of redemption, the mortgagee's possession after 1932 will only be that of a mortgagee and not that of a vendee with the result that section 9-A of the Madras Agriculturists Relief Act will directly apply to the case. The animus of the mortgagee, namely that he remained in possession as vendee, is not the decisive factor for the application of the provisions of section 9-A of the Act.

Appeal against the order of the Court of the Subordinate Judge, Mayuram, dated 7th October, 1949, in A. S. No. 75 of 1949, preferred against the order of the District Munsiff's Court, Mayuram, in O. P. No. 9 of 1949.

T. S. Krishnamurthi Ayyar for Appellant.

T. S. Kuppuswami Ayyar for Respondent.

The Court delivered the following

JUDGMENT.—The only question in this second appeal is whether section 9-A of the Madras Agriculturists Relief Act (IV of 1938) applies to the transaction in question. The scheduled properties were usufructuarily mortgaged on 5th June, 1927, in favour of the respondent's father for a sum of Rs. 500. There was a condition in the document that in case the mortgage debt was not redeemed

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*A. A. A. O. No. 18 of 1950. 9th January, 1952.

within five years, the mortgagee would become the owner. The mortgagor treating that condition as a clog on the equity of redemption applied for redemption after depositing the proportionate amount under section 9-A of the Act. Both the Courts found that the condition was a clog on the equity of redemption and therefore the creditor continued to be in possession only as mortgagee. On that finding the provisions of section 9-A of the Act directly applies. Section 9-A reads :

"Where a usufructuary mortgage was executed at any time before 30th September, 1947, and the mortgagee is in possession of the property mortgaged to him, the mortgagor shall be entitled to redeem the property notwithstanding that the time, if any, fixed in the mortgage for redeeming the mortgage has not arrived."

The learned counsel for the mortgagee contended that whatever might be the legal effect of the document he was in possession only after the expiry of five years not in his capacity as mortgagee but only in his capacity as vendee. His animus is the not decisive factor for the application of the provisions of section 9-A. If he was a usufructuary mortgagee and was in possession of the property mortgaged to him the provisions of section 9-A are attracted. The Courts found—and it cannot be disputed—that notwithstanding the aforesaid conditions he continued to be a mortgagee and he was in possession in his capacity only as mortgagee. Section 9-A therefore applies and the decision of the Courts below is correct. There is no dispute with regard to the correctness of the amount.

In the result, the second appeal fails and is dismissed with costs. No leave.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

Sanga Thevar .. *Appellant**

v.

Thanukodi Ammal and others .. *Respondents.*

Specific Relief Act (I of 1877), sections 27 (4) and 24 (b)—Suits for specific performance—Necessary allegations in the plaint regarding subsequent purchaser and readiness of plaintiff to perform his part of the contract—Remedying defects by oral evidence—Permissibility—Sale deed executed but not registered—Proper remedy.

According to section 27 (*b*) of the Specific Relief Act, the conditions to be satisfied are that the plaintiff must prove that the subsequent purchaser was not a purchaser for value, that he had not purchased it in good faith and that he had notice of the original contract. These cannot be spelled out from an averment in the plaint that the subsequent purchaser had fraudulently suppressed the sale deed in favour of the plaintiff and it would not be a sufficient compliance with the requirements of section 27.

Further there should be a specific allegation in cases of suits for specific performance that the party asking for the equitable relief has been ready and willing to perform his part of the contract. When a party fails to make the necessary allegations, he could not be allowed to remedy the defects by letting oral evidence on all such allegations.

Where it is found that in pursuance of an oral agreement to sell the vendor had executed the document of sale but it had not been registered, the remedy of the vendee is to ask for the enforcement of the registration of the document and not to ask for enforcing the original contract which had in fact become executed or performed.

Appeal against the order of the Court of the Subordinate Judge, Dindigul, dated 26th March, 1948, in A.S. No. 100 of 1948, preferred against the decree of the Court of the District Munsif, Periyakulam, in O.S. No. 295 of 1947, dated 10th July, 1948.

K. V. Srinivasa Ayyar for Appellant.

T. V. Gopalakrishnan for Respondent.

The Court delivered the following

JUDGMENT.—The second defendant in the suit is the appellant before me. The respondent filed the suit in the District Munsif's Court for enforcing a contract

* A. A. O. No. 538 of 1949. 8th January, 1952.

for sale of a house by the first defendant. The suit was for specific perfomance and the contract was an oral one ; but subsequent to that oral contract, there was a sale deed executed but was not registered, owing to certain machinations, which are alleged against the appellant. The learned District Munsif dismissed the suit on the ground that the contract alleged, on the basis of which specific performance was claimed, was not true and was not proved. A further question also arose in the suit as to whether this appellant, who was the second defendant in the lower Court and who had purchased the property from the first defendant, had notice of the contract between the plaintiff and the first defendant and whether he was entitled to retain the property purchased by him. On this, the learned District Munsif gave a finding against the plaintiff. The plaintiff, thereupon, preferred an appeal before the learned Subordinate Judge, who held that there was a valid contract between the first defendant and the plaintiff in respect of the sale of the property in question. But, on the second point he felt that the learned District Munsif had not applied his mind as to whether the appellant was a purchaser without notice and, therefore, remanded the suit for further trial and disposal. Against this remand order, the second defendant has preferred this appeal.

The first point raised by the appellant is that so far as he was concerned, necessary averments in the plaint have not been made that he was a purchaser with notice of the contract between the plaintiff and the first defendant or that he had not paid value in good faith for the property purchased from the first defendant and that section 27 (*b*) of the Specific Relief Act has not been complied with. Therefore, his contention is that the plaintiff was not entitled to any relief against him in the absence of such averments in the plaint and in the absence of proof of the same. On this point, the learned counsel for the respondent has pointed out the averments contained in paragraph 9 of the plaint and would urge that that paragraph is a sufficient answer to the complaint of the learned counsel for the appellant in that it has been alleged that the second defendant had notice of the sale, and that he was not a purchaser for value in good faith. I do not think that the averments in paragraph 9 of the plaint could be construed to contain all that the learned counsel for the respondent would urge to contain. That paragraph is simply a complaint against the defendant for having suppressed the sale deed said to have been executed by the first defendant in favour of the plaintiff, and it does not, in my opinion, comply in terms with the conditions that have to be alleged and proved under section 27 (*b*) of the Specific Relief Act. Section 27 (*b*) would say that except as otherwise provided by this chapter, specific performance of a contract may be enforced against any other person claiming under him by a title arising subsequent to the contract, except a transferee for value, who has paid his money in good faith and without notice of the original contract. According to sub-clause (*b*) of section 27, the conditions to be satisfied are that the plaintiff must prove that the second defendant purchaser was not a purchaser for value, that he had not purchased it in good faith and that he had notice of the original contract. These allegations cannot be spelled out of paragraph 9 of the plaint. In substance, the averment in paragraph 9 of the plaint is only to the effect that the second defendant had fraudulently suppressed the sale deed and that, therefore, the plaintiff was entitled to have a sale made to her and possession of the property delivered to her by her enforcing the right of specific performance against all the defendants. I do not think, as already observed, that this could be said to be sufficient compliance with the requirements of section 27 of the Specific Relief Act. There is, therefore, much force in the contention of the learned counsel for the appellant, in that the pleading is defective and, on this issue alone, the suit ought not to have been remanded but the decree of the lower Court should have been confirmed.

The next point raised by the learned counsel for the appellant is that the action brought about by the plaintiff being one in equity, it was incumbent upon the plaintiff to have made allegations in the plaint to the effect that she was ready and willing to perform her part of the contract *viz.*, to pay the sum of Rs. 1,000 and take over the property on execution of the sale deed either by the first defendant

or, in default by him, by the Court on his behalf. A perusal of the various paragraphs of the plaint does not disclose that any such allegation or averment has been made in the plaint. The only part of the plaint on which the learned counsel for the respondent could lay his finger for his contention that such an averment has been made is the prayer, wherein it is stated that a decree for specific performance may be passed as against all the defendants, directing their executing a sale deed of the undermentioned property for Rs. 1,000 at their cost and delivery of possession of the property. I do not think that this prayer can be said to be the kind of allegation or averment that is required in cases where the plaintiffs require equity to be done to them. The principle that parties, who seek equity must do equity themselves, meaning thereby that plaintiffs, who go to Court for enforceing their equitable claims against defendants must themselves express in unmistakable terms their readiness and willingness to perform their contract cannot be said to have been complied with in the form in which the prayer is couched in the plaint by the plaintiff in the suit. It is true that this principle has not been embodied in the form of a section in the Specific Relief Act but so much can be easily gathered from section 24 (*b*) of the Specific Relief Act, which provides that specific performances of a contract cannot be enforced in favour of a person, who has become incapable by performing or violates any essential term of the contract that in his part remains to be performed. It has been held by Courts in India as well as in England that the law of specific performance in this country has been based on the equitable principle that obtains in England and that in England it is a rule of practice, which is very essential and necessary to be observed *viz.*, that plaintiffs who seek to enforce equitable relief should themselves do equity and nothing should remain on their part unfulfilled, which they are themselves bound under the contract to fulfil or perform.

Both counsels in this appeal have invited my attention to the decision of the Privy Council in *Ardeshir H. Mama* v. *Flora Sasoon*[1] where it has been laid down, that the rule of equity in question is the same in India as in England and that, therefore, it is an essential condition that the party, who seeks equitable relief should also do equity. On the facts of this case and in the absence of any averment or allegation to the effect that the plaintiff was ready and willing to pay the sum of Rs. 1,000, which was the consideration agreed to between the first defendant and the plaintiff for the sale of the property in question, I do not think that the Court was justified in coming to the conclusion that the decree of the lower Court was wrong and, on that ground to have remanded the suit for further trial and disposal.

The learned Subordinate Judge instead of appreciating this complete omission of the averment, which is an essential condition for any suit for specific performance, has sought to spell out from the evidence that there was an offer of readiness and willingness on the part of the plaintiff to pay the sum of Rs. 1,000 and thereby perform her part of the contract. I do not think in the face of the decisions of this Court it was open to the learned Subordinate Judge to have inferred such readiness and willingness on the part of the plaintiff from the evidence that has been let in during the course of the trial. It cannot be said that when the party has failed to make the necessary averments or allegations in the plaint, he could be allowed to make up such defects by evidence and much less would it be reasonable to say that in cases like this where equitable relief is sought, the party should be allowed to remedy defects by letting in oral evidence on all allegations which he has failed to state in the plaint itself. The decisions in *Arjuna Mudaliar* v. *Lakshmi Ammal*[2] and *Dau Alakram* v. *Kulwantin Rai*[3], are in point and they lay down the rule that there should be a specific allegation in cases for specific performance that a party has been ready and willing to perform his part of the contract, and such not being the case in the present suit, I do not think that the suit could be sustained at all. If the suit could not be sustained on this ground, much less could an order of remand be sustained.

1. (1928) 55 M.L.J. 523 at 542 : I.R. 55 I.A. 360 : I.L.R. 52 Bom. 597 (P.C.).
2. (1948) 2 M.L.J. 271.
3. I.L.R. (1950) Nag. 386.

The further point that arises in this case is that on the evidence even if it were o be held that the oral contract had been proved, the parties having proceeded o a further stage, *viz.*, that the document of sale itself had been executed between the irst defendant and the plaintiff and when the evidence further shows that that locument of sale which was tendered for registration according to some of the vitness and which was not registered was in the possession of P.W. 8, the remedy hat was then open in such circumstances to the plaintiff was to have sought enforcement of the registration of the document and not to have proceeded to the Court for enforcing the original contract which had according to her own witnesses taken the shape of a definite document executed by the first defendant in her favour. This contention has been rightly raised by the learned Counsel for the appellant and I should think there is considerable force in this contention. When once in pursuance of the contract which is alleged to have been oral, a document came into existence and that the document went to the extent of being presented to the registering officer for being registered and was not registered for some reason or other, it follows that there was no further contract to be enforced. The contract had in fact become executed by reason of the execution of the sale deed so that on this ground also the plaintiff was bound to be non-suited. There was nothing more for the first defendant to do if the evidence of the plaintiff's witnesses was taken to be true, he having executed a document and if the document had gone out of the reach of the plaintiff, it was open to the plaintiff to have compelled its production from P.W. 8 and to have taken adequate remedies for enforcing her rights by the registration of this document instead of proceeding to Court to enforce the oral contract, which had become performed so far as the first defendant was concerned. Even from this aspect of the case, I do not think the learned Subordinate Judge was correct in having set aside the decree of the trial Court and then remanded the suit. On all these grounds, I am of the opinion that the decision taken by the learned Subordinate Judge to remand the suit was not correct and his order of remand is therefore set aisde.

The result would be that the decree of the first Court will stand confirmed and this appeal is allowed. The appellant will have his costs both in the Court below and in this Court.

Leave refused.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK, AND MR. JUSTICE RAMASWAMI GOUNDER.

Krishnan Naidu .. *Appellant.**
(Prisoner).

Criminal Procedure Code (V of 1898), sections 236 and 239—Joinder of accused and charges—Principles—Splitting up of cases—Propriety.

No general rule can be laid down as to when different offences can be said to have been committed in the course of the same transaction. The question when it arises must be determined on the facts of the particular case. But when the trial Court splits up cases, reference to it must be made in the judgment.

Where the police originally laid a charge sheet against the appellant and his father under sections 302 and 34 of the Indian Penal Code, and the committing Magistrate framed a charge of murder against the appellant and a charge under section 201 read with section 511 against the father and in the Sessions Court the case was split into two and the appellant alone was tried on the charge of murder,

Held, such splitting up was erroneous. The proper course for the trial Court was to have altered the charge against the father also after notice to one under section 302 or better still to have framed alternative charges under sections 302 and 201, Indian Penal Code against both the accused, keeping the original accusation made by the investigating police intact for a single judicial determination. As on the facts alleged by the prosecution it was doubtful which offence they will constitute, the procedure of alternative charges will be justified under section 236 of the Code.

* Referred Trial No. 50 of 1951. 8th November, 1951.
(Crl. Appeal No. 587 of 1951).

Trial referred by the Additional Sessions Judge, Salem Division for confi mation of the sentence of death passed upon the said prisoner in C.C. No. 44 of 195 on 2nd August, 1951, and appeal by the said prisoner.

V. L. Ethiraj and *K. Narayanaswami Mudaliar* for Appellant.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Judgment of the Court was delivered by

Mack, J—Appellant aged 19, the son of Rangappa Naicker, has bee found guilty under section 302, Indian Penal Code of the murder of a young woma Chittliammal aged about 16 and sentenced to death.

The facts of this case are remarkable. The police originally laid a charge-sheet against the father Rangappa Naicker, as A-1 and the son, the present appellant as A-2, it would appear, under section 302 read with section 34, Indian Penal Code The committing Magistrate on some unusual evidence in the case framed a charge of murder only against the son, and a charge under section 201, Indian Penal Code read with section 511, Indian Penal Code *i.e.*, for attempting to dispose of the murdered corpse against the father. In the Sessions Court, the case was split up into two and the learned Sessions Judge has tried the appellant separately on the charge of murder, it would appear, in view of the Full Bench decision of this Court In re *Seraje Narayana Bhatta*[1]. The trial Court judgment makes no reference at all to the fact that the father had also been charge-sheeted, and that the case was split up on this manner. A perusal of it leaves one in doubt and speculation as to the position of the father, whose absence either from the witness box or the dock, on the evidence admitted in the case, is otherwise quite inexplicable. Mr. Netto of the Salem Bar, who appeared in the trial Court and was present here to assist Mr. Ethiraj for the appellant, has clarified an obscure position. The learned Sessions Judge should, when he splits up cases in this manner, make reference to it in his judgment.

The facts of this strange case according to the prosecution are these. The corpse of Chittliammal was found in the field of Rangappa Naicker, according to the official plan about 300 yards from Kondireddipatti village, where he lived. She had been stabbed through the heart, the only fatal injury on her. She also had six abrasions or contusions, 4 in the chest and abdominal region, one on the forehead and one on the right knee. They are all simple injuries pointing to some struggle, which preceded the fatal stab injury 2¼" deep in the chest, which pierced the heart.

Rangappa Naicker himself had arranged for the marriage of this girl to his nephew P.W. 3 a few years before the offence and constructed a house for them to live in near his own. P.W. 3 left the village some time before this murder and Rangappa Naicker is said to have kept Chittiliammal as his concubine with whom his son also got infatuated and was having illicit intimacy. The only witness, who deposes to the existence of this alleged amorous rivalry between the father and the son is rather strangely the village magistrate of Kondireddipatti, Munuswami Naidu (P.W. 4) who lived in another village Anetheripatti about a mile from the scene of offence. The burden of the defence, which may be anticipated here, is that false evidence has been given and concocted by this village magistrate, who was a family enemy.

The evidence of the village magistrate Munuswami Naidu is that at 10 P.M. on Sunday, the 22nd of October 1950, one Chinnappa Naicken (P.W. 1), a resident of another hamlet Chinnampatti, which, according to the official plan is 300 yards from Kondireddipatti in the opposite direction to the scene of offence or altogether 600 yards from the scene of offence, came to him with a complaint, Exhibit P-1, which he took down. According to Exhibit P-1, P.W. 1 and one Boochadan (P.W. 7)

1. (1948) 2 M.L.J. 138: I.L.R. 1949 Mad. 220 (F.B.).

eard a noise in the field of Rangappa Naicker and on running to see, encountered :angappa Naicker and his son there the latter with a knife in his hand. Rangappa Jaicker told him that his son Krishnan had stabbed Chittliammal, begged him not) disclose anything and asked him, P.W. 7 and three other named persons, who ave not been examined including one Oor Naicker (P.W. 8) to help in cremating ıe body secretly. He refused and reported the matter to the village magistrate, ho says he went with P.W. 1 and on the way met Oor Naicker and others, the atter coming from the direction of the scene of offence, Rangappa Naicker himself nd his son. He says Rangappa Naicker on bended knees begged him to save his on, who had stabbed Chittliammal, not to report the matter and allow the body to be urnt. Rangappa Naicker himself, according to the village magistrate's evidence, ook him and showed him Chittliammal's corpse about 40 yards from a channel n his field. After inspecting it he wrote the report Exhibit P-1 incorporating hese facts, timed at 11 P.M. and despatched it to the authorities. This did not each Mathur Police station four miles away till 6 A.M. The Sub-Inspector reached he village at 9 A.M. and held the inquest, at which the village magistrate Munuswami Naidu himself was a panchayatdar. At the inquest, he says he examined P.Ws. 1, 7 and 8.

There was one eye witness to the actual stabbing, Ramaswami Moopan P.W. 2), who was not examined by the Police till the Wednesday. He and no less than three other important witnesses P.Ws. 3, 7 and 8 at the Sessions trial ll went back on their depositions in the committing Court and were permitted to e treated as hostile, their former depositions being exhibited under section 288, Criminal Procedure Code. The learned Sessions Judge was in error when in paragraph 5 of his judgment he stated that P.W. 6 had also turned hostile. He is witness of Kondireddipatti, who says he ran with a crowd to the scene and there Rangappa Naicker asked him and three others to help burn the corpse. He refused t first but was persuaded to join in carrying the corpse out of Rangappa Naicker's ield into a neighbouring groundnut field. Then they heard the village magistrate vas coming and put the corpse back into its original place. The earth taken up rom where the corpse was lying in Rangappa Naicker's field was found on chemical nalysis to be stained with human blood, and no attempt was made at any time o obliterate these traces. Though P.W. 6's deposition in the lower Court was not narked under section 288, Criminal Procedure Code, and no permission was given o treat him as hostile, in cross-examination he admitted that the village magistrate collected the witnesses in the village and paid for all his food and bus expenses in coming to Court.

In order to establish enmity between the village magistrate and Rangappa Naicker's family, much has been made of the fact that this village magistrate was prosecution witness in a murder case against Rangappa Naicker in 1949 in which ıe was acquitted. The village magistrate explained that he was examined merely s an official witness, who had sent up the first report. More relevant and tangible s a petition Exhibit D-3 written by the appellant himself on behalf of a village nenial, one Raman, dated 21st August, 1950 to the Sub-Collector complaining hat the village magistrate had not paid him his salary for July after obtaining is acquittance.

The only important witness, who has not resiled at the Sessions trial is P.W. 1, the first informant to the village magistrate from whom he recorded Exhibit P-1. But he has given evidence so astonishing in fundamentals as to make it entirely nacceptable. The evidence he gave in the Sessions Court was that at night meal ime while he was talking in the street in front of his house, he heard a woman's hrieks coming from the direction of Rangappa Naicker's field and ran with P.W. 7 nd others towards the place. He said that Rangappa Naicker's field was about furlong from the place where they were talking. This witness lived in Chinnampatti village no less than 600 yards from Rangappa Naicker's field. How he could ave heard any cries from there of a woman shouting passes comprehension. He robably went along with the large crowd, which gathered in Rangappa Naickers'

field some time after this murder. He then went on to corroborate what he said in Exhibit P-1 in which however he gave the time at which he heard the cry of "Ayyo, I am dead" at about 10 P.M. Another very improbable feature in his evidence is that when he found Rangappa Naicker and the appellant at the scene of offence, the appellant still had a knife or "soori kathi" in his hand.

Now the evidence that this witness was permitted to give at the Sessions trial and also the evidence of the village magistrate that Rangappa Naicker told him that his son had stabbed Chittliammal is legally inadmissible in a trial against the son himself without the father appearing as a witness. It is hearsay evidence of a dangerous character and wholly and legally inadmissible. The learned Sessions Judge merely made a note of the objection taken but allowed the evidence to go in. Had the father been on joint trial along with his son, the official complaint Exhibit P-1 made by P.W. 1 to the village magistrate and also the extraordinary request made by the father for his assistance in cremating the body, would have been legally admissible. The result of the splitting up of this case has been that all that the father is alleged to have said fastening responsibility on the son is totally inadmissible without his being examined as a witness himself. The learned Sessions Judge has based the conviction of the appellant mainly on P.W. 2's lower Court deposition Exhibit P-2. This is no doubt under section 288, Criminal Procedure Code substantive evidence in case. This witness lives in Kondireddipatti. His evidence was that on that sunday he was following from his village Rangappa Naicker and Chittliammal, the former carrying a tiffin carrier. Briefly his story is that the present appellant crossed him and struck a blow on Chittliammal's cheek, the tiffin carrier dropped down and she cried out "'Ayyo, appa" and then the appellant stabbed her in the chest with a knife. Rangappa Naicker then questioned his son. Father and son together came near the corpse and people came shoutting. He waited and also heard A-1 tell the persons that his son stabbed Chittliammal and begged them to arrange for the cremation of the corpse immediately. He also saw P.W. 6 and others lifting the corpse and he then went away to his field. He admitted even in the lower Court that he was cultivating the lands of the village magistrate on lease this year, but wholly denied a suggestion that he was deposing falsely at the instance of the village magistrate. In the Sessions Court, he gave an entirely different version saying that about 10 P.M. while on his way to his fields with some coolies he heard a hue and cry and the deceased Chittliammal came running from a depression, staggered and fell down close to him. He hastened away to his fields with his coolies. Even in examination-in-chief he deposed that the village magistrate tutored him to say that the woman was carrying food in a tiffin carrier and the rest of the version he gave in the committing court. He admitted that the whole of his lower Court deposition was false and pleaded that he gave it on being tutored by the village magistrate.

The next witness, who resiled is Rangappa Naicker's nephew (P.W. 3), who in the committing court deposed that his uncle got Chittliammal married to him but as he kept her as his own concubine, he left the village. In the Sessions Court, he merely says he went to his own village as he fell ill.

An extraordinary feature of this case is that the only witness, who deposes to the appellant also being on terms of illcit intimacy with Chittliammal is the village magistrate himself. His evidence that the father Rangappa Naicker was keeping this girl is strongly corroborated by the evidence of P.W. 3 in the committing Court, but the village magistrate remains the only witness examined, who deposed that the father and son were rival paramours of this girl. The village magistrate in the witness box admitted that his evidence was purely hearsay. It is strange that he was the only person in the locality, who came forward to depose in this manner.

The next witness, who has resiled, is P.W. 7 who, according to P.W. 1, ran with him to Rangappa Naicker's field on hearing a woman's shrieks. The evidence he gave in the Sessions Court was that there was a hue and cry to the

west of his village of Chennampatti, and that the village magistrate came and took him, P.W. 1 and some others. They went and saw the body but he declined to go near it in fear and went home. In his lower Court deposition, Exhibit P-5 he says he and P.W. 1 went together from Chennampatti on hearing cries to the west of their village, that they met A-1 and A-2, that A-1 told them the girl was stabbed and that they may report to the village magistrate. Very significantly, P.W. 2 did not say there that A-1 said that A-2 stabbed her. He further said that the appellant was also near the corpse. He ran home out of fear and then later on the village magistrate came and he and others accompanied him to the scene of offence. He then said that Rangappa Naicker wanted the corpse burnt but that the village magistrate did not agree. At no stage of his evidence in the lower Court, did he corroborate the village magistrate or P.W. 1 in any suggestion that it was the appellant who stabbed the woman.

The last witness, who resiled, is P.W. 8 named Chinnappa Naicker, who claims to be the Oor Naicker referred to supra. All he said in his lower Court deposition Exhibit P-6 is that he went with village magistrate, P.W. 1 and also strangely enough the eye witness P.W. 2 and saw Chittliammal's corpse in Rangappa Naicker's field. All he deposed to was that Rangappa Naicker and the appellant were there and that Chittliammal had a stab in her chest. He was treated as hostile because in the Sessions Court he did not say that when they went near the dead body, Rangappa Naicker and his son were there.

The wholesale resiling of these witnesses in the Sessions Court is an extraordinary feature of this case. It is capable of more than one explanation. It may be due to their being tutored to give false testimony, in a false twist given to this case by the village magistrate or to their having been gained over by Rangappa Naicker. There is a third reason which, we think, is more likely and that is that these witnesses after this case was split up and a case of murder was concentrated only on the present appellant, decided to give it no support at all. We are not prepared to say that they have deposed in the circumstances in all respects truly in the committing court and falsely in the Sessions Court.

It is very unfortunate that the case as originally laid by the police was split up in this manner into two separate trials. Mr. Ethiraj and the learned Public Prosecutor both agree that if the father and the son had been both tried together on charges under section 302, Indian Penal Code there would have been no misjoinder at all. In the Full Bench decision in In re *Seraje Narayana Bhatta*[1] there was a separate charge framed against three persons for causing the disappearance of a murdered corpse who had nothing to do with the murder itself. That Full Bench decision was on a reference made by Horwill, J. and myself and was occasioned by a difference of opinion between us. The view I then took and with the greatest respect to which I still incline is that in cases, in which the disposal of the body is done by one of the persons directly charged with murder, the persons who help him to dispose of the body, knowing he was the murderer, can be tried together with him, regarding murder and the disposal of the body as offences in the course of the same transaction under section 239 (*d*), Criminal Procedure Code though where disposal of a murdered corpse is done by persons, none of whom had any connection with the murder, then they should be tried separately. In our opinion and in this both Mr. Ethiraj and the learned Public Prosecutor agree, the Full Bench were dealing with the facts of a peculiar case as is clear from the following observation they made :

> " Obviously no general rule can be laid down as to when different offences can be said to have been committed in the course of the same transaction. The question when it arises must be determined on the facts of the particular case."

If the learned Sessions Judge splits up this case on the strength of this decision, all we can say is that he misapplied it. It was open to him after notice to the father to have altered the charge against the father also under section 302, Indian Penal Code or better still to have framed what we consider to have been proper charges

1. (1948) 2 M.L.J. 138 : I.L.R. 1949 Mad. 220 (F.B.).

on the facts alleged by the prosecution, *viz.*, alternative charges under section 302 and 201, Indian Penal Code against both the accused, keeping the original accusation made by the investigating police intact for a single judicial determination. On the peculiar facts in this case as alleged by the prosecution, it was clearly doubtful which offences they will constitute and the procedure of alternative charges was fully justified under section 236, Criminal Procedure Code. Mr. Ethiraj and the learned Public Prosecutor agree that if this had been done, there would have been no misjoinder at all. A superficial reading of the Full Bench decision appears to have engendered an erroneous view that an offence under section 201, Indian Penal Code can in no circumstances be tried along with section 302, Indian Penal Code. It is perfectly open to a court to convict an accused charged of murder under section 302, Indian Penal Code of an offence only under section 201, Indian Penal Code without even framing any separate charge under the latter section. This has been recognised in the Full Bench decision itself following the Privy Council decision *Begu* v. *King Emperor*[1].

We have carefully considered whether in this case there should be a retrial of the appellant along with his father. This cannot now be done without notice to the father. The only legal evidence against the son is the retracted evidence of the only eye-witness P.W. 2 and his lower court deposition admissible under section 288, Criminal Procedure Code. The evidence of P.W. 1 that he was standing with a knife in his hand with his father by the corpse is *prima facie* incredible. The legally admissible evidence against the appellant in the present case is quite insufficient to warrant a conviction. We have also decided that it is insufficient to justify even a retrial along with his father. We do not desire to express any opinion here about the truth or falsity of the evidence of the village magistrate P.W. 4 in view of the case pending aginst the father Rangappa Naicker on the charge under section 201, Indian Penal Code read with section 511, Indian Penal Code in respect of which he has been committed, which must take its course. Without the father appearing before us in the capacity of either witness or accused, we do not feel justified also in expressing any opinion. This is the unfortunate result of the bisection of the case and the Police accusation with the evidence against the son forced into the narrow groove of the first complaint and report made by the village magistrate in this case. With these observations, we allow the appeal, acquit the appellant and direct him to be set at liberty.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

B. A. Woodman .. *Petitioner.**

v.

Mrs. Regina Rajan .. *Respondent.*

Madras Buildings (Lease and Rent Control) Amendment Act (VIII of 1951), *sections* 7 (3-A), 12-B, 18 *and* 20—*Retrospective effect of—Proceedings pending before Courts within meaning of section* 20.

In between the filing of an execution application by a landlady for eviction of the tenant, against whom an order for eviction had been made, and the expiry of the time granted for delivery of possession, Act VIII of 1951 came into force on 1st May, 1951. On the question whether the tenant who belonged to an essential service could not be evicted in view of section 7 (3-A) of the Amended Act and whether the new Act has retrospective effect so as to affect the determination of the question,

Held, in view of the retrospective effect of Act VIII of 1951, and the protection that has been afforded to the tenant by reason of section 7 (3-A) and by virtue of the powers vested in the High Court, it would be in the interests of justice that the orders of the Rent Controller and of the City Civil Court in execution be declared to be *ultra vires*.

1. (1925) 48 M.L.J. 643 : L.R. 52 I.A. 191 : I.L.R. 6 Lah. 226 (P.C.).

* C. R. P. No. 1336 of 1951. 23rd January, 1952.

Petition under section 12 (*b*) of Act VIII of 1951, preferred to the High Court to revise the order of the City Civil Court, Madras, dated 9th July 1951 in E.A. No. 1772 of 1951 in E.P. No. 862 of 1951 in L. Dis. No. 4315 H.R.C. No. 1950.

M. Chinappan Nair for Petitioner.

V. Surasham and *P. M. V. Srinivasan* for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revisilon Petition is against the order of the learned City Civil Judge passed in E.A. No. 1772 of 1951 in E.P. No. 862 of 1951 in L. Dis. No. 4315 H.R.C. 1950.

The petitioner is the tenant against whom an order for eviction was passed by the Rent Controller on the 7th September, 1950. The order is in the following terms:

"Petitioner by advocate. Respondent in person. By consent respondent is given time for vacating till the 7th March, 1951. Eviction is ordered."

It transpires a further extension of time for vacating and delivery of possession was given till the 26th May 1951. This extension of time was given on 12th April 1951 by the City Civil Court. It was obviously given when the landlady filed an execution application on the 21st March, 1951. In between the filing of the execution application and the expiry of the extended time for delivery of possession, a new legislation *viz.*, Act VIII of 1951 came into force on the 1st May, 1951. That Act amended the original Act XV of 1946 as amended by further Acts. By the amendment of 1951 several new provisions were added to the existing Act. The relevant provisions which are material to this petition are those relating to section 7 (3-A), section 12-B, section 18 and section 20. Under section 7 (3-A) it was provided that no order for eviction shall be passed under sub-section (3) (1) against any tenant who is engaged in any employment or class of employment notified by the State Government as an essential service for the purpose of this sub-section, unless the landlord is himself engaged in any employment or class of employment which has been so notified. In this case it is common ground that the petitioner is engaged in an employment notified by the State Government as an essential service, he being employed in the High Court as a sergeant of the High Court. The next section that is relevant is the one contained in section 12-B which gives the High Court and the District Court power to revise, on the application of any aggrieved party, any order passed or proceedings taken under the Act by the authority, either the Rent Controller or the executing authority. There is an Explanation to this section which is also very relevant for the purpose of this petition and that Explanation reads:

"The jurisdiction of the High Court or District Court under this section shall extend also to orders passed on proceedings taken at any time within six months before the commencement of the Madras Buildings (Lease and Rent Control) Amending Act, 1951."

The next section which is relevant is section 18 but I do not think I need extract it here; but the more important section that is very material is the one enacted as section 20 which is to the following effect:

"Any rule or order made or deemed or purporting to have been made, any decision or direction given or deemed or purporting to have been given, any notification issued or deemed or purporting to have been issued, any action or proceeding taken or deemed or purporting to have been taken, or anything done or deemed or purporting to have been done, ... shall be deemed to be a rule or order made, decision or direction given, notification issued, action or proceeding taken, or thing done, under the corresponding provisions of this Act."

When E.P. No. 862 of 1951 was pending before the executing Court the tenant put in a petition E.A. No. 1772 of 1951 on the 16th May, 1951 praying that the Court may be pleased to cancel the warrant issued in E.A. No. 862 of 1951 on the ground that no order of eviction should be passed against him by virtue of the new provision under section 7 (3-A). His contention was that on a proper interpretation of section 7 (1) wherein it was stated that a tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisons

this section and while section 7 (3-A) stated that no order for eviction shall be passed under sub-section (3) against any tenant who has been notified by the State Government to be employed in an essential service, the order was inexecutable as against him and therefore the warrant should be cancelled. The learned City Civil Judge took the view that section 7 (1) of the Act refers only to eviction in execution of decrees and the decision in the case or order of eviction having been passed prior to the coming into force of Act VIII of 1951 there was no justification for him to cancel the order directing delivery of possession against the tenant. Against that order this revision petition has been preferred by the tenant.

The contention that is now raised before me by the learned counsel for the petitioner is that the order of the learned City Civil Judge is not sustainable by reason of the very provisions which he has failed to consider and whose effect he has simply brushed aside by stating that no reliance can be placed on section 7 (1) of the Act. That section does not merely contemplate eviction in execution of a decree but also contemplates eviction by other means and the word "otherwise" would certainly include orders by the Rent Controller as well. Even orders passed by the Rent Controller, if eviction is to take place it must be in accordance only with the provisions laid down in section 7 (1) and one of the provisions laid down in the amended section 7 (3-A) states that an employee who is notified to belong to an essential service cannot be evicted. The question is whether the City Civil Court, which is only executing an order of the Rent Controller passed long prior to the coming into force of the Act, can take notice of this statutory prohibition against eviction of an employee notified to belong to an essential service and pronounce that the order is not executable against such an employee. It is the contention of the learned counsel for the respondent that the City Civil Court, being simply an executing Court, under section 9 of the Act and being called upon to execute every order made under section 7, or section 8 and every order passed on appeal under section 12, or in revision under section 12-B, as if it was a decree passed by the excuting Court itself, will not be entitled to go behind the order of the Rent Controller wherein eviction of the tenant has already been ordered. It is the application of this section that is now in dispute. It has no doubt to be observed in the first instance that this Civil Revision Petition is only against the order of the City Civil Judge passed on the application of the tenant in which the applicant claimed that he was entitled to the benefit of the statutory prohibition that has been enacted under section 7 (3-A) and that the executing Court should take notice of it. But actually the learned City Civil Judge has not proceeded on this simple point that as an executing Court it is not possible for him to hear an objection raised by the tenant which according to the learned counsel for the respondent should have been raised before the Rent Controller. The reasoning given by the learned Judge is different from the point that has now been raised by the learned counsel for the respondent before me. The point stressed by the learned counsel for the petitioner on the other hand is that though the order of the Rent Controller which was passed prior to the coming into force of Act VIII of 1951 might have been valid, still no proceeding could be taken under that order in view of the new section 7 (3-A) that has been enacted and that by virtue of that section the order pronounced by the Rent Controller has become unexecutable, and therefore the learned City Civil Judge was not entitled to execute an order which had by law become void or illegal and by reason of that new law which has given the benefit to the tenant, the tenant cannot be asked to deliver vacant possession of the property in question. He further contends that he has acquired a statutory protection by virtue of the new section and therefore the executing court was bound to consider the validity of the order originally passed and then give the tenant the protection under the new section. I think there is force in the contention of the petitioner's advocate when he says that the order which had been sought to be executed by the respondent was no more capable of being executed by virtue of the new law which has therefore become a nullity. His further contention is that under section 24 of the Act any application made, appeal preferred or other proceeding instituted

under the Act and pending at the commencement of Act VIII of 1951 shall be disposed of as if Act VIII of 1951 had been in force at the time when such application, appeal or proceeding was made, preferred or instituted. The effect of this section is that the application made by the petitioner should be deemed to have been made under this Act and the proceeding instituted by the respondent for evicting the tenant should also be deemed to have been pending at the time Act VIII of 1951 came into force and the application of the tenant and the landlady will have to be disposed of as if they were made under the Act as amended by Act VIII of 1951 under which the tenant was given the protection that in so far as he is an employee in an essential service notified by the State Government, the eviction order shall not be executed against him.

It may be that the City Civil Court, proceeding with the execution, was not quite competent to go into this question as to whether section 7 (3-A) would apply to the tenant and whether he should get protection under that Act. Nevertheless when the application was made contesting that the order passed by the Rent Controller was not competent and was not capable of being executed, it was certainly open to the learned City Civil Judge to go into the question and say that an order which was not in accordance with the new section was no more executable.

Even if the learned City Civil Judge was not in a position to pronounce on the validity of the order which was sought to be executed by the landlady against the tenant, still in view of the fact that he failed to do so and a revision petition has been filed before this Court, is in my view, on a reasonable construction of section 12-B, this Court has got very wide powers to call for the records and then satisfy itself as to whether, not merely an original order passed by the Rent Controller but also any order passed by any executing Court was just or legal and was in accordance with law. The language of section 12-B gives ample power to the Court, when once the matter is before it, to call for and examine the records relating to any order passed or proceedings taken under the Act by such authority for the purpose of satisfying itself as to the legality, regularity or propriety of such order or proceeding and pass such order in reference thereto as it thinks fit. The present order is certainly one which has arisen in a proceeding which was filed by the landlady against the tenant. On an interpretation of section 20 of the Amending Act, section 7 (1), section 7 (3-A) and section 12-B, it seems to me that it is within the province and competence of this Court to consider the entire matter in its full perspective and then do justice in the matter. In my opinion, in view of the retrospective effect of Act VIII of 1951 and the protection that has been afforded to the tenant by reason of section 7 (3-A) and by virtue of the powers vested in this Court to satisfy itself as to whether the order of the Rent Controller or the subsequent order of the City Civil Judge in execution were competent or otherwise, I think it will be in the interests of justice that the Rent Controller's order as well as the order of the City Civil Judge should be set aside as not being competent and as being *ultra vires* of the sections referred to above.

Two decisions have been referred to, one reported in *Poonamchand* v. *Venkataratna Chettiar*[1], and the other in *Satyanarayana* v. *Venkatarattamma*[2]. It is not necessary for me to discuss the reasonings given in these two decisions but in my view the reasoning adopted in *Satyanarayana* v. *Venkatarattamma*[2], would attract itself to the facts of this case to some extent and the interpretation given therein of section 20 of the Amending Act VIII of 1951 is applicable to the facts of this case. I respectfully agree with that interpretation. In fact in C. R. P. No. 546 of 1951 decided by me I came to the same conclusion as the Bench in *Satyanarayana* v. *Venkatarattamma*[2] though this decision had not been brought to my notice while I was disposing of that revision petition. The learned counsel for the respondent attempted to make out that the tenant is trying to wriggle out from the original order passed by the Rent Controller by reason of the new section 7 (3-A). It is no question of wriggl-

1. (1951) 2 M.L.J. 531. 2. (1951) 2 M.L.J. 477.

ing out from the decision of the Rent Controller which at that time should be stated to have been very correctly given, but then by virtue of subsequent proceedings which are said to be pending and by virtue of the operation of section 20, a statutory right which has become vested in the tenant cannot be denied to him even if it be as contended by the learned counsel for the respondent that it was a consent order. A reading of the order passed by the Rent Controller does not however convince me that it could be said to be a consent order. Eviction is ordered irrespective of consent in that order; but the consent seems to apply only to the question of the time within which delivery of possession had to be made. For, the order seems to be clear that the question of consent has application only to the period of time when delivery of possession has to be given. But the order for eviction is independently of that consent. A feeble attempt was also made to show that there was an estoppel under section 115 of the Evidence Act. I do not think I need dilate on that. A further point raised by the learned counsel for the respondent was that the order of the Rent Controller having been passed on 7th September, 1950, and Act VIII of 1951 having come into force on 1st May, 1951, the order was not within six months contemplated under section 12-B in order to entitle its consideration by this Court in revision. I do not think there is much point in that contention for by reason of section 20 of the Amending Act and also section 18 of the Act the petition for execution as well as the petition for the cancellation of the warrant could be taken as action under the Act and they are respectively on the 21st March, 1951, and 16th May, 1951, so that the proceeding which can be taken to have been commenced, or pending, at the time when Act VIII of 1951 came into force are still within six months period referred to in section 12-B. In this view I think the learned City Civil Judge was not correct in seeking to execute the order by refusing to cancel the warrant issued against the tenant. The tenant, in my opinion, is entitled to the benefit of section 7 (3-A) and both the Rent Controllers' order as well as the order of the learned City Civil Judge will not be of any avail against him. The order of the Rent Controller cannot be executed in the face of section 7 (3-A) of the Act.

In the result this petition is allowed with costs throughout.

K.C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANCHAPAKESA AYYAR.

Ponnuru Sambiah and others .. *Petitioners**

v.

Annapareddi Venkatareddi and others .. *Respondents.*

Court-fees Act (VII of 1870), section 7, clause (v) (c)—Suit by Archakas for recovery of possession of lands parted with through judicial proceedings—Court-fee payable—Net profits—Calculation.

Where plaintiffs seek to recover possession of lands in which they claimed occupancy rights and with whose possession they had parted with legally and peacefully and under orders of Court in judicial proceedings and where a declaration of title to the kudiwaram was sought, and strangers were added, the section applicable for paying Court-fee for recovery of possession is section 7, clause (v) (c).

In calculating net profits, the cultivation expenses for raising crops should be deducted from value of annual profit and the amount of melwaram payable to landlord should also be deducted to get at the nett profits.

Kuppuswami Pillai v. *The Taj Fraksha Thaikkal Estate*, (1946) 1 M.L.J. 190, followed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Bapatla, in O. S. No. 21 of 1949.

K. Krishnamurthi and *G. Venkatarama Sastri* for Petitioners.

The Government Pleader (*P. Satyanarayana Raju*), *P. Rami Reddi*, *B. Prasada Rao*, *M. V. Nagaramiah* and *N. C. Raghavachari* for Respondents.

* C.R.P. Nos. 414, 415, 416 and 456 of 1950. 27th August, 1951.

The Court delivered the following

JUDGMENT.—These are four allied cases where the Subordinate Judge of Bapatla has directed a Court-fee to be paid *ad valorem*, on a valuation of Rs. 15,000 in the three suits covered by the Civil Revision Petitions 414 to 416, and of Rs. 9,000 in the suit covered by C. R. P. No. 456 of 1950, for recovery of possession of the lands in which the *archakas* claimed occupancy rights and from which they claimed to have been illegally *ejected* by orders of the District Court, Guntur in O. Ps., filed under section 78 of the Hindu Religious Endowments Act by the trustees of the temples acting under instructions from the Hindu Religious Endowments Board, Madras. In some suits there are other reliefs also claimed like accounting, mesne profits, etc., for which separate Court-fee has been paid and about which there is no dispute before me. The only dispute is regarding the mode of valuation for recovery of possession of these alleged occupancy lands after the *archakas* had parted, with possession, under the orders of the District Court in the O. Ps., by delivering possession to the trustees.

The learned counsel for the petitioners argued that in the first three suits the plaintiffs could value the relief regarding the recovery of possession under section 7 (xi) (*e*) of the Court-fees Act as in a case of *illegal ejection* of an occupancy tenant by a landlord by force, and pay only an *ad valorem* Court-fee of Rs. 112-8-0 on the amount of assumed rent of Rs. 1,000 payable for the year next before the date of presenting the plaint, and that the plaintiffs in the fourth suit could pay Court-fee for this relief on Rs. 600. All these petitioners were claiming to pay Court-fee for the relief of recovery of possession of these alleged occupancy lands, with whose possession they had parted by due process of law, under the orders of the District Court in O. Ps., on the wholly absurd and untenable ground that they were *illegally ejected* by the landlord. Even if the District Court's orders in the O. Ps. were wrong in law, there was no *illegal ejection* but *only legal ejection* by process of law. The learned Subordinate Judge held that the plaintiffs in all the four suits were bound to pay *ad valorem* court-fee, under section 7, clause v (*c*), on an amount of Rs. 15,000 in the first three suits, and on an amount of Rs. 9,000 in the fourth suit, being 15 times the "net profits" arising from the land during the year next before the date of presenting of the plaints. He held that as strangers (subsequent lessees from the trustees) were added in the first three suits, and as the title to the *kudiwaram* rights in the lands was sought to be got declared, section 7 (v) (*c*) of the Court-fees Act alone would apply. He relied for this position on a ruling by a Bench of this Court, consisting of Leach, C.J., and Lakshmana Rao, J., in *Kuppuswami Pillai* v. *The Taj Fraksha Thaikkal Estates by its managing trustees Katheeb M. K. Noor Sheriff and another*[1], on a reference by Rajamannar, J.

I have perused the records and heard the learned counsel on both sides. It is clear to me that in a case like this where a plaintiff is claiming occupancy rights in lands with whose possession he has parted with legally and peacefully,and under orders of Court in judicial proceedings, and where a declaration of the title of the *kudiwaram* was sought and strangers were added, the section applicable for paying the Court-fee for recovery of possession is section 7, clause v (*c*) as held by the lower Court relying on the Bench ruling, quoted above. Only, in calculating 15 times the *net profits*, the lower Court, in my opinion, erred in adopting the Rs. 1,000 and 600 shown as *annual profits* by the petitioners as the *net profits*. The cultivation expenses for raising the crops should be deducted, as urged by the learned counsel for the petitioners, from the value of the harvested crops (or *annual profits*, which was Rs. 1,000 and 600), and the rent or *melwaram* payable to the landholder should also be deducted *afterwards* from the above figure in order to get the *net profits*. Indeed, "annual profit," in the usual sense of the word, means the gross income or the price of the produce got from the lands. It is obvious

1. (1946) 1 M.L.J. 190.

that unless the cultivation expenses are deducted, it will not be correct to call that *net profits* to all. Usually we understand by *net profits*, from a land, what a man gets over and above his cultivation expenses. From the amount thus arrived at after deducting the cultivation expenses, a further amount must be deducted, in these cases, towards the rent or *melwaram* admittedly payable to the landholder, under the ruling in *Kuppuswami Pillai* v. *The Taj Fraksha Thaikkal Estate by its managing trustees Katheeb M. K. Noor Sheriff and another*[1], as these are only suits for establishing title to *kudiwaram* alone.

[His Lordship then discussed, the evidence and calculated the actual court-fee payable on an application of the above principles and concluded].

Mr. Krishnamurthi and Mr. Venkatarama Sastri, for the petitioners, urged that in several appeals decided in this Court, by Benches and single Judges, *archakas*, like these petitioners, have been allowed to enjoy under the temples, a suitable portion of the land (fixed in each case) to provide them with the wherewithal for doing service to the temples, and have been directed to surrender only the remaining lands to the temples. They prayed that such orders might be made in these cases also by me now, in order to save the *archakas* from wasting money in Court-fees and litigation. But, surely, these revision petitions, concerned only with the Court-fees due for recovery of possession, are not the proper forum for agitating this matter. When the suits come on for hearing, the trial Court will doubtless consider the various rulings of this Court regarding that matter, and pass appropriate orders suitable to each case after hearing both sides. No doubt, temples depend on *archakas* and *archakas* depend on temples, and a give and take policy is conducive to the welfare of both. The petitioners are at liberty, even before the deficit Court-fee is paid within the time fixed, to negotiate with the trustees of the temples and with the Hindu Religious Endowments Board on the basis of the judgments of this Court directing such equitable division, and arrive at just and equitable settlements appropriate to each case. I am sure the Hindu Religious Endowments Board will be as anxious to avoid wasteful, acrimonious and unnecessary litigation as the *archakas* but the *archakas* must be reasonable in their demands.

In all these civil revision petitions, all the parties will bear their own costs, as I am ordering only *ad valorem* court-fee for this relief on roughly half the amount fixed by the lower Court.

K.C. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Vadlamani Kalidas .. *Appellant**

v.

Fakir Mohammad Saheb and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 34, rule 4 (4)—Puisne mortgagee impleaded in first mortgagee's suit—Right to apply for final decree.

A puisne mortgagee who has been impleaded in a suit by the first mortgagee and obtains a preliminary decree can (even if the mortgagor has paid off the first mortgagee) apply for a final decree in the same manner as the plaintiff might have done under clause (4) of rule 4 of Order 34 of the Code of Civil Procedure. Order 34, rule 4 (4) is not exhaustive of the terms to be embodied in a preliminary decree for the sub-rule provides for such variations as the circumstances of the case may require. When there is a preliminary decree in favour of the puisne mortgagee, unless that decree is discharged by any of the ways known to law, the party in whose favour such a decree is made will be entitled to pursue the other and necessary steps to realise the amount decreed to be paid to him.

Appeal against the decree of the Court of the Subordinate Judge, Amalapuram, in A. S. No. 41 of 1947 preferred against the decree of the District Munsiff's Court, Amalapuram, in I. A. No. 169 of 1946 in O. S. No. 28 of 1940.

1. (1946) 1 M.L.J. 190.

* S.A. No. 712 of 1948. 1st November, 1951.

P. Somasundaram and *P. Suryanarayana* for Appellant.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This second appeal arises out of I. A. No. 169 of 1946, an application filed by the appellant for passing a final decree in his favour. One V. Kama Sastri filed O. S. No. 28 of 1940 on the file of the Court of the District Munsiff of Amalapuram to enforce the mortgage dated 18th March, 1918. Defendants 1 to 6 were either the mortgagors or their legal representatives. Defendant 7 was the subsequent purchaser of portion of the hypotheca. Defendants 8 and 9 were the subsequent mortgagees. Defendant 9, one of the puisne mortgagees impleaded in the suit prayed in his written statement for a decree on the foot of his mortgage. A preliminary decree was passed on 11th March, 1943. Defendant 9 paid the amount due to the plaintiff. Having paid the amount, he filed I. A. No. 179 of 1944 for passing a final decree in his favour not only for the amount due under the suit mortgage but also for the amount due under the subsequent mortgage held by him. On 30th March, 1944, the learned District Munsiff dismissed that application on the ground that there was no provision in the preliminary decree directing the passing of final decree for the consolidated sum of the two mortgages, one in favour of the plaintiff and the other in favour of defendant 9. But he held that defendant 9 was entitled to a final decree in his favour for the sum which he paid over to the prior mortgagee. On the same day, defendant 9 filed I. A. No. 363 of 1944 for amending the preliminary decree so as to bring it in conformity with form No. 9 of Appendix D of schedule 1, Civil Procedure Code. Pending that application, the receiver appointed for the administration of the mortgagor's estate paid the amount due on the first mortgage with subsequent interest to defendant 9. Defendant 9 received that amount without prejudice to his rights, which can only mean without prejudice to his rights which he was agitating in the aforesaid application. Full satisfaction of the plaintiff's mortgage claim was recorded on 1st August, 1944. The application for amendment was disposed of by the learned District Munsiff on 3rd September, 1945. He allowed the amendment and directed the decree to be brought in conformity with form No. 9 of Appendix D of schedule 1, Civil Procedure Code. He also rejected the plea that the application should not be allowed as full satisfaction of the decree was recorded. After the decree was amended, he filed the present application for the passing of the final decree. But that was dismissed by another District Munsiff on the ground that the application for final decree at the instance of defendant 9 was not maintainable as full satisfaction of the preliminary decree was recorded. When an appeal was filed to the Subordinate Judge, he confirmed the same. Defendant 9 preferred the above second appeal. The respondents are not represented by counsel.

The rights of a puisne mortgagee who is impleaded as defendant to a suit on the prior mortgage are governed by Order 34, rule 4 (4), Civil Procedure Code. It reads :

"Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in form No. 9, form No. 10 or form No. 11, as the case may be of Appendix D with such variations as the circumstances of the case may require."

Under form No. 9, the amounts does to the first mortgagee and the second mortgagee are declared. The defendants or any of them are directed to pay the amount due to the first mortgagee in Court within the prescribed time. It also directs the mortgagor to pay into Court on or before the prescribed date the amount due to the second mortgagee. If the amount due to the plaintiff is not paid, the property of the mortgagor is directed to be sold. The procedure to be followed if the hypotheca is directed to be sold is found in clause 4 (iii) of form No. 9. It says :

"In the case where a sale is ordered under clause 4 (ii) . . . . . the money realised by such sale shall be paid into court and be duly applied (after deduction therefrom of the expenses of the

sale) in payment of the amount payable to the plaintiff under this decree and under any furthe orders that may have been passed in this suit and in payment of the amount which the court ma adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expens as may be payable under rule 10, together with such subsequent interest as may be payable unde rule 11 of Order XXXIV of the First Schedule to the Civil Procedure Code, 1908, and that th balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that if an balance be left, it shall be paid to the defendant No. 1 or other person entitled to receive the same."

Under sub-clause (iv) of clause 4:

"if the money realised by such sale shall not be sufficient for payment in full of the amount due to the plaintiff and defendant, No. 2, the plaintiff or defendant No. 2 or both of them as the cas may be, shall be at liberty (when such remedy is open under the terms of their respective mortgag and is not barred by any law for the time being in force) to apply for a personal decree against defenc ant No. 1 for the amounts remaining due to them respectively."

Clause 5 (*a*) says:

"If defendant No. 2 (second mortgagee) pays into court to the credit of this suit the amoun adjudged due to the plaintiff but defendant No. 1 makes default in the payment of the said amo defendant No. 2 shall be at liberty to apply to the court to keep the plaintiff's mortgage alive for h benefit and to apply for a final decree."

Clause 6 provides the manner in which the second mortgagee, who paid the firs mortgage amount will be paid and also recognises his right to obtain a persona decree for the balance, if the amount realised is not sufficient to discharge botl the mortgages. Form No. 10 relates to a suit by the second mortgagee impleadin the first mortgagee as party. Form No. 11 refers to a suit by a sub-mortgagee.

The aforesaid provisions show that the mortgagee, who is the plaintiff, i ordinarily in charge of the suit. In case the mortgagor makes default in payin the amount declared due to him, he will have to apply for the passing of a fina decree and for the sale of the property. In a particular contingency, the secon mortgagee is entitled to apply for a final decree, that is, when he pays off th first mortgagee and thereby is subrogated to his right. In that contingency he i entitled to treat the suit brought by the first mortgagee as one for his benefit. H can apply to the Court under clause 5 of form No. 9 to keep the plaintiff's mortgag alive for his benefit and to apply for a final decree in the same manner as the plainti might have done under clause 4. But can a puisne mortgagee, who obtained preliminary decree in his favour also apply for the passing of a final decree if th first mortgage of the plaintiff is paid off by the mortgagors? If he cannot, it ma cause unexpected and undeserved hardship to the puisne mortgagee. A puisn mortgagee, who is made a party to a suit by a prior mortgagee, may agitate h rights in that suit and get a preliminary decree for payment. The suit may dra on for a number of years and if the mortgagors pay off the first mortgagee, th rights of the puisne mortgagee to institute another suit therefor may get barred.

Order 34, Civil Procedure Code, provides a machinery for ascertaining th rights of the puisne mortgagee and for declaring the amount due to him. Forr No. 9 also provides for a decree directing the mortgagor to deposit the amount du to him in Court within the time specified. But it does not expressly provide for case where after such a preliminary decree was made, the mortgagor pays off th first mortgagee. Order 34, rule 4 (4) is not exhaustive of the terms to be embodie in a preliminary decree for sub-rule (4) of Order 34 (4) provides for such variatior as the circumstances of the case may require. Further, when there is a preliminar decree in favour of the puisne mortgagee, unless that decree is discharged by an of the ways known to law, the party in whose favour such a decree is made will b entitled to pursue the other and necessary steps to realise the amount decreed to b paid to him. In *Vedavyasa Aiyar* v. *Madura Hindu Labha Nidhi Co., Ltd.*,[1] the fac were:

"In a suit for sale by a prior mortgagee against the mortgagor and a puisne mortgagee, decree not only directed the sale of the mortgaged properties for the amount found due to the pri mortgagee but also ascertained the amount due to the puisne mortgagee and ordered the payme to him of this amount out of the surplus sale proceeds."

1. (1918) 35 M.L.J. 639: I.L.R. 42 Mad. 90.

When the puisne mortgagee filed another suit, it was argued that section 47, Civil Procedure Code, was a bar to that suit and that the remedy of the puisne mortgagee was to execute the decree made in his favour in the suit by the prior mortgagee. At page 94, the learned Judges say :

"The utmost that can be said is that if the first mortgagee for some reason or other does not apply for sale in spite of the fact that he has not been paid, the other mortgagees can apply for sale in order to work out the rights to share in the surplus if any. This is quite different from their applying to sell the property to discharge the amount declared due to each of them. If the mortgagor pays off the amount for which alone a sale in default of payment was directed, it is difficult to see how under the express terms of the decree, each puisne encumbrancer can come forward and ask for sale. No time is fixed in the decree for redeeming them. There is no direction in the decree directing the mortgagee to pay them any amount and the right to share which is dependent on there being a sale and a surplus after paying off the plaintiff mortgagee cannot be enforced if for any reason the sale cannot take place at the instance of the plaintiff."

This judgment is therefore based upon the terms of the preliminary decree, which did not provide for redemption of the second mortgage. The second mortgagee also did not discharge the first mortgage. In *Jagannadha Rao* v. *K. V. Sastry*[1], another Bench of this Court had to consider the scope of Order 34, rule 4 (4). In that case, a mortgagee brought a suit for sale against the mortgagor, his sons and the puisne mortgagee. In that suit, the amount due to the puisne mortgagee and the question whether the subsequent mortgage was binding upon the sons were decided. The question arose whether the decision was binding on the principle of *res judicata* in a subsequent suit filed by the subsequent mortgagee. In the prior suit, a decree was drawn up in the manner required by Order 34, rule 4, and in the words found in form No. 9, Appendix D. At page 337, the learned Judges considered the scope of Order 34, rule 4 (4) and observed :

"That sub-rule says that where in a suit for sale subsequent mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in form No. 9 of Appendix D. It is clearly the object of the Legislature in this sub-rule that not only the rights of the prior mortgagee but also those of the subsequent mortgagees should be worked out in order to finally determine the claims on the property, which is the subject of the suit. As already pointed out, it provides an additional right on the part of the subsequent mortgagee to execute the decree as the plaintiff himself could provided that he pays off and redeems the mortgage of the plaintiff. No decree can therefore be passed in favour of the plaintiff alone without also determining the amount due to the subsequent mortgagees."

In this case it is not necessary to express my final opinion on the larger question raised as the puisne mortgagee paid off the first mortgagee. When he applied for final decree, it was dismissed on the ground that there was no provision in the preliminary decree directing the passing of a final decree for the consolidated sum of the two mortgages. On the same day, he applied for the amendment of the decree. The decree was amended on 3rd September, 1945 and in the amended decree, defendants 1 to 6 were directed to pay into Court the amount due to the puisne mortgagee. Meanwhile, on behalf of the mortgagors, the amount due to the first mortgagee, which the puisne mortgagee paid off, was paid to him by the Receiver on behalf of the mortgagors. The puisne mortgagee received that amount and passed a receipt without prejudice to his rights, which he was agitating in the application for amendment. The recording of full satisfaction in the circumstances of the case was only a tentative one subject to the result of the said application. As the preliminary decree was now amended and as a decree in the appellant's favour was given, he would be entitled to apply for the passing of a final decree for sale. The order of the lower Court is therefore set aside and the appeal is allowed with costs throughout.

Leave refused.

K.S. *Appeal allowed.*

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1. (1948) 1 M.L.J. 4 at 6 : A.I.R. 1948 Mad. 336.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Kalluri Krishnayya .. *Appellant**

v.

Potti Venkata Subbarayudu .. *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), *section* 9 (*as amended by amending Act XXIII of* 1948)—*Applicability—Debts incurred after the Act came into force.*

Before the amending Act XXIII of 1948 came into force, the law was that neither section 8 nor section 9 would apply to a debt incurred after 22nd March, 1938. The debt under section 9 could not be traced back to the earlier debt but should be scaled down with reference to the actual contract with the reduction of interest indicated in the section. Though the position with respect to debts under section 8 is altered as a result of the Explanation III to the section substituted by the amending Act XXIII of 1948, there is no change with respect to the tracing back of a debt under section 9 because in the proviso to that section though the words 'whether by same or a different debtor and whether in favour of the same or a different creditor' were inserted, nothing is said about debts renewed after the Act came into force.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla, in A. S. No. 183 of 1947, preferred against the decree of the District Munsiff's Court, Ongole, in O. S. No. 22 of 1946.

M. S. Ramachandra Rao and *M. Krishna Rao* for Appellant.

U. Sethumadhava Rao for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal raises a question in regard to the applicability of section 9 of the Madras Agriculturists' Relief Act (hereinafter referred to as the Act) to debts incurred after the Act came into force.

The facts are simple and are not in dispute. The defendant executed a promissory note Ex. P-1, dated 5th January, 1943, in favour of the plaintiff for a sum of Rs. 1,024-6-0. The prior promissory notes, which culminated in Ex. P-1, are as follows :

Ex. P-2 dated 7-1-1940.

Ex. P-3 dated 9-1-1937.

Ex. P-4 dated 11-1-1934.

The consideration for the earliest promissory note was Rs. 500. It will be seen from the aforesaid dates that the original debt was contracted after 1st October, 1932, and that Exs. P-1 and P-2 were executed subsequent to the Act, *i.e.*, 22nd March, 1938. The plaintiff filed O. S. No. 22 of 1946 on the file of the Court of the District Munsiff, Ongole, for recovery of a sum of Rs. 1,024-6-0 due under the promissory note Ex. P-1 with subsequent interest at 9 per cent. per annum. The defendant pleaded that he is an agriculturist and that the debt should be scaled down under the Act. He also contended that though Exs. P-1 and P-2 were executed subsequent to the Act, they were so executed under an arrangement between the parties that at the time of the settlement of the suit, the debt should be ascertained according to the Act and that the renewals were made only for the purpose of acknowledgment of the debt. The learned District Munsiff held that the agreement pleaded was not true but that the promissory notes executed subsequent to the Act were not supported by consideration. He found, after giving credit to the amounts paid, that the plaintiff would be entitled to a decree for sum of Rs. 333 and subsequent interest from 9th September, 1944, at 6¼ per cent. per annum. In appeal, the learned Subordinate Judge held that the plaintiff would be entitled to a decree on the basis of Ex. P-1 and, after giving credit to the amounts paid, he gave a decree for a sum of Rs. 656-13-8 with subsequent

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* S.A. No. 1008 of 1948. 21st November, 1951.

interest at the rate of 6¼ per cent. per annum. The defendant preferred the above second appeal.

The learned counsel for the appellant contended that, in view of the provisions introduced by amending Act XXIII of 1948, the debt is liable to be scaled down under the provisions of the Act. To appreciate the contention of the learned counsel, the relevant provisions of the Act, as amended by Act XXIII of 1948, may be read :

"8. Debts incurred before 1st October, 1932, shall be scaled down in the manner mentioned hereunder, namely :

(1) All interest outstanding on the 1st October, 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date."

"Explanation III : Where a debt has been renewed or included in a fresh document executed before or after the commencement of this Act, whether by the same or a different debtor and whether in favour of the same or a different creditor, the principal originally advanced together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable under this section."

This Explanation has been substituted by Amending Act XXIII of 1948 for the Explanation, which read as follows :—

"Where a debt has been renewed or included in a fresh document in favour of the same creditor, the principal originally advanced by the creditor together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable by the agriculturist under this section."

"9. (1) Debts incurred on or after the 1st October, 1932, shall be scaled down in the manner mentioned hereunder, namely :

Interest shall be calculated up to the commencement of this Act at the rate applicable to the debt under the law, custom, contract or decree of court under which it arises or at five per cent. per annum simple interest, whichever is less, and credit shall be given for all sums paid towards interest and only such amount as is found outstanding, if any, for interest thus calculated shall be deemed payable together with the principal amount or such portion of it as is due :

Provided that any part of the debt which is found to be a renewal of a prior debt (whether by the same or a different debtor, and whether in favour of the same or different creditor) shall be deemed to be a debt contracted on the date on which such prior debt was incurred and if such debt had been contracted prior to the 1st October, 1932, shall be dealt with under the provisions of section 8."

The words "whether by the same or a different debtor, and whether in favour of the same or different creditor" were inserted in the proviso by the Amending Act XXIII of 1948.

"13. In any proceeding for recovery of a debt, the court shall scale down all interest, due on any debt incurred by an agriculturist after the commencement of this Act, so as not to exceed a sum calculated at 6¼ per cent. per annum, simple interest, that is to say, one pie per rupee per mensem simple interest, or one anna per rupee per annum simple interest."

The law in regard to the interpretation of the aforesaid provisions in their unamended form was well settled and the decisions cited before me afford illustrations to the principles accepted by the Court. The applicability of section 8 of the Act to a promissory note executed after the commencement of the Act was considered in *Suryanarayana* v. *Alawandar Rao*[1].

The learned Judges observed at page 566 that

"it is well settled that a debt incurred after the commencement of Madras Act IV of 1938 cannot be scaled down except in accordance with section 13 of that Act."

The same rule was applied in *Thiruvenkadatha Ayyangar* v. *Sannappan Servai*[2] to a debt incurred after 1st October, 1932 and renewed after the Act came into force. The learned Judges observed at page 309 :

"Section 13 seems to provide a complete machinery for dealing with debts incurred after the commencement of the Act, and it appears to have been designed as part of a regular scheme whereby debts of agriculturists are divided into three categories : first, those incurred before 1st October,

1. (1945) 2 M.L.J. 565. 2. (1941) 2 M.L.J. 307.

1932, which fall under section 8; secondly, those incurred from 1st October, 1932 to 22nd March 1938, which fall under section 9; and thirdly, those incurred after 22nd March, 1938. The only point in seeking to apply section 9 to the last class of debts is to get the advantage of the proviso to section 9 (1). It seems to us that having regard to the scheme of the Act, if it had been the intention of the Legislature to include the theory of renewals into the scaling down operations in respect of debts incurred after the commencement of the Act, some specific provisions would have been made in this behalf. We are of opinion that all debts incurred after the commencement of the Act, whether they be in discharge of prior debts or not, will fall only under section 13."

In *Sarveswararao* v. *Venkata Subbayya*[1], the learned Judges further pointed out the scope of the proviso to section 9. They stated

"the obvious intention of the Legislature in enacting this proviso was merely to give a rule for the classification of debts into those to which section 8 will apply and those to which section 9 will apply. The latter class of debts has to be scaled down with reference to the actual contract modified to the extent indicated by the reduction of the rate of interest."

In an unreported judgment by another Bench of this Court of which I was also a member, this view was not accepted. There the suit promissory note was executed on 10th October, 1936. The prior promissory note was dated 10th November, 1933. We held that even in the case of a debt covered by section 9, the debt can be traced back to the earlier debt. That judgment was delivered on 10th March, 1949, *i.e.*, subsequent to the enactment of the Amending Act XXIII of 1948. The law therefore at the time when the Amending Act came into force was that neither section 8 nor section 9 would apply to a debt incurred after 22nd March, 1938. The debt under section 9 could not be traced back to the earlier debt but should be scaled down with reference to the actual contract with the reduction of interest indicated in that section. Section 13 governed all debts whether incurred for the first time or renewed in respect of earlier debts, if they were incurred or renewed after the Act came into force. At that stage, the Legislature intervened and substituted Explanation III to the pre-existing Explanation. Under the substituted Explanation, a debt, which has been renewed or included in a fresh document executed after the commencement of the Act, is also liable to be scaled down under section 8 of the Act. But, designedly, no similar explanation was added to section 9. I state "designedly" because the proviso to section 9 was also amended. Though the words found in the substituted Explanation III to section 8, *viz.*,

"whether by the same or a different debtor and whether in favour of the same or a different creditor"

were inserted in the proviso, the other part of that Explanation in regard to debts renewed after the Act came into force was not added to section 9 by an Explanation or otherwise. The Legislature presumably had knowledge of the decision in *Sarveswararao* v. *Venkata Subbayya*[1], wherein it was held that where no portion of the debt has been incurred before 1st October, 1932, the debt cannot be traced back and the debtor is only entitled to get under section 9 in respect of that debt the relief of reducing the rate of interest as provided therein. In view of that decision, as no question of tracing back the debt under section 9 arises, the Legislature did not think fit to add a similar Explanation to section 9 also. It follows that the suit promissory note, which was executed after the Act came into force and to which the provisions of section 9 apply, cannot be traced back to the earliest debt Exhibit P-4.

The principal of Exhibit P-1 must be taken to be the principal for applying the provisions of section 9. The learned Subordinate Judge's calculation is correct and is consistent with the provisions of section 9.

It is then contended by the learned counsel that the learned Subordinate Judge should have held that Exhibits P-1 and P-2 were only taken as vouchers acknowledging the debt incurred prior to the commencement of the Act. The defendant pleaded in the written statement that there was an arrangement between the parties that at the time of the settlement of the suit debt, the amounts shall be ascertained according to the Act, and, that the renewals were made for the purpose of acknowledging the debt. The learned District Munsiff held against the said

1. (1943) 1 M.L.J. 231.

agreement; though, curiously notwithstanding that finding, he held that the suit promissory note was not supported by consideration. In appeal, the learned Subordinate Judge accepted that finding. The argument of Mr. Ramachandra Rao that the learned District Munsif's finding that the promissory notes were taken as vouchers was not disturbed by the appellate court is without any basis whatsoever as a perusal of the District Munsiff's judgment shows that the Munsiff did not accept the defendant's case that they were given as vouchers.

In the result, the appeal fails and is dismissed with costs. No leave.

V.P.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Poosarla China Appalanarasimhalu .. *Petitioner**

v.

The Board of Revenue, Chepauk, Madras .. *Respondent.*

Indian Stamp Act (II of 1899), section 57—Scope of the powers and duty of Revenue Board under.

As held by the Supreme Court in *Chief Controlling Revenue Authority and the Superintendent of Stamps* v. *The Maharashtra Sugar Mills, Ltd.*, (1950) 2 M.L.J. 564 : 1950 S.C.J. 444, the power to make a reference under section 57 of the Act is not for the benefit of the Revenue Authority. It is coupled with a duty cast upon him as a public officer to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so, it is within the power of the Court to direct him to discharge that duty and make a reference.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* or other appropriate writ against the respondent calling for the records connected with and leading to the order of the Board of Revenue in its B.P.Rt. No. 5479 of 1951, dated 14th August, 1951 and to direct the Board of Revenue to draw up a statement of the case and refer it to the High Court for its opinion under section 57 of the Stamp Act.

E. Venkatesam and *E. L. Bhagiratha Rao* for Petitioner.

Vepa P. Sarathy for the Government Pleader (*P. Satyanarayana Raju*) for Respondent.

The Court made the following

ORDER.—This is an application for the issue of a writ of *mandamus* or other appropriate writ for directing the Revenue Board of Madras to refer the case to the High Court under section 57 of Act II of 1899.

One China Brahmajee and another Pedda Brahmajee were brothers. The petitioner is the son of China Brahmajee. Parvateesam and Sriramamurthi are the sons of Pedda Brahmajee. There was a partition between the two branches. Lists were prepared and they were reduced to writing on 1st July, 1946. Sriramamurthi produced the lists before the Commercial Tax Officer, Vizagapatam, in connection with some enquiry there. The Commercial Tax Officer impounded the instrument under section 33 of the Indian Stamp Act and forwarded it to the Deputy Collector, Narasapatam, for collection of deficit stamp duty and penalty. The Revenue Divisional Officer held that the document was a partition deed and, therefore, required to be stamped as a partition deed. He directed Sriramamurthi to pay a sum of Rs. 4,590 made up of deficit stamp duty payable on the document and the penalty imposed thereon. Sriramamurthi filed a petition before the Revenue Divisional Officer on 23rd December, 1947, questioning the correctness of the decision and also contending that the stamp duty and the penalty should be collected not only from him, but from the other sharers. The Revenue Divisional Officer, after giving notice to the parties concerned, reviewed his order and fixed the deficit stamp duty at a sum of Rs. 1,252-8-0 and the penalty at a sum

* Writ Petition No. 734 of 1951. 11th February, 1952.

of Rs. 6,262-8-0, and directed the Tahsildar, Chodavaram, to collect the said amounts from all the sharers. The petitioner preferred an appeal to the District Collector of Vizagapatam and against the said order of the Revenue Divisional Officer. The District Collector agreed with the Revenue Divisional Officer and dismissed the appeal. When a revision was filed to the Revenue Board of Madras, that was dismissed on the ground that they saw no reasons to interfere. The petitioner then filed an application before the Revenue Board under section 57 of the Indian Stamp Act requesting them to refer the case to the High Court for decision. The Revenue Board again held that it saw no reason to comply with the request of the petitioner. The present petition is filed for purposes of directing the Revenue Board to refer the case to the High Court.

The scope of the powers and the duty of the Revenue Board under section 57 of the Act has been clearly stated recently by the Supreme Court in *Chief Controlling Revenue Authority and the Superintendent of Stamps* v. *The Maharashtra Sugar Mills, Ltd.*[1]. The head-note in that case clearly brings out the salient features of the judgment. It reads :

" The power contained in section 57 of the Stamp Act is in the nature of an obligation or is coupled with an obligation and can be demanded to be used also by the parties affected by the assessment of the stamp duty. The power to make a reference under section 57 of the Act is not for the benefit of the Revenue Authority. It is coupled with a duty cast upon him, as a public officer to do the right thing, and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference. If he omits to do so, it is within the power of the Court to direct him to discharge that duty and make a reference."

The question, therefore, is whether, in the present case, important questions of law arise and whether the Revenue Board did not discharge their duty under the provisions of section 57 of the Act.

The learned Government Pleader contended that the point that arose in the case was the construction of a document and when once the construction put upon the document by the Revenue Board was correct, the Revenue Authorities had a clear right under the Act to recover the deficit stamp duty and the penalty imposed from all the parties to the document whereas the learned counsel for the petitioner argued that three substantial questions of law arose in the case and that this was a fit case for the Revenue Board to refer the case to the High Court for decision.

The three questions that arose for decision were stated by the Collector as follows :

1. Whether the document in question is not an instrument of partition within the meaning of section 2 (15) of the Indian Stamp Act and is not, therefore, liable to stamp duty or penalty ;

2. Whether P. Sriramamurthi, one of the co-sharers, being the person that produced the document before the Commercial Tax Officer, he alone was the person who could be proceeded against for the realisation of the duty and penalty and that it was not right to order collection from all the three brothers in equal shares ; and

3. Whether the Revenue Divisional Officer, having called upon Sriramamurthi to pay the stamp duty and penalty by his order dated 6th January, 1947, was not justified in subsequently reviewing the same by means of his order dated 13th July, 1948, in which the appellant and the other two brothers were asked to pay the stamp duty and penalty in equal shares.

The Collector held against the petitioner on all the points.

After hearing the learned counsel appearing for the petitioner and for the Revenue Board, I am of the view that the questions raised are substantial questions of law and the Revenue Board should have referred the matter to the High Court under section 57 of the Act. As the case will be referred to the High Court for decision, I think it is not advisable or even necessary to express my opinion on the three questions raised. I, therefore, direct the Revenue Board to refer the aforesaid three questions to the High Court under section 57 of Act II of 1899 within a month after the service of the writ. The petitioner will have his costs. Advocate's fee Rs. 100.

V.P.S. ——— *Writ issued as prayed for.*

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1. (1950) 2 M.L.J. 564 : 1950 S.C.J. 444 (S.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Sri Birapalli Sreekanta Venkata Krishna Reddi Garu .. *Appellant**

v.

Dandu Venkataraju and others .. *Respondents.*

Madras Estates Land Act (I of 1908), sections 145 and 147—Sale in execution of rent decree—No notice to purchaser—Validity.

The Madras Estates Land Act does not say that a transfer of a holding subsequent to the filing of an execution application against the original pattadar can be ignored or cannot be recognised by the landholder. Section 145 (2) of the Act will equally apply to a transferee prior to the filing of the application and to a transferee subsequent to that date. Once the recognition is made the transferee will become the owner for all purposes of the Act and thereafter the landholder can look to the purchaser only for effectuating his rights. A sale held without issuing a notice to the owner of the property is against principles of natural justice. Therefore a sale held in execution of a rent decree (after the receipt of a valid notice by the landholder) without issuing notice to the purchaser of the holding is void.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge, Eluru, in A.S. No. 39 of 1947, preferred against the decree of the Court of the District Munsif, Kovvur, in O.S. No. 78 of 1945.

P. Satyanarayana Raju for Appellant.

K. Bhimasankaram for Respondents.

The Court delivered the following

JUDGMENT.—The only question in this second appeal is whether the sale held in execution of a rent decree without issuing notice to the purchaser of the holding is valid.

The facts are simple and may be briefly stated. One Chintalapati Bapiraju had occupancy rights in the plaint schedule items. The defendant, Zamindar of Nandigudem, is the landholder. As Bapiraju was in arrears of rent, the defendant filed S. S. No. 422 of 1940 on the file of the Deputy Collector, Kovvur and obtained a decree. On 18th August, 1942, he filed E.P. No. 175 of 1942 for executing the decree. On 25th December, 1942, purporting to be under the terms of an agreement, dated 25th December, 1939, the sons of Bapiraju sold the holding to the plaintiffs under Exhibit P-1. Subsequent to the purchase, in execution of a rent decree and without giving any notice to the purchasers the holding was sold on 21st October, 1943 and purchased by the Zamindar. The plaintiffs, *i.e.*, the vendees under Exhibit P-1 filed O.S. No. 78 of 1945 on the file of the District Munsif Court, Kovvur, for a declaration that the said court sale was not binding on them inasmuch as they were not impleaded in the execution application and no notice of the sale was served on them. Both the courts held that the sale was void and gave a decree as prayed for.

Learned counsel for the appellant raised before me the following two points : (1) that the landholder is not bound to give notice or to implead the plaintiffs as their purchase was not recognised by the landholder under the provisions of the Madras Estates Land Act and (2) though the execution of the decree after the purchaser was recognised by the landholder was bad, there was no duty cast on the landholder to implead the purchaser as the sale was subsequent to the filing of the execution application. The first point turns upon the provisions of section 145 (2) of the Madras Estates Land Act which is as follows :

"Where a holding or any portion thereof is transferred by the act of a ryot, the landholder on receiving notice thereof in writing from the transferor and the transferee shall recognise the transfer."

In this case the evidence accepted by the Court below establishes that a notice in writing signed by the transferor and the transferee was received by the landholder.

* S.A. No. 1677 of 1948. 17th January, 1952.

P.W. 1 speaks to that fact and his evidence has been accepted. There are no pe missible grounds for taking a different view of the evidence adduced in the cas I therefore hold that the provisions of section 145 (2) have been strictly complie with and therefore the landholder is bound to recognise the transfer.

I am also not satisfied that there are merits in the second point either. Sectio 147, the governing section says :

"(1) All acts and proceedings commenced or had under this Act against the transferor or tl co-sharers prior to

(a) the giving of the notice under sub-section (2) of section 145 in so far as such acts and pro ceedings affect or purport to affect the land on which the arrear is due, the crops growing thereo and the products gathered therefrom, shall as against the transferee or co-sharer be as valid an effectual as if such acts and proceedings had been commenced or had against the transferee or co sharer himself, and he had been the defaulter."

Under this section all acts and proceedings against the original pattadar prior t the requisite notice will be binding on the purchaser. It is argued that as a corollar to this section, the sale subsequent to the initiation of the proceedings will be bindin on him and it is not necessary to implead him as a party even though he has complie with the provisions of section 145 (2). The section speaks of "all acts and proceed ings." Though the execution application was filed prior to the sale, it cannot be sai that the act of sale took place or proceedings in respect of that sale were initiate prior to the issue of the aforesaid notice. In *Veeramma* v. *Ramanna*[1], Leach, C.J and Lakshmana Rao, J., had occasion to resolve the conflict between two judgment of single Judges one that of Venkataramana Rao, J. and the other of Wadsworth, J The learned Judges agreed with the view expressed by Venkataramana Rao, J. in preference to that of Wadsworth, J. There the facts were the landholder havin had notice under section 145 (2) of the Act of the transfer of a portion of a holdin belonging to a pattadar, brought the holding to sale in execution of a rent decre passed against the pattadar under section 77 of the Act without giving notice of th execution proceedings to the transferee. The learned Judges held that the sal was void as under section 147 (1) such notice was necessary. It is true, as pointe out by learned counsel for the appellant, that on the facts of that case, the transfe of the holding was effected prior to the filing of the execution application. But perusal of the judgment discloses that nothing turned upon the circumstance The *ratio decidendi* of the decision is found at page 852. The learned Judge observed :

"It is quite a different matter to say that no notice shall be given to a transferee when the has been a rent suit and the landholder is proceeding in execution of the decree obtained by him ther in. Section 145 (2) read with section 147 (1) makes it quite clear that notice is necessary. Whe notice is required and is not given the transferee cannot be affected by anything done behind his bac If the property is sold in such circumstances, the sale is invalid."

In support of their conclusion the learned Judges relied on a decision of a Full Benc in *Kanchamalai Pathar* v. *Shahaji Raja Sahib*[2], where the learned Judges held that sale without issuing notice under Order 21, rule 22, Civil Procedure Code, to th legal representative of the judgment-debtor was void. Venkataramana Rao, J in *Subbarayulu Naidu* v. *Arunachala Nadar*[3] expressed his view in the following terms

"Thus it will be seen that once the transfer is notified to the landholder, the transferee is entitle to be impleaded in any fresh proceeding initiated after such notification though such proceedin be in connection with any decree or execution pending against the transferor before the date of notif cation or recognition."

It is again true, as pointed out by the learned counsel, that in that case the transfe was effected prior to the filing of the execution application. But the above remark clearly indicate that that fact would not make any difference in the legal situatio for though the execution was started earlier, the proceedings in respect of the sal would be void as no notice of that sale was given to the transferee who was legall recognised by the landholder.

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1. (1946) 1 M.L.J. 226 : I.L.R. (1946) Mad. 846.
2. (1935) 70 M.L.J. 162 : I.L.R. 59 Mad. 461 (F.B.).
3. (1936) 70 M.L.J. 576.

Even on principle the contention of the learned counsel does not appear to be sound. The Madras Estates Land Act does not say that a transfer of a holding subsequent to the filing of an execution application against the original pattadar can be ignored or cannot be recognised by the landholder. Section 145 (2) will equally apply to a transferee prior to the filing of the application and to a transferee subsequent to that date. Once the recognition is made the transferee will become the owner for all the purposes of the Act and thereafter the landholder can look to the purchaser only for effectuating his rights. A sale held without issuing notice to the owner of the property is against the principles of natural justice.

For all the aforesaid reasons, I agree with the courts below that the sale held without giving the requisite notice to the transferee is void. The second appeal fails and is dismissed with costs.

No leave.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice.*

Dusbha Viswanadha Sastri, power-of-attorney holder for Ivaturi Mallikarjuna Rao and others .. *Appellants**

v.

Dronamraju Venkatakrishna Rao and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 90—Execution sale for a larger amount than actually due under the decree and purchase by decree-holder himself—Validity.

A decree-holder himself purchasing the property in execution levied for a much larger amount than what he knew to be actually due under the decree cannot be allowed to retain the property and the sale cannot be allowed to stand.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge, Ellore, in A.S. No. 47 of 1946, preferred against the decree of the District Munsif's Court, Kovvur, in O.S. No. 334 of 1942.

V. Parthasarathi for Appellants.

U. Sethumadhava Rao, K. Krishnamurthi and *M. Dwarakanath* for Respondents.

The Court delivered the following

JUDGMENT.—Both the courts have held that the sale held in execution of the decree in S. S. No. 312 of 1937 in E.P. No. 26 of 1938 was not valid. The District Munsif who tried the suit set aside the sale on four grounds, but in appeal the learned Subordinate Judge held that the decree had to be set aside on two grounds. These two grounds really amount to this, namely, that the decree was executed for an excess amount and to the knowledge of the decree-holder who himself was the purchaser. By virtue of section 15 of Madras Act IV of 1938 the judgment-debtor obtained benefit of half the rent for faslis 1344, 1345 and 1346. The amount deposited by the judgment-debtor was even withdrawn by the decree-holder. Nevertheless execution was levied for the entire amount and not for the balance only, and this in spite of an order of Court. Obviously, therefore, the decree-holder who knew that what was due under the decree was an amount far less than the amount for which he brought the properties of the judgment-debtor to sale cannot retain the properties purchased at such a sale by himself, whatever might be the case of an innocent third party purchaser. It will really amount to allowing a person who is in the wrong to take advantage of that wrong.

Observations in a decision of a Division Bench in *Kasturi Aiyangar* v. *Arunachalam Chettiar*[1] were relied upon by learned counsel for the appellant. In that

*S.A. No. 45 of 1947. 3rd December, 1951.

1. (1915) 34 I.C. 350 and 352.

case the learned Judges held that the levy of execution for the full amount w: justified, but went on to say by way of *obiter* that even if a certain payment had bee taken into account, there would still be money due and it could not be said tha the Court had no jurisdiction to proceed with the execution of the decree. Ther was no necessity in that case to finally determine the question whether, in circum stances like those in the present case, namely, of a decree-holder himself purchasin the property in execution levied for a much larger amount than what was actuall due and to his knowledge, the sale should be allowed to stand. In *Rewa Mahto* v. *Ramkishen Singh*[1] the purchaser was a third party who clould not be impresse with the knowledge of another decree against the decree-holder in the case in favou of the judgment-debtor.

I agree with the learned Subordinate Judge in holding that the sale has to b set aside. The second appeal is therefore dismissed with costs. Leave refused.

V.P.S. ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Sakuntala Bai .. *Petitioner**

v.

Venkatakrishna Reddi, the Customs Inspector of Reddichavadi Customs Chouki, Cuddalore Taluk .. *Respondent.*

Sea Customs Act (*VIII of* 1878), *section* 198—*Customs Inspector abusing and assaulting person suspected of smuggling—Prosecution for—Accused if can plead that it was an official act and a month's previous notice under section* 198 *was necessary—Criminal Procedure Code* (*V of* 1898), *section* 197—*Sanction of Central Government, if essential for prosecution.*

It is no part of the duty of a Customs Inspector to lose his temper and abuse and assault a person suspected of smuggling who refuses to remove the gold ornaments worn by her. Such acts cannot be said to have been done or purported to be done in the discharge of official duties. Accordingly a month's previous notice to the accused is not necessary for the prosecution of the Customs Inspector. Such a prosecution does not require sanction under section 197, Criminal Procedure Code. Assuming such sanction is necessary, the sanction of the Central Government is not necessary because the Customs Inspector is removable by a delegated authority.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the District Magistrate (Judicial) of South Arcot, Cuddalore, in C.C. No. 399 of 1950, dated 9th December, 1950.

T. R. Srinivasan for Petitioner.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—This is a criminal revision petition filed against the order of discharge made by the learned District Magistrate (Judicial) of South Arcot at Cuddalore in C.C. No. 399 of 1950.

The facts are :—One Sakuntala Bai travelled in a bus from Pondicherry to Cuddalore on 17th April, 1950. It is stated that she was on her way to her husband's house. The bus was stopped at Reddichavadi Customs Chouki for inspection by the customs authorities. This Sakuntala Bai states that she was examined by the woman customs guard and was sent out and that while she was about to get back into the bus she was called by the accused Venkatakrishna Reddi the Inspector of the Reddichavadi Customs Chouki and asked to remove the gold bangles and the gold golusu worn by her and that she refused to do so. Thereupon the accused is said to have abused her and also assaulted her by giving a slap on her face and a few blows on her back with his leather belt and that he forcibly removed the gold bangles and golusu from her hands and detained her in the Chouki till 8-15 P.M. until she paid a fine of Rs. 1,000. On the foot of that she filed a complaint against

1. (1886) L.R. 13 I.A. 106: I.L.R. 14 Cal. 18 (P.C.).

*Cr. R.C. No. 107 of 1951. 6th February, 1952.
(Cr. R.P. No. 106 of 1951).

ie accused on 26th April, 1950. This case was filed before the Stationary Sub-Magistrate of Cuddalore under sections 355, 323 and 342, Indian Penal Code. in C.C. No. 1414 of 1950 and the learned Sub-Magistrate after examining the complainant on oath took the complaint on file under section 355, Indian Penal Code and issued summons to the accused.

Then on a petition (C.M.P. No. 24 of 1950) filed by the accused the case was transferred to the file of the District Magistrate and numbered as C.C. No. 399 of 1950. I may point out here that the complainant sought to corroborate her case by a medical certificate also.

The accused took a preliminary objection under section 197, Criminal Procedure Code and also under section 198, Sea Customs Act. His case was that as Inspector of Customs attached to the Central Government appointed under section 3 of the Sea Customs and Land Customs Act, he was a public servant not removable from office even by the Local Government and that to prosecute such an officer for an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties sanction will have to be obtained from the Central Government and that under section 197, Criminal Procedure Code, the Court could not take cognizance of the offence against him except with the previous sanction of the Central Government. The contention under section 198 of the Sea Customs Act is that

"no proceeding other than a suit shall be commenced against any person for anything purporting to be done in pursuance of the said Act without giving to such person a month's previous notice in writing of the intended proceeding and of the cause thereof; or after the expiration of three months from the accrual of such cause."

There is no dispute in this case that this procedure was not followed in the sense that notice was not given though the complaint was filed within three months of the accrual of such cause. These contentions found favour with the learned District Magistrate (Judicial) of Cuddalore and the complaint was dismissed and the accused was discharged.

The two points which fall for consideration before me are whether section 198, Sea Customs Act, and section 197, Criminal Procedure Code, apply to this case.

Point 1.—So far as section 198, Sea Customs Act, is concerned the learned District Magistrate was not at all justified in holding that that section applied to the facts of this case. The reasoning of the learned Judicial District Magistrate is that the accused got wild and assaulted the lady as she refused to remove the jewels from her hands and surrender them and that therefore that even if the accused had assaulted the complainant it was an act done or purporting to be done by the accused in the discharge of his official duties. I am astonished that such an argument should have found countenance with a Judicial District Magistrate as nowhere does the Sea Customs Act permit the Customs authorities to beat a respectable lady not only with hands but also with a belt as part of their official duty. Chapter XVII of the Sea Customs Act lays down the procedure in regard to such cases. It was open to the Inspector to arrest this lady on his suspecting that she was trying to smuggle dutiable goods and then produce her before the nearest Magistrate or Customs Collector and seize the articles liable to confiscation, etc. It is no part of the duty of a Customs Inspector to lose his temper and do any of the acts attributed to him in the complaint and if he does so it will certainly be an act not done or purporting to be done in the discharge of his official duties. This point has been elaborately dealt with in two leading judgments of the Privy Council and the Federal Court. In *Hori Ram Singh* v. *Emperor*[1] the phrase "act done or purporting to be done in execution of the duty as servant of the Crown" was fully discussed. Their Lordships of the Federal Court laid down that

"the test is not that the offence is capable of being committed only by a public servant and not by any one else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty. The section cannot be confined to only such acts as are done by a

1. (1939) 2 M.L.J. (Sup.) 23.

public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. The section is not intended to apply to acts done purely in a private capacity by a public servant. It must have been ostensibly done by him in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at that time. Moreover, an act is not less one done or purporting to be done in execution of a duty because the officer concerned does it negligently."

This has not been the case here. If for instance the complainant woman tried to run away or resist the removal of the ornaments by the female guard, who should naturally be employed in seizing the articles, one can understand if force is used to prevent the woman running away or ovecome her resistance. That application of force could be an act done or purporting to be done in execution of his duty though negligence might have been displayed and more force than was necessary was used. But when the Sea Customs Act itself prescribes the procedure to be followed in such cases this Customs Inspector could not administer summary condign punishment and assault a respectable woman with hands and belt and cause injuries to her. Therefore applying the principles laid down in this Federal Court decision this is certainly not an instance of "an act done or purporting to be done in execution of duty as a servant of the Crown". Then turning to the decision of the Privy Council in *Gill* v. *King Emperor*[1] their Lordships have held that

"a public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a Government Medical Officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act."

In other words, their Lordships of the Privy Council while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials, cannot accede to the view that the relevant words have the scope that has in some cases been given to them. Therefore, as I have stated, it is an astonishing fact that the learned Judicial District Magistrate should have thought that beating a would-be smuggler not for the purpose of seizure but for ventilating his outburst of temper is an act done in the course of official duty or purporting to be done in the course of official duty by a servant of the State. The less we protect such public servants the better and the more we allow citizens to ventilate their just grievance the better. On this construction there is no question of failure to follow the procedure prescribed under section 198, Sea Customs Act.

Point 2: Then turning to section 197, Criminal Procedure Code, as I have pointed out above two contentions are advanced, *viz*., that first of all this is an offence for which sanction is required and secondly that the sanction should be given by the Central Government. In my opinion both these contentions are devoid of any substance.

In order to make out the pre-requisite of sanction it must be established that the act which was done was an act done by the official while acting or purporting to act in the discharge of his official duties. To some extent this point has been discussed while dealing with section 198, Sea Customs Act. The test to be applied in such cases has been well laid in two decisions of this Court. In *Sheik Abdul Kadir Sahib* v. *Emperor*[2], Coutts-Trotter, J., pointed out that section 197, Criminal Procedure Code, is intended to apply to those cases in which the offence is an offence which can be committed by a public servant only, that is, cases in which his being a public servant is a necessary element in the offence. Thus, where a Judge commits an offence from the Bench which could be committed by anybody and which entails consequences neither in the way of penalty nor anything in the least different because a Judge committed it from what it would entail if committed by anybody else., sanction is not required for his prosecution under section 197, Criminal Procedure Code. In *Raja Rao* v. *Ramaswami*[3], Jackson, J., pointed out as follows:

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1. (1948) 2 M.L.J. 6: L.R. 75 I.A. 41: (1948) F.L.J. 13: (1948) F.C.R. 19.
2. (1916) 1 M.W.N. 384.
3. (1927) 52 M.L.J. 647: I.L.R. 50 Mad. 754

"Section 197, Criminal Procedure Code, presents no difficulty if the obvious intention of the legislature is borne in mind. It is no part of British policy to set an official above the common law. If he commits a common offence he has no peculiar privilege. But if one of his official acts is alleged to be an offence, the State will not allow him to be prosecuted without its sanction, for the obvious reason that otherwise official action would be beset by private prosecution. Judges would be charged with defamation, policemen with wrongful restraint, and distrainers with theft. This privilege of immunity from prosecution without sanction only extends to acts which can be shown to be in discharge of official duty, or fairly purporting to be in such discharge."

In other words, a prosecution for an offence arising out of the abuse of official position by an act not purporting to be official, does not require sanction under section 197, Criminal Procedure Code.

In this case two points are involved, *viz.*, first of all whether the Customs Inspector did assault this Sakuntala Bai as alleged by her and which she was prepared to prove by means of medical certificate and otherwise and secondly, whether in the event of her affirmatively and satisfactorily proving that the accused did assault her then whether it was for one of the purposes which would have made out that it was a case of use of reasonable force for discharging an official duty and then the question of sanction would arise. So on the mere contention of the accused that even if he is assumed to have assaulted the complainant he would be protected under section 197, Criminal Procedure Code, is meaningless. It is not a pure question of law but a mixed question of fact and law and has to be decided after investigation and cannot be short-circuited by summarily throwing out the complaint.

Then in regard to this accused being a servant of the Central Government, it is of academical importance in view of the fact that I have held that *prima facie* at the present stage no sanction is necessary. But assuming that such a sanction is necessary, the sanction of the Central Government is not necessary because the Customs Inspector is removable by a delegated authority. It is admitted that the Customs Inspector can be dismissed by a person other than the Central Government. There is a bench decision of this Court on this point: *Pichai Pillai* v. *Balasundara Mudaly*[1], It was held there as follows:

"The expression 'any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority' in section 197 (1), Criminal Procedure Code, will not include public servants whom some lower authority has by law or rule or order been empowered to remove."

The section clearly intends to draw a line between public servants and to provide that only in the case of the higher ranks should the sanction of the Local Government to their prosecution be necessary.

In this decision *Sheik Abdul Kadir Saheb* v. *Emperor*[2], and *Narayan* v. *Emperor*[3] were dissented from. See also *Afzalur Rahman* v. *Emperor*[4].

The order of the lower Court therefore cannot be supported and the dismissal and discharge are set aside and the present learned District Magistrate is directed to take the case on file and dispose of it according to law in the light of the observations made above.

Petition allowed and discharge of accused set aside.

K.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

Ramakrishna Padayachi and others .. *Petitioners**

v.

The State and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 345—Offences under sections 426 and 448 of the Penal Code—Compounding with caretaker—Real owner, if bound.

The offence under section 426, Indian Penal Code, can be compounded by the person to whom the loss or damage was caused and the offence under section 448 by the person in possession of the property trespassed upon.

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1. (1935) 68 M.L.J. 608: I.L.R. 58 Mad. 787.
2. (1916) 1 M.W.N. 384.
3. (1934) M.W.N. 370.
4. (1943) 2 M.L.J. 62: (1943) F.L.J. 7:

*Cr.R.C. No. 247 of 1951. (Cr.R.P. No. 246 of 1951). 4th December, 1951.

Where the accused trespassed upon property and caused damage to the property therein and compounded the case with a caretaker who was the person in possession for the nonce,

Held, that the Magistrate was right in refusing to accept the compromise with respect to the prosecution under sections 426 and 448 of the Indian Penal Code where the complainant was the real owner of the property and as the caretaker cannot be considered to be the person in possession of the property.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Kumbakonam, in C.C. No. 39 of 1950, dated 24th November, 1950.

K. Veeraswami and *G. John Arthur* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

M. Srinivasa Gopalan for complainant.

The Court made the following

ORDER.—This criminal revision case is filed against the conviction and sentence of the learned Additional First Class Magistrate of Kumbakonam in C.C. No. 39 of 1950.

The short facts are: The criminal revision petitioners before us were tried for offences under sections 448, 426 and 323, Indian Penal Code, on the foot of the following facts set out in paragraph 2 of the judgment of the lower Court. P.W. 7 who is a graduate has opened an Ashramam by name Vivekananda Ashramam at Thillayadi for the benefit of the poor children. A boarding hostel is attached to the Ashramam and the boarders who were 10 in number including P.Ws. 2 and 3 and the son of P.W. 1 by name Dharmalingam were also given education by sending them to the schools at Thillayadi or Tirukadayur lying adjacent. The parents of the boarders used to pay small sums towards the boarding and education of their children and P.W. 7 also used to make collections from the public towards the maintenance of the Ashramam. P.W. 1 is a native of Muthupet and he is a mason by profession. P.W. 1 had work in the temple at Thiruvidakali lying adjacent to Thillayadi and he took his food at the Ashramam and stayed for the night at the Ashramam from the second week of January, 1950. Accused 1 is the father of accused 2 and 3 and they all reside in Thillayadi. On the night of 18th January, 1950, at about 8 P.M., P.W. 7 was absent from the village and P.Ws. 2 and 3 and other boarders were studying in the Ashramam building while P.W. 1 was having his food in the kitchen. At that time the three accused went in front of the bamboo locked gate to the compound of the Ashramam building and asked that the gate be opened. Before P.W. 2 went to the gate with the key, the gate was broken and accused 1 to 3 entered into the building. Accused 1 abusing P.W. 7 and threatening to injure P.W. 7 asked where P.W. 7 was and tore a tiger skin kept on an easy chair crosswise rendering it useless. On hearing the hubbub in the hall P.W. 1 who was having his food in the kitchen went there, told accused 1 that P.W. 7 was away from the village and questioned their action. Accused 3 asking P.W. 1 what right he had to interfere, hit P.W. 1 on his face with the back end of a hand electric torch light. Accused 2 also hit P.W. 1 on his face with a knuckle cluster. Accused 1 also beat P.W. 1 with hand on P.W. 1's back. P.W. 1 was dragged to the verandah and there also he was beaten by all the accused. P.W. 1 became unconscious when all the accused ran away. The next day P.W. 1 went to the hospital at Porayar where P.W. 1 was treated as an in-patient for three days by P.W. 9, the Medical Officer in charge. On receipt of the accident report sent by P.W. 9, the Porayar Station Head Constable recorded a complaint from P.W. 1 at the hospital. After registering the complaint as crime No. 10 of 1950 and after seizing the torn tiger skin and broken lock of the gate and after completing the investigation, P.W. 10, the Sub-Inspector submitted a charge-sheet to Court.

There was a composition between P.W. 1 and the accused in the following terms;

"Myself and the accused have compromised the matter. As I have compromised the above case by arbitration and as I feel that it is not just to proceed further with this case, I pray that the Court may be pleased to accept my compromise memo and release the accused."

It is to be noted that P.W. 7 has not joined in this compromise.

The entering into this compromise was subsequently disputed even by P.W. 1 and the learned Magistrate, who held an enquiry into the same as he was perfectly competent to do, came to the conclusion that P.W. 1 had entered into the compromise willingly and that he was trying to falsely resile from it, recorded the compromise and acquitted the accused of the offence of voluntarily causing hurt to P.W. 1 by accused 2 and 3 under section 323, Indian Penal Code. The learned Magistrate refused to hold, as he was urged to do so by the accused, that this compromise also covered the offences under sections 448 and 426, Indian Penal Code, against all these criminal revision petitioners and examined the evidence of both the prosecution and the defence against them and came to the conclusion that they were guilty as charged and sentenced them to petty fines.

The point taken in this revision petition is that on the evidence on record the offences against these persons have not been made out; and secondly that on the composition put into Court the accused should have been acquitted under all heads.

In so far as the first point is concerned the lower Court on abundant and satisfactory evidence has come to the conclusion in a well-reasoned judgment that the accused persons were guilty of the offences for which they have been convicted. Nothing was placed before me to come to a different conclusion by reason of any misappreciation of the evidence. Therefore, on the finding of fact there is no reason to interfere.

Then turning to the point of law, the persons by whom the offences under sections 426 and 448, Indian Penal Code, can be compounded are set out in column 2 of table 1 attached to section 345, Criminal Procedure Code. The offence under section 426, Indian Penal Code, can be compounded by the person to whom the loss or damage was caused. The offence under section 448, Indian Penal Code, can be compounded by the person in possession of the property trespassed upon.

The evidence in this case is that P.W. 7 is the owner of the tiger skin and the person to whom the loss or damage was caused, and P.W. 1 was only a caretaker for the time being. Accused 1 cannot compound this offence with P.W. 1.

In regard to the offence under section 448, Indian Penal Code, there is a long line of decisions which clearly show that the caretaker P.W. 1 cannot be considered to be the person in possession of the property trespassed upon. The charge of criminal trespass can be compounded by the person who is in actual possession of the property trespassed upon; and he (P.W. 7) and not the juridical possessor (P.W. 1) the person who can bring the complaint in respect of the offence. Otherwise we might have a juridical possessor, *e.g.*, a trustee, filing a complaint for criminal trespass and the actual possessor compounding the offence, a result which could never have been contemplated by the Legislature; *See* 8 L.B.R. 425 (1). The caretaker for the time being is neither the juridical nor the actual possessor. But he is only in constructive possession on behalf of either the one or the other. To hold otherwise would lead to a strange result namely a servant taking money from the accused and compounding the offence, whereas the really injured party namely the master and actual possessor, would be left without any lawful remedy against the aggressor. That is why in two decisions of our High Court this position has been clarified. In *Venkatesu* v. *Kesamma*[1], Krishnan Pandalai, J., held that the offence of criminal trespass under section 447, Indian Penal Code, may be committed even when the person in possession of the property is absent, provided the entering into or upon the property is done with intent to do any of the acts mentioned in this section. Thus, where a person entered upon a field that had been leased during

1. (1930) 60 M.L.J. 366: I.L.R. 54 Mad. 515.

the absence of the lessee and ploughed it and only the lessor came to the spot on hearing it to prevent the commission of such act, held that that was not enough to exonerate that person from intention to annoy the lessee and that such a person could properly be convicted under section 447, Indian Penal Code. In *Narayan* v. *Madarkhan*[1] this decision was relied upon and it was held by Kuppuswami Aiyar, J., that where the object of the ryots' association was to take possession of the lands in the possession of the Zamindar in a high-handed manner, a trespass by the members of the association for that purpose on the zamindar's lands must be deemed to have been with the intent to annoy and insult the zamindar and the mere fact that he was not present would not indicate that there could have been no intent to annoy or insult. A man need not necessarily be insulted only by acts done in his presence. In this case on the facts the trespass was intended only to annoy and insult P.W. 7 and not P.W. 1 who merely happened to be present as caretaker for the nonce in the absence of P.W. 7.

Therefore the learned Additional First Class Magistrate has rightly refused to accept the compromise in regard to the offences under sections 426 and 448, Indian Penal Code and there are no grounds to interfere.

This petition is dismissed.

V.P.S. ——— *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Gundalapalli Rangamannar Chetty .. *Petitioner.**

v.

Desu Rangiah and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949), *section* 7 (2) (*ii*)—*Sub-letting which entails eviction—Essentials.*

There cannot be a sub-letting, unless the lessee parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. To create a lease or sub-lease a right to exclusive possession and enjoyment of the property should be conferred on another. Taking in other partners in his business by a lessee will not by itself constitute sub-letting and the lessee is not liable to eviction under the provisions of Madras Act XXV of 1949.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in C.M.A. No. 35 of 1950 on the file of the Court of the Subordinate Judge, Nellore and quash the order therein.

K. Umamaheswaram and *A. Subramanian* for Petitioner.

M. S. Ramachandra Rao for Respondents.

The Court delivered the following

JUDGMENT.—This is an application for issuing a writ of *certiorari*, and for quashing the order of the Subordinate Judge of Nellore in C.M.A. No 35 of 1950.

The first respondent, Desu Rangaiah, took the premises bearing Door No. 258, Ward No. 5, Stonehousepet, Nellore, belonging to the petitioner on rent 10 years ago for his business. Two years back he entered into a partnership with Thadikamalla Venkataseshayya and Posa Veeranna for carrying on business in onions. The partnership arrangement was embodied in a deed, Exhibit B-1. Under Exhibit B-1 the leasehold interest was not transferred to the partners. That related only to the partnership business to be carried on jointly by the first respondent Desu Rangiah, Venkateseshayya and Posa Veeranna. It regulated only the rights and liabilities in regard to the business. The first respondent continued to be in possession of the premises with a liability to pay rent to the petitioner. The

1. (1944) 2 M.L.J. 380.

*C.M.P. No. 6445 of 1951. 15th February, 1952.

rent originally was a sum of Rs. 10. It was enhanced from time to time till it reached the present rate of Rs. 60. Further requests for enhanced rent by the landlord were not acceded to by the first respondent. Presumably this circumstance made the landlord to file M.B.C. No. 32 of 1950 on the file of the House Rent Controller, Nellore, for evicting the first respondent from the premises. The main ground for eviction was that the first respondent had sub-let the premises to the second respondent's firm. It was alleged that the first respondent was carrying on business in Srirangarajapuram after sub-letting the premises to the second respondent who was described in the petition as Tadikamalla Venkataseshaih Posa Veeranna, represented by its two partners. The Rent Controller dismissed the petition. In appeal the Subordinate Judge held that there was no sub-letting, and on that finding dismissed the appeal. The petitioner filed the above writ.

Learned counsel for the petitioner raised before me that same point, which has been negatived by the Subordinate Judge. He contended that by reason of the partnership, in law there was a sub-letting of the premises to the second respondent within the meaning of section 7 (2) (ii) of Act XXV of 1949. The relevant portion of the section reads:

> "Section 7 (2): A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application is satisfied—
>
> (ii) that the tenant has after the 23rd October, 1945, without a written con-cn of the landlord—
>
> (a) transferred his right under the lease or sub-let the entire building or any portion thereof, if the lease does not confer on him any right to do so, the controller shall make an order directing the tenant . . . ."

Under this clause, a landlord would be entitled to evict his tenant if he transferred his right under the lease or sub-let the entire building or any portion thereof. It was not stated in the petition that the first respondent transferred his right under the lease deed; nor was that point raised before the Subordinate Judge. The petitioner would therefore be entitled to evict the first respondent, only if he established that the first respondent sub-let the premises to the second respondent.

The scope of the word "sub-let" has been the subject of judicial determination in connection with covenants prohibiting sub-letting and imposing the penalty of forfeiture, if the covenants are contravened. In *Pebbles* v. *Glosthwaite*[1], Romer, J., considered the scope of such a covenant. One Phillip took from the defendant's predecessor-in-title a lease of the first and second floors of a premises. It contained a proviso for re-entry by the lessors in case of a breach of the lessee's covenants, and one of these covenants was that he would not assign, underlet or part with the possession of the demised premises without the previous licence in writing of the lessors. After the death of Phillip, his executors sold the premises and business to a limited company called A. M. Pebbles & Son, Ltd. The stock was delivered to the company which put its name upon the demised premises. The property was not assigned to the company and no licence to assign or part with the possession was obtained from the lessors. The executors had a large shareholding in the new company, and two of them were directors of it, who attended at the premises and took part in the management of the company's business. The question was whether the executors of the tenant had broken the covenant. The learned Judge observed:

> "Clearly there was no assignment or under-letting, but it was said that there had been a parting with possession without the necessary consent . . . . The legal possession was still theirs, although pending completion and the obtaining of a licence to assign they had allowed the company to use the premises for the purposes of the company . . . . . If a lessee retained possession he did not commit a breach of such a covenant by allowing other people to use the premises."

The Court of Appeal confirmed the judgment. Lord Justice Lindley made remarks much to the same effect. The learned Judge said,

1. 13 L.T. Rep. 37.

"They were informed by their solicitor Mr. Seames, that they should not part with possession No doubt they let the company into possession but they did not part with possession themselves and so long as it was true in fact that the lessees had not parted with possession they had committed no breach of the covenant."

In *Jackson* v. *Simons*[1], the question was whether the tenant broke a similar covenant. The defendant who was the tenant, without the plaintiffs' consent or knowledge agreed for the sum of 7£ per week to allow the proprietor of a night club carried on in a basement beneath the shop to use the front part of the shop between the hours of 10-30 P.M. and 2 A.M. for the sale of tickets of admission to the club. Romer, J., held that the arrangement conferred no estate or interest in the demised premises but was a mere privilege or licence to use portion thereof, the defendant retaining the legal possession of the whole and did not, therefore, constitute a breach of the covenants not to assign, underlet, or part with the demised premises or any part thereof. The same view was expressed by the Court of Appeal in *Chaplin* v. *Smith*[2]. In that case, the lessee had covenanted with his lessor that he would not assign or underlet or part with possession of the demised premises or any part thereof. He assigned his business to a company of which he was the managing director and in which he held a controlling interest. He carried on the business of the company on the premises which were stated to be its registered address and on which the name of the company was exposed. He kept the key of the premises in his possession. The company agreed to indemnify him in respect of the rates and taxes. Subsequently, a second company was formed of which the lessee was the managing director, and which took over the business, assets and liabilities of the first company. In negotiating for this transfer the lessee stipulated that he should remain in possession as actual tenant of the demised premises. On those facts the Court of Appeal held that there had been no breach of the lessee's covenant. At page 211 Scrutton, L.J., made the following observations:

"He did not assign; nor did he underlet. He was constantly on the premises himself and kept the key of them. He did business of his own as well as business of the company. In my view he allowed the company to use the premises while he himself remained in possession of them."

Foa on Landlord and Tenant, 6th Edn., at page 323, summarised the law on the subject in the following words:

"The mere act of letting other persons into possession by the tenant, and permitting them to use the premises for their own purposes, is not, so long as he retains the legal possession himself, a breach of the covenant."

It is clear from the aforesaid decisions that there cannot be a sub-letting unless the lessee parted with legal possession. The mere fact that another is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub-lease. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of right to enjoy such property. Therefore to create a lease or sub-lease a right to exclusive possession and enjoyment of the property should be conferred on another. In the present case the exclusive possession of the premises was not given to the second respondent. The first respondent continued to be the lessee, though in regard to the business carried on in the premises he had taken in other partners. The partners are not given any exclusive possession of the premises or a part thereof. The first respondent continues to be in possession, subject to the liability to pay rent to his landlord. The partnership deed also, as I have already stated, does not confer any such right in the premises on the other partners. I therefore hold that in the circumstances of the case the first respondent did not sub-let the premises to the second respondent, and therefore he is not liable to be evicted under the provisions of Act No. XXV of 1949.

The application therefore fails and is dismissed with costs, advocate's fee Rs. 100.

K.S. ——— *Application dismissed.*

1. (1923) 1 Ch. 373. 2. (1926) 1 K.B. 198.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

N. Balaraman .. *Petitioner**

v.

The Corporation of Madras .. *Respondents.*

Madras City Municipal Act (*IV of* 1919), *section* 366 (2)—*Reference to the Council by Commissioner on appellate order of Standing Committee reversing the order of the Commissioner to issue a licence for firewood selling and storing—Decision of Council—Necessity to give opportunity to the person affected to put forward his case.*

When a tribunal is entrusted with quasi-judicial functions affecting rights of parties it is the elementary principle that the said tribunal should give an opportunity to the person affected to put forward his case. The council on a reference by the Commissioner on an appellate order by the Standing Committee reversing the Commissioner's refusal to issue a licence for firewood selling and storing cannot set aside the order without giving to the person affected an opportunity to put forward his case. A decision without giving such opportunity is contrary to the principles of natural justice and liable to be quashed by a writ of *certiorari.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the refusal of licence for the petitioner for running a firewood depot in No. 69, Guruvappa Chetti Street, Chintadripet, Madras, for the year 1951-52 and to quash the order of the Council, dated 11th September, 1951, refusing licence to the petitioner and the order of the Commissioner directing the petitioner to close the trade immediately, communicated in Assistant Revenue Officer's letter, dated 19th September, 1951.

Raman of Raman and *Raghavan* for Petitioner.

T. Ramaprasad Rao for *John and Row* for Respondents.

The Court made the following

ORDER.—This application is for issuing a writ of *certiorari* to quash the order of the Corporation of Madras. The petitioner is the proprietor of the firewood depot situated at No. 69, Guruvappa Chetty Street, Chintadripet, Madras. On 2nd February, 1951, the Commissioner of the Corporation refused to issue a licence on the following grounds : (1) there is no space for loading and unloading inside the firewood depot ; (2) the splitting is done on the road margin ; and (3) there is no open space 20 feet all round in order to reduce fire risk. The petitioner appealed against that order to the Standing Committee (Health). The Standing Committee set aside the order of the Commissioner and directed the issue of the licence. The Commissioner referred the matter to the council and the council passed a resolution on 11th September, 1951, setting aside the order of the Standing Committee and restoring that of the Commissioner. The petitioner filed this application for setting aside that order on the ground that the order was arbitrary and also contrary to the principles of natural justice. The relevant sections of the Madras City Municipalities Act are as follows :

"Section 287 (1) : No place within the limits of the City shall be used for any of the purposes mentioned in schedule VI without a licence obtained from the Commissioner and except in accordance with the conditions specified therein."

One of the items of schedule VI is firewood selling or storing.

"Section 365 (3) : Every order of the Commissioner or other municipal authority refusing, suspending, cancelling or modifying a licence or permission shall be in writing and shall state the grounds on which it proceeds.

Section 366 (1) : An appeal shall lie to the Standing Committee from—

(*d*) any refusal by the Commissioner to grant a licence under sections 282, 287, 295, 299 and 304 (2).

Section 366 (2) : If, on any such appeal, the Standing Committee reverses or substantially modifies any action taken or proposed to be taken by the Commissioner or any order passed by him, he may, within one month of the date of such decision, refer the matter to the council, and pending the decision of the council on such reference, the Commissioner shall not be bound to give effect to the decision of the Standing Committee."

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* Writ Petition No. 581 of 1951. 30th November, 1951.

It is clear from the aforesaid provisions that issuing an order or refusing to issue a licence is of quasi-judicial nature and the Commissioner will have to comply with the provisions of the Act and also shall give reasons for his refusal. Against the order of refusal, a statutory right of appeal is given to the Standing Committee. If the order of the Standing Committee is against the view expressed by the Commissioner he can refer the matter to the Council whose order will be final. In this case, it is not disputed that the Council set aside the order of the Standing Committee without giving an opportunity to the petitioner to put forward his case. When a tribunal is entrusted with quasi-judicial functions affecting the rights of parties, it is the elementary principle that the said tribunal should give an opportunity to the person affected to put forward his case. Any decision made by such a tribunal without giving that opportunity is contrary to the principles of natural justice and is liable to be set aside. But the procedure which a tribunal is to follow depends upon the functions, the character and the administrative convenience of the tribunal. It is not possible to equate the Council to a Court of law, and insist upon that tribunal to follow and adopt the rules of judicial procedure adopted and followed by Courts. It is hoped that the Corporation will evolve a procedure which will give a reasonable opportunity to a party affected to put forward his case. The order of the Corporation of Madras is hereby quashed and they are directed to dispose of the reference in accordance with law. In this view, the other question does not arise for consideration. In the circumstances, the parties will bear their own costs.

K.S. — *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

Messrs. Mohamed Ali Sarafali & Company, Madras .. *Applicants**

v.

The Commissioner of Excess Profits Tax, Madras .. *Respondent.*

Excess Profits Tax Act (XV of 1940), section 5, proviso 3—Assessee in Madras stocking goods in Hyderabad—Assessee entering into contracts of sale of those goods in Madras and delivery of goods and receipt of price in Hyderabad—Loss in respect of—Apportionment as for the contracting in India and delivery and receipt of price in Hyderabad.

The assessee a firm in Madras purchased cotton in Hyderabad through a firm at Adoni, a portion of which could not be brought from Hyderabad as there were no transport facilities. So they were stocked at Nanded where the assessee owned a godown. Contracts for sale of this cotton were entered into in Madras (sometimes written and sometimes oral) and delivery of the goods and payment of the price were at Nanded. A clerk of the assessee at Nanded made deliveries and received payments. In respect of losses relating to these goods,

Held: that by reason of delivery of the goods and payment of the price at Nanded in the Hyderabad State part of the business was carried on in the Native State and a portion of the loss accrued there. A splitting up of the loss incurred into two-thirds as representing the contracting for the sale of the goods and one-third as representing the delivery and receipt of the price is proper.

Case referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of the Indian Income-tax (Amendment) Act, 1939 (Act VII of 1939), in 66 R.A. 429 and 430 (Madras) of 1948-49 on its file.

T. V. Viswanatha Ayyar for Applicants.

C. S. Rama Rao Sahib for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—Two questions were referred to us for decision by the Appellate Tribunal under section 66 (1) of the Indian Income-tax Act:

"Whether on the facts and in the circumstances of the case the loss in respect of the transactions 3, 5 and 6 accrued or arose in an Indian State, within the meaning of proviso 3 to section 5 of the Excess Profits Tax Act?

2. Whether the splitting up of the loss relating to 308 bales into two-thirds as representing the contracting for the sale of goods and one-third as representing delivery and receipt of the price is erroneous in law."

* Case Referred No. 30 of 1949. 27th September, 1951.

The facts as they appear from the statement of the case were : The assessee is a registered firm and carried on business at Madras in cotton and other goods. It carried on business in cotton in Hyderabad State as well as in British India. The accounts relating to the cotton business also were maintained at Madras. During the relevant chargeable accounting periods, the assessee brought cotton through Sanjivappa & Sons a firm at Adoni. A portion of the goods purchased from Sanjivappa & Sons could not be brought from Hyderabad as there were no transport facilities, and so they were stocked at Nanded where the assessee owned a godown. The cotton was subsequently sold by the assessee, and the process adopted was, according to the assessee, that when the customer came to Madras for purchase of cotton the contracts were entered into at Madras sometimes written and sometimes oral and delivery of the goods and payment of the price were at Nanded where a clerk or some representative of the firm of the assessee were to deliver the goods. The goods were otherwise in the custody of a watchman at Nanded. During the chargeable accounting period, the assessee incurred a loss in respect of his dealings relating to the cotton at Hyderabad. The Excess Profits Tax Officer declined to allow the assessee to set off the loss in respect of the goods delivered at Hyderabad State and adjust it against the profits earned by him in British India. On appeal to the Appellate Assistant Commissioner, however, he allowed the claim in full as the entire loss accrued in British India itself and no part of it outside British India. On appeal to the Appellate Tribunal, this decision was modified. There were six transactions during the chargeable accounting periods of which transaction 4 may be left out of consideration, as it was merely a speculative contract in respect of which the differences were adjusted. As regards transactions 1 and 2 relating to 308 bales of cotton, the opinion of the Appellate Tribunal was that the contracts were entered into in British India at Madras, but the purchase price was paid at Nanded where the goods were delivered. The Appellate Tribunal concluded that part of the business was outside British India in a Native State and therefore under proviso 3 to section 5 of the Excess Profits Tax Act, the loss should be apportioned in respect of the transactions 1 and 2. The loss was apportioned, one-third as representing delivery of the goods and receipt of the price at Hyderabad and two-thirds as representing the contracting for the sale of the goods at Madras. As regards transactions 3, 5 and 6, the Appellate Tribunal held that the contracts also were entered into in Hyderabad State, and that the delivery of the goods and payment of the price were in Hyderabad. It was therefore held that to the extent indicated in the decision of the Appellate Tribunal, the assessee was not entitled to have the loss accrued in Hyderabad adjusted against the profits in British India.

In this reference it was argued on behalf of the assessee by his learned advocate, Mr. Viswanatha Ayyar, that the accrual of the loss even in respect of transactions 1 and 2 was entirely in British India, as the assessee practically did not carry on any business at Nanded. The accounts were maintained at Madras. The contracts were entered into at Madras. The control of the entire business was at Madras. And all that was done at Nanded was as the goods were there, delivery under the contract had to be made there and the price recovered. We do not think that the effect of the delivery of the goods and the payment of the price at Nanded in respect of the contract entered into in British India could be so belittled as to reduce the activities at that place to ministerial acts having no reference to the business. Under the provisions of the Sale of Goods Act, unless there is a contract to the contrary, the price for the goods is payable only against delivery and it is for that reason, in respect of transactions 1 and 2 the price was paid at Nanded where alone the delivery was effected. Therefore part of the business was done under the contracts in Hyderabad State. We therefore think that the view taken by the Appellate Tribunal that part of the business was carried on in a Native State, *viz.*, Hyderabad, was correct. We do not see any reason for altering the proportion fixed in respect of these two transactions by the Appellate Tribunal. Nothing has been shown to establish that proportion was unreasonable

or was not warranted by the facts and circumstances of the case. The answer therefore to question No. 2 must be in the negative and against the assessee.

There remain however transactions 3, 5 and 6. As regards these the finding of the Appellate Tribunal, that the contracts were entered into in Hyderabad was vigorously attacked by the learned advocate for the assessee on the ground that there was absolutely no evidence on record in respect of that finding and the finding of the Appellate Tribunal was based on pure speculation. The department it is that is claiming to apply the proviso (3) to section 5 of the Excess Profits Tax Act, and it is for them to establish by evidence that the contracts were in fact entered into in the Native State. There is nothing in the accounts maintained by the assessee which were produced before us under our direction to indicate or suggest that these contracts were entered into in the Hyderabad State, nor is there any evidence to establish that there was an accredited representative clothed with authority and power to enter into contracts on behalf of the assessee at Hyderabad. In these circumstances it must be presumed that the assesee followed the practice which he had applied in the case of other transactions and there is no reason, in our opinion to differentiate transactions 3, 5 and 6 from transactions 1 and 2 except the fact that in respect of those two transactions there was a written contract. Whether the contract was written or was oral, it makes no difference as it is not thereby established that the oral contract must have been entered into in a Native State. It is a fact which must be ascertained and established from positive evidence on record on which there is none in the present case. It therefore follows that there is no justification in support of the finding of the Appellate Tribunal in respect of transactions 3, 5 and 6. They also stand on the same footing as transactions 1 and 2 and for the reasons given by the Appellate Tribunal for holding that part of the business in respect of transactions 1 and 2 accrued and arose in a Native State, it follows that in respect of these transactions also the same inference must be drawn. There is no reason for not working out the proportion of the loss in the manner in which it was done in the case of transactions 1 and 2. We therefore direct the apportionment of the loss even in respect of transactions 3, 5 and 6 in the proportion of one-third as representing delivery of goods and receipt of the price and two-thirds as representing the contracting for the sale of the goods in British India. The answer therefore to the first question that is referred to us must be as stated above and is answered partly in favour of the assessee and partly in favour of the Commissioner. We think that in the circumstances of the case, there should be no order as to costs.

K.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Vasam Setti Appa Rao and others .. *Petitioners.**

Evidence Act (I of 1872), section 25—Statement by accused to prohibition officer—Rule requiring corroboration of a resiled statement—If applies.

A Prohibition Sub-Inspector is not a police officer within the meaning of section 25 of the Indian Evidence Act and so, as a statement by the accused to him is not a confessional statement, the rule requiring co roboration of resiled statements before a Court can act upon them, does not apply to it.

Petitions under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate of Peddapuram in C. A. No. 180 of 1951, etc., preferred against the judgment of the Court of the Stationary Sub-Magistrate, Peddapuram, in C. C. No. 452, etc., of 1951, respectively.

D. Narasaraju, A. Krishnaswami and *K. B. Krishnamurthi* for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) on behalf of the State.

* Cr. R.C. Nos. 537, 543-568, 799-816 and 982 of 1931. Cr. R.P. Nos. 532, 538-563, 786-803 and 965 of 1951. — 22nd February, 1952.

The Court made the following

ORDER.—In this batch of revision petitions two points of law are taken, *viz.*, that an incriminating statement made by the person later on charged as an accused to a Prohibition Officer would be a confession made to a police officer within the meaning of section 25 of the Indian Evidence Act; and secondly, that such a confessional statement must be corroborated, and that failing which there would be no validly acceptable evidence for convicting the accused.

Both these points taken must fail because it has been held that a Prohibition Sub-Inspector under the Madras Prohibition Act is not a Police Officer in the decision in *Venkatareddi*, In re[1], and it has been followed by Panchapakesa Ayyar, J., in *Vadivel Goundar* v. *State*[2].

In regard to the second point inasmuch as the statement to a Prohibition Officer is not a confessional statement, the rule relating to the corroboration of a resiled confessional statement does not apply to this case. But apart from that, there is material corroboration as a matter of fact in all these cases.

The extent and the nature of the corroboration required before a Court can act upon and accept such statements will depend upon the circumstances of each case. In *King* v. *Baskerville*[3], Lord Reading, the Lord Chief Justice laid down that:

> " . . . . evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it . . . The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but it was committed by the accused.
>
> The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. A good instance of this indirect evidence is to be found in *Reg.* v. *Birkett*[4]. Were the law otherwise many crimes which are usually committed between accomplices in secret, such as incest, offences with females, or the present case, could never be brought to justice."

In *Reg.* v. *Birkett*[4], the prisoner was tried and convicted for stealing a sheep. In order to corroborate the evidence of the approver, reliance was placed on the circumstance that a quantity of mutton which might have been part of the carcass of the stolen sheep was found in the house.

The circumstantial detail in this case relied upon by the prosecution is that the accused himself climbed the tree and brought down the toddy pots which were found to contain toddy, showing thereby that it was he who had put the pots there and who drew the toddy within the meaning of section 4 of the Act.

Therefore, the second point taken also must fail.

The learned advocate pressed finally for a reduction of the sentence, putting forward several mitigating circumstances like the fact that these persons were originally toddy tappers; they have now become unemployed; that they have learnt a lesson and that sending them to jail would only convert them into gaol birds making them lose their self-respect and harden them into defying law and order more impudently in future than before. I agree.

Therefore, I reduced the period of imprisonment to the period already undergone, namely, about 3 weeks and in addition impose a fine of Rs. 30 on each of the accused or in default to undergo one month's imprisonment. Time for payment of the fine, two months.

These revision petitions are disposed of accordingly.

V.P.S. ——— *Petition dismissed.*
Sentence reduced.

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1. (1947) 2 M.L.J. 218 : I.L.R. (1948) Mad. 574.
2. (1952) 1 M.L.J. 69.
3. (1916) 2 K.B. 658.
4. (1839) 8 C. and P. 732 : 173 E.R. 694.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Sri Raja Venkata Ramayya Appa Rao Bahadur Varu .. *Petitioner**

v.

The Collector of Madras and another .. *Respondents.*

Revenue Recovery Act (I of 1890), sections 3 and 5—Arrears of income-tax accrued in one district—Collector of that district sending requisition to the Collector of another district for collecting from properties situate in that district—Validity.

Under section 3 of the Revenue Recovery Act where an arrear of land revenue or a sum recoverable as arrear of land revenue is payable to a Collector he may send to the Collector of another district where the defaulter's property is situate a certificate in the form prescribed. The section applies only to cases where land revenue or sum recoverable as land revenue is payable to the Collector. It cannot be applied to a case where the amounts are payable to an officer other than the Collector, and as income-tax is payable to the income-tax officer the section has no application. But under section 5 of the Act the Collector of the district in which the office of the Income-tax Officer is situate has power to send a certificate of the amount to be recovered to the Collector of another district. The word 'recoverable' in the section is not used in the restricted sense of only connoting the actual process of collection. A perusal of the section of the Income-tax Act shows that the amount is recoverable by the Income-tax Officer though the actual process of recovery is entrusted to the Collector.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondents to forbear from distraining and selling the petitioner's property as threatened in the notice C/2-1926/B, dated 14th March, 1951.

O. Chinnappa Reddi for Petitioner.

Vepa P. Sarathi for the Government Pleader (*P. Satyanarayana Raju*) and *C. S. Rama Rao Sahib* for Respondents.

The Court made the following

ORDER.—This is an application for the issue of a writ of *mandamus* directing the respondents to forbear from distraining and selling the petitioner's property for recovery of arrears of income-tax.

The petitioner was one of the partners of the United Construction Company, Rajahmundry, who took a contract, job No. 539 of the aerodrome works of Mathurapudi for execution. The contract work commenced in October, 1942, and was completed by December, 1943. On 20th March, 1950, the petitioner received a communication from the Income-tax Officer, Special North Circle, Madras, calling upon him to pay a sum of Rs. 16,445-3-0 being his share of income-tax, excess profits tax and compulsory deposit, and he duly paid the same. He received another notice from the Income-tax Officer, Rajahmundry, demanding him to pay a sum of Rs. 39,807-3-0 being the unpaid tax payable by the other partners. On 19th April, 1951, he received a notice from the Tahsildar of Madras threatening to distrain and sell the properties of the petitioner if the said amount was not paid forthwith. The petitioner's case is that the Collector of East Godavari district in which the alleged arrears of income-tax accrued has no jurisdiction to send to the Collector of Madras a requisition for collecting tax from the properties situate in Madras. On that contention he seeks for the issue of the aforesaid writ of *mandamus*.

The provisions of the Revenue Recovery Act (I of 1890) govern the situation. The relevant provisions are sections 3 and 5 of the Act :—

" Where an arrear of land-revenue, or a sum recoverable as an arrear of land-revenue, is payable to a Collector by a defaulter being or having property in a district other than that in which the arrear accrued or the sum as payable, the Collector may send to the Collector of that other district a certificate in the form as nearly as may be of the schedule, stating—

(a) the name of the defaulter and such other particulars as may be necessary for his identification, and

* C.M.P. No. 6632 of 1951. 9th February, 1952.

(*b*) the amount payable by him and the account on which it is due . . . . .

(*c*) The Collector of the other district shall, on receiving the certificate, proceed to recover the amount stated therein as if it were an arrear of land-revenue which had accrued in his own district."

"*Section* 5.—Where any sum is recoverable as an arrear of land-revenue by any public officer other than a Collector or by any local authority, the Collector of the district in which the office of that officer or authority is situate shall, on the request of the officer or authority, proceed to recover the sum as if it were an arrear of land-revenue which has accrued in his own district, and may send a certificate of the amount to be recovered to the Collector of another district under the foregoing provisions of this Act, as if the sum were payable to himself."

Learned counsel for the petitioner contended that arrears of income-tax is neither payable to the Collector nor recoverable by the Income-tax Officer and therefore neither section 3 nor section 5 of the Revenue Recovery Act (Act I of 1890) would apply to the case. Under section 3 where an arrear of land-revenue or a sum recoverable as an arrear of land-revenue is payable to a Collector he may send to the Collector of that other district a certificate in the form prescribed where the defaulter's property is situate. Section 3 applies only to cases where the land-revenue or sum recoverable as land-revenue is payable to the Collector. To ascertain the meaning of the word "payable" the material provisions of the Madras Revenue Recovery Act may be noticed. In section 1 it is stated thus :

"Public revenue due on land shall, for the purposes of this Act be taken to include cesses or other dues payable to Government on account of water supplied for irrigation."

Section 3 reads as follows :—

"Every landholder shall pay to the Collector, or other officer empowered by him to receive, the revenue due upon his land on or before the day on which it falls due, according the Kistbundy or other engagement, and where no particular day is fixed, then within the time when the payment falls due according to local usage."

"*Section* 4.—When the whole or a portion of a kist shall not be so paid, the amount of the kist or of its unpaid portion shall be deemed to be an arrear of revenue."

Under the aforesaid provisions "public revenue" also includes cesses or other dues payable to Government on account of water supplied for irrigation. Every landholder shall pay the same to the Collector within the prescribed period. If it is not paid it will be recovered by the Collector in the manner prescribed by the Act. Under the said Act, therefore, the revenue is payable to the Collector. The cesses on account of water supplied for irrigation are also included in the term "public revenue" and made recoverable as arrears of land revenue. There may also be cases where under different Acts dues payable to the Collector though not be strictly public revenue may be recoverable as arrears of land-revenue. Section 3, therefore, in my view applies only to a case where the land-revenue or a sum recoverable as arrears of land-revenue is payable to the Collector. It cannot be applied to a case where the amounts are payable to an officer other than the Collector. In the present case as income-tax is payable to the Income-tax Officer, section 3 can have no application. But under section 5 of Act I of 1890 where any sum is recoverable as an arrear of land-revenue by any public officer other than a Collector or by any local authority, the Collector of the district in which the office of that officer or authority is situate may collect it and may send a certificate of the amount to be recovered to the Collector of another district under the foregoing provisions of this Act as if the sum were payable to himself. The contention of the learned counsel for the petitioner is that the sum is not recoverable by the income-tax Officer and therefore the section will not apply.

Section 6 makes it clear that the officer who actually collects the amount is the Collector of the district in which the arrears accrued or the Collector of another district to whom the former Collector sends the certificate. Therefore, the word *recoverable* has obviously been used not in the restricted sense of only connoting the process of actual collection. A perusal of the relevant provisions of the Indian Income-tax Act (Act XI of 1922) also supports this interpretation. Chapter VI of the Act deals with recovery of taxes and penalties. That chapter makes a distinction between the recovery and the process of collection. Under section 45 of the Act the tax shall be paid within the prescribed time after service

of notice or order and the assessee failing to pay shall be deemed to be in default. Under section 46 when an assessee is in default in making a payment of income-tax, the Income-tax Officer may in his discretion direct that, in addition to the amount of the arrears, a sum not exceeding that amount shall be *recovered* from the assessee by way of penalty. Under section 46 (1-A) for the purposes of sub-section (1) the Income-tax Officer may direct the *recovery* of any sum less than the amount of the arrears and may enhance the sum so directed to be *recovered* from time to time in the case of a continuing default, so however that the total sum so directed to be *recovered* shall not exceed the amount of the arrears payable. Under section 46 (2) the Income-tax Officer may forward to the Collector a certificate under this signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land-revenue. It will, therefore, be seen from the aforesaid provisions that the amount is recoverable by the Income-tax Officer but the *process of recovery* is entrusted to the Collector. Therefore as income-tax is recoverable by the Income-tax Officer as land-revenue under section 5 of the Revenue Recovery Act (I of 1890) the Collector of the district, in which the office of the Income-tax Officer is situate has power to send a certificate of the amount to be recovered to the Collector of another district.

In the result this application fails and is dismissed with costs. Advocate's fee Rs. 100.

V.P.S. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Insolvency Jurisdiction.)

PRESENT :—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE VENKATARAMA AIYAR.

The Official Assignee of Madras .. *Applicant**

v.

A. R. Narayana Mudaliar and another .. *Respondents.*

Presidency Towns Insolvency Act (III of 1909)—Undischarged insolvent—Competency to contract and incur debts after adjudication—Enforcement of such liability.

There is nothing in any of the provisions of the Presidency Towns Insolvency Act which prohibits expressly or impliedly an insolvent from borrowing or entering into contracts giving rise to financial liability after adjudication and prior to his discharge. As insolvency is not a disqualification which prevents a person fyom entering into a contract, it follows that his liability under the contract so entered into can be enforced in appropriate proceedings. It would be wrong to say that no court has got any power or jurisdiction to entertain a suit against an insolvent on the basis of a debt incurred by him while an undischarged insolvent. Leave of Court is not necessary as a condition precedent to the institution of a suit to enforce the obligation under a bond executed by an undischarged insolvent.

In the matter of C. Ganapathy Mudaliar, an insolvent.

Deputy Official Assignee (*P. Sivaramakrishniah*) for Applicant.

Respondents not represented.

The Judgment of the Court was delivered by

The Chief Justice.—In application No. 552 of 1949 in Insolvency Petition No. 71 of 1940, Mack, J., held that an undischarged insolvent had no borrowing capacity at all and that the Act (the Presidency Towns Insolvency Act) provides no machinery by which any creditor who lends to an undischarged insolvent can recover his debt. He also held that no Court has got any power or jurisdiction to entertain a suit against the insolvent on the basis of a debt incurred by him while an undischarged insolvent. Krishnaswami Nayudu, J., in two applications which came up for disposal before him was not inclined to accept this view of Mack, J., and in view of the importance of the question raised, he considered it necessary that the appli-

* Petition No. 226 of 1936. Application No. 268 of 1951. 23rd August, 1951.

cations should be heard and disposed of by a Bench of this Court. This is how these applications came up before us for disposal.

Mack, J., came to the conclusion that an undischarged insolvent had no borrowing capacity at all, not on any authority but because he thought that it was the effect of some of the sections of the Presidency Towns Insolvency Act. The sections mentioned by him in his judgment are sections 17, 45, 46, 50, 52 and 102 of the Presidency Towns Insolvency Act. Section 17 lays down the effect of an order of adjudication, that the property of the insolvent vests in the Official Assignee and becomes divisible among his creditors and after the order of adjudication no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt nor can any creditor commence any suit or other legal proceedings in respect of such debt except with the leave of Court. Section 45 provides that an order of discharge shall release the insolvent from all debts provable in insolvency except certain kinds of debts mentioned in sub-section (1). Section 46 deals with the debts which are provable in insolvency. Section 50 especially provides that after an order of adjudication has been made no distress for rent due before such order shall be made upon the goods or effects of the insolvent. Section 52 describes the insolvent's property which is divisible among his creditors and sets out what it shall not comprise and what it shall comprise. Section 102 is a penal provision under which an undischarged insolvent obtaining credit to the extent of fifty rupees or upwards from any person without informing such person that he is an undischarged insolvent is liable on conviction to be punished with imprisonment for a term which may extend to six months or with fine or with both. It is obvious that none of the sections either expressly or impliedly affects the contractual capacity of an undischarged insolvent. In fact, Mack, J., himself recognised that there was no specific section in the Act which prohibited an insolvent from borrowing before he obtains his discharge from a creditor or money-lender lending money. On the other hand, the scheme of the Act in respect of debts which are covered by any particular proceeding in insolvency, shows clearly that any disability which a creditor may have is only in respect of debts provable in insolvency and these are only debts incurred by the insolvent prior to his adjudication. Under section 46, all debts and liabilities present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency. The effect of this provision is that any debt incurred by the insolvent after adjudication and before his discharge cannot be a debt provable in that insolvency. Section 102 appears to imply that an undischarged insolvent could obtain credit to any extent if he informs the person giving him credit that he is an undischarged insolvent. There is nothing which we can find in any of the provisions of the Presidency Towns Insolvency Act which prohibits expressly or impliedly an insolvent from borrowing or entering into contracts giving rise to financial liability.

Under section 11 of the Indian Contract Act, every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Now insolvency is not a disqualification which prevents a person from entering into a contract. It follows that there is nothing in law which prevents an insolvent who has not yet obtained his discharge from borrowing or making himself liable financially.

It is well established that there is no legal objection to an undischarged insolvent from being again adjudicated bankrupt on the basis of debts not covered by the prior insolvency, that is to say, by debts incurred after the order of adjudication. In *Dossa Gopal* v. *Bhanji*[1], this was specifically decided. Starling, J., relied upon

1. (1901) I.L.R. 26 Bom. 171.

the ruling in *Morgan* v. *Knight*[1], for the proposition that there can be no objection to a man becoming bankrupt a second time before he has received his final discharge under the first. There are numerous cases in England and in India in which the competitive claims between the creditors in one insolvency and the creditors in the second insolvency have been dealt with. A few of such cases will be found referred to in *Abdul Rahim* v. *Official Assignee*[2], to which Mack, J., was a party. In *Gustasp Behram* v. *Bhagwandas Sobharam*[3], it was decided that a decree debt to which the insolvent became liable after an adjudication and before discharge, and which could not be traced to any liability antecedent to the order of adjudication, could be enforced against the insolvent after and notwithstanding his discharge. The reasoning of the decision was that a debt incurred by the insolvent after adjudication and before discharge was not provable in insolvency and therefore the order of discharge would not release the insolvent from such a debt and it could be enforced even after discharge. In *Sisram* v. *Ram Chander Mal*[4], the question now before us fell to be directly decided. In that case, the question was whether leave of Court for bringing a suit in respect of an obligation incurred after the order of adjudication was necessary under section 28 (2) of the Provincial Insolvency Act. The suit was on a bond executed by an undischarged insolvent after the order of adjudication. It was held that leave of Court was not necessary as the liability sought to be enforced was a new obligation incurred after the order of adjudication and the debt in question was not a debt provable in insolvency. Niamatullah, J., in the course of his judgment observed thus:

> "It appears that the bond on which the suit is based was executed after the order of adjudication. The insolvent is not under any disability in the matter of entering into contracts and the bond is therefore not open to objection on the score of its validity."

If there is no legal objection to an undischarged insolvent entering into contracts, it follows that his liability under the contract so entered into can be enforced in appropriate proceedings. In *Sisram* v. *Ram Chander Mal*[4], it was directly held, as already mentioned, that leave of Court is not necessary as a condition precedent to the institution of a suit to enforce the obligation under a bond executed by an undischarged insolvent. It is impossible to find any principle or authority, to support the view of Mack, J., that no Court has got any power or jurisdiction to entertain a suit against an insolvent on the basis of a debt incurred by him while he was still undischarged. Unless barred by the provisions of any statute any Court which has got pecuniary and other jurisdiction to entertain a suit will not cease to have jurisdiction to entertain that suit because the defendant in the suit happens to be an undischarged insolvent. We have already seen that section 17 only refers to debts provable in insolvency and debts incurred after the order of adjudication and before discharge are not debts provable in that insolvency.

Krishnaswami Nayudu, J., was inclined to take the same view that we are now taking and we agree with him that an undischarged insolvent is not legally incapacitated from incurring any debt, and a creditor is not prevented from recovering on the basis of a debt so incurred by way of a suit or otherwise. The decision of Mack, J., on this point must be held to be wrong. In this view the applications must be dismissed as the debts were incurred during the pendency of earlier insolvency petitions when the insolvents had not yet been discharged.

V.S. *Applications dismissed.*

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1. (1864) 143 E.R. 947.
2. (1948) 2 M.L.J. 656 : I.L.R. (1949) Mad.
3. (1931) I.L.R. 55 Bom. 649.
4. (1929) I.L.R. 52 All. 439.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAGHAVA RAO.

P. B. Krishnamachariar and three others .. *Appellants**

v.

G. N. Ramabadran and four others .. *Respondents.*

Hindu Law—Limited owner—Powers of alienation—Alienation by widow to pay off debts incurred for the marriage of daughter and daughter's daughter—If binding on the reversioners.

A limited owner like a Hindu widow inheriting her husband's estate may alienate the property purely for secular purposes or for religious or charitable purposes. To support the alienation for secular purposes the necessity for such an alienation or the benefit to the estate conferred by it must be established. The religious and charitable purposes are divided into two categories, the *nityakarma* or obligatory acts and the *kamyakarma* or optional acts. In respect of the former, if the income from the estate is inadequate to meet the expenditure, the limited owner is entitled to sell the whole of the property if necessary as the duties must be performed. As regards the non-obligatory or non-essential acts, it not being incumbent on the limited owner to perform them, the power of the limited owner is not as large as in the case of indispensable acts. The terms, necessity and benefit must be confined to alienations made by a limited owner for what are termed secular or worldly purposes. The alienations however for spiritual necessity can be justified only either if they were made for meeting the indispensable acts or duties which must be performed, such as the *shraddah* ceremonies or the marriage of the daughter and the like or even if they were made for securing the merit or spiritual bliss to the deceased in the other world; it must be shown that the extent alienated was a reasonable portion of the property inherited. The reasonableness, of course, must be decided according to the circumstances of the family. It is within the competence of a widow to incur expenditure in connection with a *kanyadhana* as an act of piety calculated to promote the spiritual bliss of her husband and the relationship of the kanya to the female holder of the estate as her daughter or daughter's daughter would not take away from, but if at all, only add to, the spiritual bliss of the father or the husband as the case may be. The fact of indigence or affluence of the parents of the girl would not affect the question.

On the facts it was held that the alienation to pay off debts incurred for the marriage expenses of a daughter and a daughter's daughter was binding on the reversioners and could not be challenged on the ground of its being beyond the powers of the limited owner.

Appeal and the memorandum of objections against the decree of the Court of the Subordinate Judge of Chingleput in Original Suit No. 70 of 1944.

R. Gopalaswami Ayyangar and *K. R. Krishnaswami Ayyar* for Appellants.

T. L. Venkatarama Ayyar and *G. N. Rangaswami* for first to third Respondents.

The Court delivered the following

JUDGMENTS: *Satyanarayana Rao, J.*—This appeal raises the question of the binding nature of an alienation on the reversioners to the estate of one Srinivasa Raghavachari. The appellants, defendants 3 to 6, who are the representatives of the alienee, substantially failed, though the findings of the learned Judge are mostly in their favour and hence this appeal.

In this suit, the plaintiffs impeached also another alienation in favour of the 7th defendant. They succeeded in the trial Court but there is no appeal by the unsuccessful defendant.

Notwithstanding the extraordinary precautions taken by the alienee and the assurance given at the time of the alienation by the plaintiffs' father who is a graduate and their maternal grand-uncles who are advocates, the alienee could not but face a litigation, unrighteously, as it seems to us, instigated and conducted by the plaintiffs' father who was responsible largely for bringing about the alienation for his own benefit. This Court, however, not being a Court of morals, is not entitled to decide the case on these considerations and we have to meet out justice according to well-established principles of Hindu Law. Srinivasaraghavachari, the last male owner, died in 1898, and left behind him the first defendant, then a young widow aged seventeen years and a daughter, the second defendant. The estate then consisted of 85 acres of wet land and 35 acres of punja in Devanathan village and 250 acres roughly in Parithipattu village near Avadi. These 250 acres consisted of wet

* Appeal No. 521 of 1947. 6th December, 1950.

and dry lands. There were also two houses, one in Big Street, Kumbakonam and the other in Sannadhi Street, Conjeevaram, besides some shops in Conjeevaram He left also debts to the tune of Rs. 4,000 to 5,000 and cash in G. P. Notes of Rs. 12,000 and jewels worth about Rs. 4,000 to 5,000. There was also the mother of Srinivasaraghavachari who survived him and the G. P. Notes of the value of Rs. 12,000 were utilised in settling her maintenance claim. In or about 1910, the marriage and nuptials of the second defendant were performed at a cost of nearly Rs. 18,000 for which purpose the lands of the extent of 250 acres in Parithipattu near Avadi was sold. The estate which the first defendant inherited from her husband was looked after and managed by her father till 1905 when he became a sanyasi. The father also was a rich man owning properties worth 2 lakhs. After the death of the father, the first defendant managed her estate and perhaps after the marriage of the second defendant, the son-in-law also assisted her in the management. It is in evidence that the estate was not fetching sufficient income to meet the requirements of the family. There were also litigations pertaining to the estate which involved the estate in heavy expenditure. The first defendant's son-in-law, the second defendant's husband, started in 1920 a cinema business which resulted in loss and the mother-in-law purchased the lands of the son-in-law in Kannivakkam and discharged his debts to the extent of about Rs. 20,000. As the result of the property of the son-in-law having been lost, his family became entirely dependent upon the first defendant and the estate of Srinivasaraghavachari. The second defendant has a number of children, three boys and five girls leaving out a child which died. The maintenance and education of the children and the medical expenses of the second defendant who was constantly ill as well as of her husband Sundaravaradachari had to be met by the first defendant from the estate. In 1928 the eldest of the daughters of the second defendant, Komalavalli, had to be married and expenses had to be incurred for that marriage and later for her nuptials in 1930. The first defendant has got five brothers, the maternal uncles of the second defendant. Of these Mr. C. V. Rajagopalachari, D.W. 2 is an Advocate at Madras and C. V. Jagannathachari is a leading member of the Bar at Kumbakonam. As there were pressing debts to be paid, the plaintiffs' father and their maternal grand-uncle Mr. Rajagopalachari, D.W. 2, approached in 1932, D.W. 1, Srinivasachariar, an Advocate, practising at Conjeevaram who was also a Government pleader for over 20 years. As Sundaravaradachari and D.W. 2 wished to sell the house and shops at Conjeevaram they hoped that D.W. 1's client and the head of a Mutt, P. B. Ananthacharyaswami, would buy the property. This Ananthacharyaswami had a number of sishyas and was the head of a Tenkalai Mutt at Conjeevaram. He is the father of the third defendant and defendants 4 to 6 are the sons of the third defendant. The attempts of the two Advocates and Sundaravaradhachari were successful and a sale deed for Rs. 7,500 was executed on 30th September, 1937, Exhibit D-1 (*a*), by defendants 1 and 2 and Sundaravaradachari as guardian of his minor sons, the plaintiffs. This document is attested by the maternal uncle of the second defendant, D.W. 2 and D.W. 1 the pleader of Conjeevaram and two others. A security of immovable property was also given for this sale securing the properties which the first defendant purchased from the son-in-law, Sundaravaradachari. The Swamiji was at that time on tour and he apparently wanted to be satisfied about the *bona fides* of the sale and it was after his return that the consideration was paid in full discharge of two of the seven items of debts agreed to be discharged in part under the terms of the sale deed. The two debts which were fully discharged are the debt due to C. S. Narayanaswami Iyer of Kumbakonam which is item 2 in the sale deed and which is stated, according to the recitals, to have been incurred in 1938 for the marriage of Komalavalli, the principal amount of which was Rs. 3,000. The second debt that was fully discharged was the debt due to the Kumbakonam Bank. On the 4th November, 1932, the Kumbakonam Bank wrote to D.W. 2 stating that there was no written representation by the borrowers at the time the loan was advanced, but one V. Krishnaswami Ayyangar told the Bank about the purpose of the loan. The bank enclosed with that letter, Exhibit D-3, addressed to the vendee Anantachariar

in which it is mentioned that the loan of Rs. 3,000 was taken from the bank by Lakshmi Ammal, the first defendant and Sundaravaradachariar and that it was understood that the said loan was taken for the purpose of the marriage and nuptials of the daughter of Sundaravaradachariar. The letter gave also particulars regarding the balance of the principal and interest due in respect of that loan. On 25th April, 1934, after the Swami's return from his tour, defendants 1 and 2 and Sundaravaradachariar as father and guardian of the plaintiffs gave a letter to the vendee authorising the vendee to discharge the two debts, *i.e.*, the debt due to the Kumbakonam Bank and the debt due to Narayanaswami Aiyar of Kumbakonam which were incurred for the expenses of the marriage and nuptials of the grand-daughter of the first defendant, *i.e.*, Komalavalli. This is intended to vary the stipulation in the sale-deed that these and other debts should be discharged in part from the consideration for the sale payable by Ananthachariar to the vendors. The amount was thereafter paid and C. S. Narayanaswami Iyer gave a letter to Ananthachariar on 1st May, 1934, Exhibit D-7, acknowledging receipt of the full payment of the debt which had by then ripened into a decree in Original Suit No. 9 of 1934, Sub-Court, Kumbakonam. Narayanaswami Iyer undertook in that letter to enter up full satisfaction of the decree after the Court re-opened after summer recess. The letter also added that the loan of Rs. 3,000 was taken from him by Sundaravaradachari and C. V. Rajagopalachari, D.W. 2, on 16th July, 1928, on the representation made to him that it was required for meeting the bills of expenses incurred in connexion with the marriage of Komalavalli, the daughter of the second defendant. This letter is attested by Mr. S. Panchapakesa Sastri, Advocate (now a Judge of this Court). The amount due to the Kumbakonam Bank was also paid and the debt discharged and there is no dispute regarding that.

The plaintiffs instituted this suit on the 21st October, 1944, and it is in evidence, which is not contradicted on the plaintiffs' side, that at the time of the institution of the suit and even subsequently the plaintiffs and defendants 1 and 2 and Sundaravaradachariar were living as members of one family. In this the validity of the sale is challenged on the ground that it is beyond the power of the first defendant to sell property and that there was no valid and binding necessity to support the sale. The plaintiffs also went to the length of impeaching the sale on the ground that it was not supported by consideration. What they claim in the suit is a declaration that the sale-deed dated 30th September, 1932, was not valid and binding upon the reversionary interests of the plaintiffs beyond the lifetime of defendants 1 and 2. The vendee Ananthachariar Swami died and the third defendant, his son and father of defendants 4 to 6 filed a written statement setting out in detail the circumstances under which the sale deed came to be executed and the consideration was paid and also maintained that the sale is binding on the reversion. The plaintiffs, beyond filing some documents, did not adduce any rebutting evidence. On the defendants' side a number of documents including the letters Exhibit D-14 series have been filed and D.Ws. 1 and 2, the two attestors to the document who along with the plaintiffs' father took the principal part in arranging the sale, have been examined. The learned Subordinate Judge found that the entire consideration for the sale was paid and that the two debts which were discharged by the vendee were debts incurred for the marriage and nuptials of Komalavalli and that the sale, in view of certain decisions of this Court, is binding on the reversioners. He, however, found, taking every circumstance into consideration including the status of the parties, that the widow was not justified in spending such a large amount for the marriage and nuptials and that a sum of Rs. 1,000 for the marriage and Rs. 500 for the nuptials would be just and proper and that out of the consideration of Rs. 7,500 this amount of Rs. 1,500 alone is binding on the plaintiffs as reversioners. He therefore held that the sale does not bind the plaintiffs but that the reversioners whoever they may be at the time the reversion opens, will be entitled to recover possession of the property on payment of Rs. 1,500 to the alienee before recovering possession.

The appeal is by the defendants 3 to 6, the representatives of the alienee, and there is also a memorandum of cross-objections filed by the plaintiffs disputing the findings of the learned Subordinate Judge that Rs. 1,500 out of the consideration is binding on the reversion.

The question that falls to be determined is therefore the binding nature of the alienation under Exhibit D-1 (*a*) on the reversion. As regards the payment of consideration and the discharge of the debts and the purpose for which the debts were incurred, the findings of the learned Subordinate Judge are in favour of the appellants. These findings are, in our opinion, fully justified by the evidence on record. There are the undoubted representations made to the alienee evidenced by the letters which the creditors gave, Exhibits D-3, D-4 and D-7, and by the recitals in the sale deed, Exhibit D-1 (*a*), which sets out the history of the family from the time of the death of Srinivasaraghavachari to the date of the deed. In the sale deed there is a recital that Komalavalli, the eldest daughter of the second defendant, was married in 1928 and her nuptial marriage was performed in 1930 and that in connexion with these two ceremonies, debts had to be incurred. With reference to the debt due to Narayanaswami Iyer there is also an express recital that the debt was borrowed for the marriage of Komalavalli. No such recital, however, is expressly made with reference to the debt borrowed from the Kumbakonam Bank. The point that was stressed during the course of the arguments on behalf of the plaintiffs was that the borrowing from Narayanaswami Iyer was not a debt incurred on behalf of the estate as the promissory note was executed as admitted by D. W. 2, by himself and Sundaravaradachari. The widow, it is said, was therefore not justified in alienating property for discharging the debt due from these two people to C. S. Narayanaswami Iyer. The subsequent suit by Narayanaswami Iyer was also against the executants of the promissory note, D.W. 2 and Sundaravaradachariar. D.W. 2 explains in his evidence that he had secured the loan from Narayanaswami Iyer and that at the outset Narayanaswami Iyer was willing to take a letter from the first defendant but he had subsequently changed his mind and wanted a promissory note executed by him and the son-in-law, Sundaravaradachari. He obtained the money and paid it into the hands of Sundaravaradachari who applied it for discharging the various pressing debts incurred for the marriage such as piper, the pandalman and so on. The letter which he took from his sister to Narayanaswami Iyer was, as the evidence shows, handed over to Narayanaswami Iyer but that letter is not now forthcoming nor is the promissory note but there is no reason to disbelieve the evidence of this witness D.W. 2 and it was accepted by the trial Judge. The debt due to the Kumbakonam Bank arose out of a loan obtained by the first defendant and Sundaravaradachari and that was for the nuptials of Komalavalli. D.W. 2 was a surety for the bank on behalf of his sister. D.W. 1, the Kancheepuram pleader, who arranged the transaction expressly states in his evidence that representations were made by the defendants 1 and 2 and by Sundaravaradachariar and Rajagopalachari and that he had believed those representations as he had no reason to doubt them. He acted as the agent of the vendee and when he was satisfied that the amount was needed for the purposes indicated in the sale deed, he advised the vendee to pay the amount to discharge the debts. The vendee took the precaution of including the plaintiffs' father also as the guardian of the minor plaintiffs in executing the sale deed and there were the attestations of D.Ws. 1 and 2 besides the letters from the Kumbakonam Bank and Narayanaswami Iyer. The fact that in the sale deed the debt borrowed from the Kumbakonam Bank was not expressly stated to be in connexion with the expenses of the nuptials of Komalavalli does not, in our opinion, entitle us to disbelieve the evidence of D.W. 2 particularly as there is a clear recital in the sale deed that debts were incurred for the marriage and nuptials of Komalavalli. Though the debt borrowed from Narayanaswami Iyer was advanced on the personal credit of D.W. 2 and Sundaravaradachari, it is obvious that they borrowed this amount for the benefit of the first defendant and for the purpose of the marriage. D.W. 2 did not get the benefit of the loan and undoubtedly Sundaravaradachari and the first and second defendant it was that had the full benefit of that loan. It, therefore, comes with

ill-grace from the plaintiffs to argue that this loan was a personal debt of D.W. 2. It therefore follows that sums aggregating to Rs. 6,000 were borrowed for the marriage and nuptials of Komalavalli which were performed in 1928 and 1930 respectively. This leads us to the question whether the debt was justified under Hindu Law, and whether the alienation can be upheld. At the time the debts were incurred Sundaravaradachari's family was undoubtedly in indigent circumstances having practically no property of its own and all were living as members of the family of the first defendant and were entirely dependent upon her and the estate which she inherited from her husband. All the persons connected with this transaction were educated people and two of them are lawyers. The plaintiffs' father himself is a graduate and though he was conducting the suit on behalf of the plaintiffs along with an old clerk of his father as stated by the learned Subordinate Judge, he did not venture to go into the witness box though he could have given very valuable evidence on some of the important points that arise in the case. It must therefore be assumed that except the estate inherited by the first defendant, Sundaravaradachari had no other means of performing the marriage and nuptials of Komalavalli and of maintaining himself and his large family.

The power of a limited owner like the widow inheriting her husband's estate or a daughter inheriting the father's estate to make an alienation of the properties comprised in the estate has been the subject-matter of several decisions of the Privy Council and the High Courts. She may alienate the property purely for secular purposes or for religious or charitable purposes. To support the alienation for secular purposes the necessity for such an alienation or the benefit to the estate conferred by it must be established. The religious and charitable purposes are divided into two categories. the *nityakarma* or obligatory acts and *kamyakarma* or optional acts. The obligatory religious duties are the obsequies and the periodical ceremonies such as the annual ceremonies of the last male holder the peformance of which cannot be dispensed with. In respect of such acts, if the income from the estate is inadequate to meet the expenditure, the limited owner is entitled to sell the whole of the property if necessary as the duties must be performed. As regards non-obligatory or non-essential acts, it is not incumbent on the limited owner to perform them. They are not indispensable acts or duties but the performance of such acts is commended as they would confer *punya* or spiritual benefit and are conducive to the bliss of the soul of the deceased. In respect of such acts, however, the power of the limited owner is not as large as in the case of indispensable acts. In such a case, the sale or other alienation cannot be upheld unless it is reasonable in the circumstances of the family and the properties sold bear only a small proportion to the property inherited from the last owner. The obligations which the last owner would have been only morally bound to discharge may become legal obligations in the hands of the limited owner who inherits the estate. The terms, necessity and benefit, must therefore be confined to alienations made by a limited owner for what are termed secular or worldly purposes. The alienations however for spiritial necessity can be justified only either if they were made for meeting the indispensable acts or duties which must be performed, such as the shraddah ceremonies or the marriage of the daughter and the like or even if they were made for securing the merit or spiritual bliss to the deceased in the other world, it must be shown that the extent alienated was a reasonable portion of the property inherited. The reasonableness, of course, must be decided according to the circumstances of the family. These principles are deducible from two decisions of the Privy Council in *The Collector of Masulipatm* v. *Cavaly Venata Narainappah*[1] and *Sardar Singh* v. *Kunj Bihari Lal*[2], and the Full Bench decision of this Court in *Ambhu Bai* v. *Soni*[3].

The acquisition of spiritual merit or *Punya* as the object of life in this world has been emphasised by the Smriti writers. Manu says in Chapter IV, para 238.:

1. (1861) 8 M.I.A. 529, 550, 551.
2. (1922) 44 M.L.J. 766 : L.R. 49 I.A. 383 : I.L.R. 44 All. 503 (P.C.).
3. (1940) 2 M.L.J. 298 : I.L.R. 1941 Mad. 13 (F.B.).

धर्मं शनैः संचिनुयाद्वल्मीकमिव पुत्तिकाः ।

परलोक सहायार्थं सर्वभूतान्यपीडयन् ॥

(Giving no pain to any creature, let him slowly accumulate spiritual merit, for the sake (of acquiring) a companion to the next world, just as the white ant (gradually raises its) hill." Para 239 :

नामुत्रहि सहायार्थं पितामाता च तिष्ठतः ।

न पुत्र दारा न ज्ञाति धर्मस्तिष्ठति केवलम् ॥

(For in the next world neither father, nor mother, nor wife, nor sons, nor relations stay to be his companions ; spiritual benefit alone remains (with him). Para 240 :

एकः प्रजायते जन्तुरेक एव प्रलीयते ।

एको नु भुङ्क्ते सुकृतमेक एव च दुष्कृतम् ॥

(Single is each being born ; single it dies ; single it enjoys (the reward of its virtue) ; single (it suffers the punishment of its) sin.)
Para 241 :

मृतं शरीरमुत्सृज्य काष्ठलोष्ठसमं क्षितौ ।

विमुखा बान्धवा यान्ति धर्मस्तमनुगच्छदि ॥

(Leaving the dead body on the ground like a log of wood, or a clod of earth the relatives depart with averted faces ; but spiritual merit follows the (soul).)
Para 242 :

तस्माद्धर्मं सहायार्थं नित्यं संचिनुयाच्छनैः ।

धर्मेण हि सहायेन तमस्तरति दुस्तरम् ॥

(Let him therefore always slowly accumulate spiritual merit, in order (that it may be his) companion (after death) ; that with merit as his companion he will traverse a gloom difficult to traverse).
Para 243 :

धर्मप्रधानं पुरुषं तपसा हतकिल्बिषम् ।

परलोकं नयत्याशु भास्वन्तं खशरीरिणम् ॥

(That companion speedily conducts the man who is devoted to duty and efface his sins by austerities, to the next world, radiant, clothed with an ethereal body).

It is for this reason that the shastras enjoined the various modes by which a person can acquire spiritual merit or *punya*. The dedication of a small extent of property to God to perpetuate the name of the husband and to have archana performed in a temple in the name of the deceased, gifts to Brahmanas on occasions like the *pushkarams* of various rivers, not to speak of such gifts at the Sraddah ceremonies, feeding of *athithi* and *abyagathi*, maintaining dependants and various other deeds have been praised. The limited owner, therefore, even in respect of non-obligatory duties is not required to keep herself inactive and is not prevented from making any attempt to contribute for the spiritual welfare of the deceased if the estate permits. According to Manu "the father, the mother, the guru (elderly relation worthy of respect), a wife, an offspring, poor dependant and guest and a religious mendicant" are declared to be the group of persons who are to be maintained and Brihaspathi says :

"the widow inheriting her husband's estate should honour with food and presents for their benefit the husband's paternal uncle and the like venerable elderly relation, daughter's son, sister's son and maternal uncle, the aged and helpless persons, guests and females of the family".

These two texts undoubtedly indicate that poor dependants and the female members of the family should be maintained and should be honoured with food and presents. No doubt, the obligations so enumerated in the texts cannot be treated as obligatory but they are certainly acts which conduce to the spiritual welfare and contribute to the acquisition of spiritual merit in the other world. The persons who are dependant upon the last owner as members of the family and who are poor and were being maintained by the last owner who was under a moral obligation acquire a legal obligation when the estate devolved upon the limited owner. All the matters enumerated in the two texts may not be enforceable in the present day. It is for that reason, I think, that the decisions, have established that if the daughter's family is indigent, the widow is bound to maintain her and also to perform the marriage of the daughter's daughter, and the marriage and upanayanam of the daughter's sons and for these purposes would be entitled to alienate a reasonable portion of the property. On the same analogy, the daughter who inherits the father's estate is also empowered by decisions to incur debts and alienate property for the purpose of performing the marriage and upanayanam of her own sons and of the marriage of her daughter and even of her grand-daughter. The performance of the marriages of the female members of the family whom the limited owner is not under an obligation to get married is considered to be conducive to the spiritual welfare of the last male owner as *kanyadhanam* is considered, according to the Hindu Shastras, as a meritorious act from a religious point of view. In the case of a destitute kanya, though not so closely related to the family as to claim a legal obligation against the estate to meet the expenses of her marriage, if the limited owner spends money and performs the marriage of such a maiden, provided the amount spent is reasonable in the circumstances, the debts incurred for such a purpose would be binding on the estate and an alienation to discharge such debts would equally be binding. The texts bearing on this question have been subjected to an elaborate and critical examination by Venkataramana Rao, J., in *Srinivasa Rao* v. *Seshacharlu*[1] a case relating to an alienation of the whole of the estate by a daughter, who inherited her father's estate, to defray the marriage expenses of her daughter's daughter, her grand-daughter when the parents of the girl were indigent. The alienation to the extent to which it was reasonable was upheld. Besides, the texts referred to by Venkataramana Rao, J., there are also other texts of Smriti writers such as Manu, Marichi, Samvarta, Brihaspati, and Vasishta, in which the gift of a Kanya is stated to confer merit upon the giver. The texts are :

अग्निहोत्रादिभिर्यत्स्याद्दीक्षितब्राह्मणस्य च ।
तत्कन्यां विधिवद्दत्त्वा फलमाप्नोति मानवः ॥

Manu cited in Viramitrodaya Chowkhamba Edn., p. 831 (A man giving a maiden in marriage according to precept will get the fruit what a Brahman engaged in Diksha will get through the performance of Agnihotra and other rites.)

नाग्निचिन्नरकं याति न कन्यादो न तत्सुतः ।
विश्वजित्समितो यज्ञः कन्यादानमहत्फलम् ॥

Marichi cited in Smritichandrika, Mysore Edn., Vol. 43, p. 214. (One who does Agnichayana, the giver of a maiden in marriage, and his son, these three never go to hell. The gift of a maiden yields enormous fruits. It is an Yajna equal to the Visvajit Sacrifice).

ज्योतिष्टोमातिरात्राणां शतं शतगुणीकृतम् ।
प्राप्नोति कन्यकां दत्त्वा होममन्त्रैश्च संस्कृताम् ॥

1. (1941) 2 M.L.J. 406 : I.L.R. (1942) Mad. 42.

Samvarta cited in Smritichandrika, Mysore Edn. Vol. 43, page 214. (One who gives a virgin sanctified with the mantras of homa gets hundredfold the fruit of a hundred Jyotishtoma and Atiratra sacrifices).

सहस्र स मिता धेनुरनड्वान् दशधेनवः ।
दशानुडुत्समं यान दशयानसमो हयः ।
दशवाजिसमा कन्या भूमिदानं च तत्समम् ॥

Brihaspati cited in Smritchandrika, Mysore Edn. Vol. 43, page 214. (The gift of a cow is equal to that of a thousand (gold çoins), the gift of a bull to that of ten cows ; the gift of a vehicle to that of ten bulls ; and the gift of kanya to that of ten horses and the gift of land stands on a par.)

सर्वेषामेव दानानामेक जन्मानुगं फलम् ।
हाटकक्षितिगौरीणां सप्तजन्मानुगं फलम् ॥

Vasishta, cited in Hemadri (Asiatic Society of Bengal Edn.) Danakhanda, page 679. (The benefits accruing from all other gifts last for a single birth. The fruit of gifting gold, land and a maiden lasts for seven births).

अलंकृत्य तु यः कन्यां भूषणाच्छादनादिभिः ।
दत्वा स्वर्गमवाप्नोति पूज्यते वासवादिभिः ॥
कूकुदश्चाश्वमेधी च प्राणदाता भयेषु च ।
समं यान्ति रथा एषां त्रयो वै नात्र संशयः ॥

Samvarta, cited in Viramitrodaya, page 832 (One who gives a kanya providing her with jewels, clothing, etc. attains Heaven and is worshipped by Indra and others. A kookuda, i.e., one who gifts a maiden decked with jewels, the performer of the Asvamedha Sacrifice and one who saves another's life in danger—these three march together on parallel cars to Indira's abode).

आत्मीकृत्य सुवर्णेन परकीयां तु कन्यकाम् ।
धर्म्येण विधिना दातुमसगोत्रोऽपि युज्यते ॥

Skanda Purana, cited in Hemadri's Danakhanda, page 680. (It is proper even for a man belonging to a different Gotra to make one's own another's daughter by the gift of gold and give her in marriage according to the Sastraic injunctions).

We do not propose in this judgment to subject the decisions once more to a critical examination as the texts and the law have been more than once examined by this Court and a recent instance of such an examination is the decision in *Parisa* v. *Nataraja*[1]. The earliest of the decisions which related to the marriage of the daughter's daughter is that of the Allahabad High Court in *Rustam Singh* v. *Moti Singh*[2]. The family being poor and the father of the girl being unable to meet the expenses of the marriage, it was held that the daughter inheriting the father's estate was entitled to alienate the property for the marriage of her daughter. This was followed by this Court in *Chudammal* v. *Nadamuni Naidu*[3], and the Lahore High Court followed these two decisions in *Jai Ram* v. *Bhagat Ram*[4]. Devadoss, J., thought that the daughter was not justified in alienating the property inherited by her from

1. (1950) 1 M.L.J. 90 : I.L.R. 1950 Mad. 788.
2. (1896) I.L.R. 18 All. 474.
3. (1909) 3 I.C. 77.
4. A.I.R. 1935 Lah. 440.

her father for performing the marriage of her son but his decision and the subsequent decision of Ananthakrishna Ayyar, J., in *Anandarao* v. *Venkatasubba Rao*[1] which related to the upanayanam of the daughter's son were dissented from and disapproved by Venkatasubba Rao, J., in *Mallayya* v. *Bapi Reddi*[2], which was case of a marriage of a daughter's son. The learned Judge examined the legal position and principle and observed in the course of the judgment that the marriage of a daughter's daughter is an *a fortiori* case. The learned Judge referred to the decision of the Privy Council in *Sardar Singh* v. *Kunj Bihari Lal*[3]. and the distinction pointed out in that judgment between obligatory religious duties and non-obligatory duties. The learned Judge rested his decision on the principle that the daughter's son occupies a peculiar position under Hindu Law, and that he confers spiritual benefit on the maternal ancestors and therefore the upanayanam and the marriage which qualify the daughter's son to perform and take part in the religious ceremonies were considered essential. He however confined his decision to the case of the family of daughter's son being in indigent circumstances. When the decision of Anantakrishna Ayyar, J., in *Anandarao* v. *Venkatasubba Rao*[1], was taken in Letters Patent Appeal, the learned Judges reversed that decision in *Venkatasubba Rao* v. *Ananda Rao*[4] and upheld the alienation made for the purpose of performing the upanayanam for the daughter's son even though the family was not in indigent circumstances. This is undoubtedly based on the peculiar position which the daughter's son occupies. It must be remembered that the position which the daughter's son occupies in the order of inheritance is due to Vignaneswara as he interpreted the participle एव in Yagnavalkya's text as including the daughter's son after the daughter and for this he relied on the tenets of Vishnu and Manu who treat the daughter's son as equivalent to a son's son. The case in *Parisa* v. *Nataraja*[5] is a case of a marriage of a daughter's son, the family being in indigent circumstances. The Full Bench in *Ambu Bai* v. *Soni Bai*[6], upheld the right of a widowed indigent daughter for maintenance against the father's estate following the principle of the Full Bench decision in *Janki* v. *Nand Ram*[7] that the moral obligation in the hands of the father became a legal obligation by his death and consequently a liability on the estate of the widow.

There are therefore two lines of cases. One line of cases relating to daughter's son whether it is marriage or upanayanam and the obligation, when the family is indigent or even if it is not indigent, based upon the spiritual benefit which the daughter's son confers upon the maternal ancestors. In case of marriages of the daughter's daughter or the daughter's grand-daughter, however, the alienations are supported on the ground that the gift of a destitute kanya in marriage is conducive to the spiritual welfare and confers spiritual merit on the last male owner as his funds are utilized for the performance of the marriage. It may possibly be rested on the footing that where these girls, whether it is the daughter's daughter or the daughter's grand-daughter, are practically members of the father's family when they are indigent and poor as in the present case, a moral obligation ripens into a legal obligation for if the last male-holder had been alive he would certainly have felt it his duty to dispose of his own daughter's daughter or his own daughter's grand-daughter in marriage where the families of those girls were not in affluent circumstances to perform the marriage. I do not however rest the decision on this ground and express no final opinion without a fuller examination of the point. The authority, therefore, is overwhelming and the object of the alienation in the present case for the performance of the marriage and nuptial ceremonies of Komalavalli is perfectly justified.

The learned Subordinate Judge does not differ from this view but he set aside the alienation on the ground that the widow was not justified in spending as much as

1. (1929) 58 M.L.J. 127.
2. (1931) 62 M.L.J. 39.
3. (1922) 44 M.L.J. 766 : L.R. 49 I.A. 383 : I.L.R. 44 All. 503 (P.C.).
4. (1934) 67 M.L.J. 204 : I.L.R. 57 Mad. 772.
5. (1950) 1 M.L.J. 90 : I.L.R. 1950 Mad. 788.
6. (1940) 2 M.L.J. 298 : I.L.R. 1941 Mad. 13 (F.B.).
7. (1888) I.L.R. 11 All. 194 (F.B.).

Rs. 6,000 for the two ceremonies. It is not disputed that the amount was in fact spent for those purposes. The decisions which we have adverted to including the latest decision of Venkataramana Rao, J., in *Srinivasa Rao* v. *Seshacharlu*[1] have held that the expenditure incurred must bear a reasonable proportion to the estate and have regard to the circumstances of the family and Hindu notions regarding the propriety of the expenditure. In the decision in *Srinivasa Rao* v. *Seshacharlu*[1] the widow alienated the entire property which she had inherited. We have ourselves examined the printed records in that case and we are unable to find anything to justify the alienation of the entire estate inherited by the widow. No doubt, under those circumstances, the alienation of the entirety of the estate may not be justifiable. In the present case, the plaintiffs' father assumed a wholly unhelpful attitude and did not place any material before the Court regarding the necessity for the expenditure. The point itself was not taken in the pleadings nor was there any suggestion in the cross-examination of the witnesses who have been examimined on the defendants' side, D.Ws. 1 and 2. They are respectable members of the Bar and they are themselves relations; at least one of them is a relation of the family and belongs to the same community as the alienee. We have no material on which to decide the status and the circumstances of the family and the reasonable amount which could have been spent for the marriage and nuptials of Komalavalli. The learned Judge, if he thought that the alienation could not be justified to the extent of Rs. 6,000, the principal, he should have given an opportunity to the parties to enlighten the Court as regards the propriety of the expenditure. But this course was not adopted and the defendants were not in a position to adduce evidence and were at a disadvantage as the point was not taken. Though Sundaravaradachari had lost all his property and was mainly dependent upon the family of the first defendant, it cannot be said that the status of the first defendant's family was such as to lead to the inference that the expenditure was extravagant. It is common knowledge that in middle class families the expenditure for marriages and nuptials are very high. It is unfortunately due to various circumstances including the amount of katnam and presents extracted by the sons-in-law from the unwilling parents-in-law; but it cannot be avoided as the parents of the girl would be anxious to place the girl in a family which is comparatively in affluent circumstances. In 1928 and 1930 the family of the first and second defendants had good property though the income was not sufficient to meet its expenses. Having regard to the circumstances that the second defendant's marriage and nuptials were performed at a large expense of Rs. 18,000 in 1910, it cannot be said that one-third of the amount spent for the marriage and nuptials of Komalavalli was extravagant and does not bear a reasonable proportion to the estate which the first defendant inherited from her husband. All the members of the family, D.W. 2, and his brother and D.W. 1 considered that the expenditure was not such as to lead to the inference that it was extravagant. In these circumstances, we think that we would not be justified in setting aside the alienation on the ground that the expenditure was extravagant and the property alienated was unreasonably large having regard to the facts set out above. We disagree therefore with the finding of the learned Subordinate Judge and uphold the alienation in favour of the appellants in its entirety.

The result is that the appeal is allowed with costs, the decree of the Subordinate Judge is set aside and the suit as against these appellants is dismissed with costs. In this view it is unnecessary to consider the memorandum of cross-objections which is dismissed but without costs.

Raghava Rao, J.—I agree in the conclusion of my learned brother, but wish to add a few words on the legal aspect of the question for determination.

Learned Counsel for the respondents did not dispute the power of the first defendant to make an alienation of her husband's estate within the limits allowed by the Hindu law for meeting the expenses incurred in connection with the marriage of her daughter's (*i.e.* second defendant's) daughter. Nor did he dispute the legiti-

1. (1941) 2 M.L.J. 406: I.L.R. 1942 Mad. 42.

macy of any expenditure for the garbhadhana ceremony as such, *i.e.* as apart from the expenditure for the vivaha ceremony which preceded it by some years. His argument was, firstly, that the expenses for the garbhadhana samskara not being recited in the sale deed could not be accepted as true and secondly that the expenses for that samskara and the vivaha samskara even if incurred in the aggregate sum of Rs. 6,000 could not be treated as reasonable in measure in the eye of law so as to justify the alienation under challenge, but must be regarded as too extravagant to support it.

The existence in law of a power of the kind exercised by the first defendant in the present case could not indeed be disputed because of the long settled law on the subject which has been examined by my learned brother in his judgment from its very foundations in the smritis in so far as they not only enjoin on an individual punya-sanchayana in general, but also acclaim the virtue of *kanyadhana* in particular as a highly meritorious act. I need only add that *kanyadhana* like godana is an important part of the vedic obsequial ritual observed on the 12th day of the death as one of the shodasamahadhanas to be made by the karta after sapindikarana. To incur expenditure in connection with any *kanyadhana* as an act of piety calculated to promote the spiritual bliss of her husband is undoubtedly within the competency of a Hindu widow, and *a fortiori* so where the kanya is that of an indigent family. The relationship of the kanya to the female holder of the estate as her daughter or daughter's daughter does not certainly take away from but if at all only add to the spiritual bliss of the father or husband as the case may be; nor does the fact of indigence or affluence of the parents of the girl matter, except *perhaps* on a question of the relative measure of the meritoriousness which can never be precisely assessed or estimated and need not be enquired into, and *certainly* on a question of the measure of the expenditure to be incurred which must, of course, vary accoring to the status of the parents of the girl to be married.

The question of indigence or affluence has been held immaterial by the learned Chief Justice and Krishnaswamy Nayudu, J., in *Parvba* v. *Nataraja*[1], which related to the marriage of a daughter's son of the last male-holder, and there is no reason why it should be held material in the case of the marriage of a daughter's daughter of the last male-holder, except as I think in either case to the extent and in the sense indicated just now by me. The learned Judges in that decision rightly observe :—

"We do not think there is any real justification in making distinction between the alienations for marriage expenses of a daughter's daughter and for marriage expenses of a daughter's son."

In both the cases it is only a measure of expenditure which the Court can consider reasonable that can support the alienation and support it *pro tanto*.

The test of this reasonableness has been propounded in the cases in terms of a quantitative ratio by no means certain or definite, which the Court has to apply to the facts of each case as best as it can. In *Sardar Singh* v. *Kunj Behari Lal*[2], which related to an alienation by the widow of which the avowed object was to offer food to an idol, Mr. Ameer Ali in delivering the judgment of their Lordships' Board of the Judicial Committee of the Pricy Council, first calls attention to the *locus classicus* in *The Collector of Masulipatam* v. *Cavaly Venkata Narainappah*[3], where the Master of the Rolls in delivering judgment in the latter case said as follows :—

"It is admitted on all hands that if there be collateral heirs of the husband, the widow cannot of her own will alienate the property except for special purposes. For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely wordly purposes. To support an alienation for the last she must show necessity."

Mr. Ameer Ali proceeds to refer afterwards to *Ram Kawal Singh* v. *Ram Kishore Das*[4], where the alienation was not for the maintenance of an idol which had been established by the husband of the widow and the dedication was held *prima facie*

1. (1950) 1 M.L.J. 90 : I.L.R. 1950 Mad. 788.
2. (1922) 44 M.L.J. 766 : L.R. 49 I.A. 383 : I.L.R. 44 All. 503 (P.C.).
3. (1861) 8 M.I.A. 529, 550, 551.
4. (1895) I.L.R. 22 Cal. 506.

to be for the widow's own spiritual welfare and not for the husband's. His Lordship then enunciates the distinction between the two kinds of spiritual acts for which the Hindu female can make alienations of the inherited estate—compulsory and optional acts—in that in the case of the former, if the income of the property or the property itself is not sufficient to cover the expenses she is entitled to sell the whole of it, while in the case of the latter she can alienate a small portion of the estate inherited for the pious or charitable purposes contemplated by her. His Lordship then quotes with approval the following passage from *Tatayya* v. *Ramakrishnamma*[1]:

"We think we are warranted in holding that if the property sold or gifted bears a small proportion (which it is impossible to define more exactly) to the estate inherited and the occasion of the (disposition or) expenditure is reasonable and proper according to the common notions of the Hindus it is justifiable and cannot be impeached by the reversioner."

Referring to the quantitative ratio herein suggested, this is what Jackson, J., in delivering the judgment of the Bench consisting of himself and Butler, J., observes in *Venkatasubbarao* v. *Ananda Rao*[2]:

"The quantitative ratio approved in this judgment is not at first sight easy to understand. If a small gift to an idol is conducive to the husband's spiritual bliss, would not a larger gift be still more conducive? Probably human nature being what it is, Courts are not prepared to sanction transactions which offend ordinary commonsense and good husbandry. If a widow devotes the whole of her estate to the idol there will be suspicion of fraud or undue influence. In our present case there is no suggestion of undue extravagance and it must be remembered that the quantitative ratio works in both direction. Her pious duty for her husband's satisfaction is to honour her daughter's son and some meagre gift for the ceremonies which would only make him ridiculous in the eyes of the neighbours would not fulfil this obligation."

At page 774 of the report, earlier, there is another observation of the Court also worth noting in this connection. Where the piety of purpose about the alienation by the female holder is impeached in any given case on the ground of the absence of sincere religious feeling in the mind of the alienor, asks Jackson, J.,

"Who is to distinguish positively between sincere religious feeling and idle sentiment?"

The learned Judge then proceeds thus:

"All that can safely be said is that where the point is doubtful and where there is not the slightest suspicion of ulterior motive or fraud, the benefit of the doubt should be given to religious feeling. It is not for a Court of law to disparage the pious acts of devout people".

It may be interesting to observe, pausing here, rather parenthetically, that judicial conception of Hindu piety has gone indeed so far as to sanction within the limits of the operation of this quantitative ratio test an alienation by a Hindu family manager by way of a gift to a Roman Catholic Church. It has been held in this Court by Chandrasekhara Aiyar, J., in *Rev. Kolandai* v. *Rev. Gnanavaram*[3], that where the family owned considerable properties and the land gifted by the manager to a Roman Catholic Church is a very small fraction measuring 1 acre 20 cents worth Rs. 50 and remaining uncultivated, the other coparceners would be bound. Says the learned Judge at page 157, first column of the report:

"The Hindu religion has been the most tolerant religion of the world and the very idea that pious and charitable purposes should refer to and mean objects that can be said to promote a particular faith, creed or dogma is foreign to its ideals. True piety transcends castes and creeds and whatever is done to advance belief in God and His rule over the Universe can be said to be an act of broad-minded piety."

The piety of *kanyadhana* with which we are concerned in this case is undoubted and there is no question of any distinction here between an act of piety conducive to the spiritual bliss of the husband and an act of piety conducive to the spiritual bliss of the widow as such as in *Rama Kawal Singh* v. *Ram Kishore Das*[4]. The only point for consideration therefore, is, whether the first defendant in making the alienation complained of in the present case exceeded the limits allowed to her by the law according to the quantitative ratio test laid down by the decisions. My learned brother has given reasons with which I agree for holding that she did not. It is

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1. (1910) 20 M.L.J. 798: I.L.R. 34 Mad. 288, 291.
2. (1934) 67 M.L.J. 204: I.L.R. 57 Mad. 772.
3. (1943) 2 M.L.J. 664: A.I.R. 1944 Mad. 156.
4. (1895) I.L.R. 22 Cal. 506.

significant that the daughter and the son-in-law—the mother and father respectively of the plaintiffs—joined in the transaction—and that neither of them, and in particular the latter, has gone into the box. No "ulterior motive or fraud" and no "undue extravagance of expenditure" within the meaning of the decisions has been pleaded, much less proved.

It seems to me too that a *bona fide* alienee like the father of the third defendant need have gone no further than to satisfy himself that there were outstanding debts in fact and indeed incurred by the first defendant as for the marriage and for the later allied ceremony of garbhadhana of her daughter's daughter. To call upon him to go further and satisfy himself that the expenditure incurred was one which a Court of law would hold reasonable, should the transaction of sale be later challenged, is to impose on him an onerous and undue responsibility not easily feasible of discharge in a matter on which if there were more Courts than one dealing with the question they may not for aught one knows find themselves agreeing in the same conclusion. To say that such an alienee must either take the risk of the Court deciding adversely to him on the question of the reasonableness of the expenditure or refrain from going in for the property altogether does not appeal to me in the slightest as a canon of practical justice and equity which this Court should endorse. Except in a case of proved fraud on the power in the sense of its exercise for sinister or ulterior purpose or in a case of proved collusion between the alienor and the alienee in order to defeat the reversion, the Court ought not, in my opinion, to be astute or anxious to invalidate the transaction. The alienee must, I am inclined to think, stand protected so long as the *causa causans* inspiring the transaction is an indebtedness for a lawful and binding purpose. The principle of equity recognised from as early as the Privy Council decision in *Hanoomanpersaud's case*[1], in favour of *bona fide* alienee or creditor acting on the representation of a lawful purpose by the limited estate-holder is not merely that he stands resolved from the obligation to prove the real existence of an alleged and reasonably credited necessity as a condition precedent to the validity of the transaction, but also that such alienee or creditor is not affected by the precedent mismanagement of the estate. This latter aspect of the principle has been expressed by the Privy Council in *Niladri Sahu* v. *Mahant Chaturbhuj Das*[2], which related to an alienation by the head of a mutt in the terms that only the immediate and not the remote cause, the *causa causans* of the borrowing is the thing to be considered. This aspect of the doctrine is, in my opinion, equally applicable to an alienation by a widow holding a limited estate. That in such cases the anterior mismanagement does not affect the *bona fide* alienee or creditor is an integral part and parcel of the equitable doctrine expounded by Knight Bruce, L.J., in *Hanoomanpersaud's case*[1] and, in my opinion, the sale impeached in the present case must in this view also stand. We are now concerned with the rights of an alienee under a sale effected for the discharge of a debt already incurred for a lawful and binding purpose by the holder of the limited estate, not with the rights of a creditor simple or secured for the first time advancing a loan for such a purpose.

As regards the principle discussed before the Court below, as well as before us, that a moral obligation on the part of an ancestor becomes a legal obligation on the descent of the estate, on his heir, I must own to some amount of doubt in regard to its applicability to the present case. Although the doctrine has become too well-settled in Hindu Law to be disputed at this time of day I am inclined to think that it can only apply to cases where the obligation even as a moral one did arise during the original owner's lifetime. To fasten on the estate in the hands of the heir a liability not *in esse* but only *in posse* during the lifetime of the original owner is, I am afraid, to go further than is warranted by the decisions on the subject or the ratio thereof. The principle is, no doubt, one peculiar to Hindu Jurisprudence which insists that not merely legal but also moral obligations of the propositus must be fulfilled by the taker of the estate after his death in the interest of his spiritual

1. (1856) 6 M.I.A. 393.

2. (1926) 51 M.L.J. 822: L.R. 53 I.A. 253: I.L.R. 6 Pat. 139 (P.C.).

benefit and welfare. The principle is certainly not one of which the Courts ought to fight shy because there is, in my opinion, a high liberality of spiritual outlook underlying the doctrine which no Hindu ought by any means to feel abashed about. I am not prepared to extend the principle, however, to any merely moral obligation which did not concretely exist during the lifetime of the original owner because the person claiming enforcement of such obligation against the later taker of the estate was not in existence at all during the lifetime of the original owner. Moreover, I entertain some doubt how far the liability to meet the expenses of marriage and garbhadana of a daughter's daughter is to be regarded as within the ambit of a person's moral obligation according to the texts to maintain her during his lifetime. The principle, as observed in *Kamini Dassee* v. *Chandra Pode Mondle*[1] is one which is or is not to be applied to a particular case according to the view that the Court takes on its own merits. It will have to be determined in each case, whether having regard to the relationship, the means and various circumstances of the party claiming maintenance, the later proprietor was, according to the principles of the Hindu Law and to the usage and practice of the Hindu people, morally bound to maintain that party. Even assuming that a person's liability to meet marriage expenses of his daughter's daughter may be treated as on the same footing as an obligation to merely maintain her, there is, as I have already indicated, no inexorable logic about the situation such as compels me to say, as at present advised that although the daughter's daughter came into being only after the death of the person, his heir or heiress would be bound by the obligation as a legal obligation into which a moral obligation of the person might well become converted on the devolution of his estate on his heir or heiress. The extension of the doctrine in the manner suggested is calculated to introduce sometimes a complication into the situation by reason of too many burdens for the estate to bear coming into existence over an undefined period of time after the death of the original owner against the estate in the hands of the later taker. Far from operating as a rule of spiritual *benefit* to the original owner, I cannot help feeling that the extension may work, sometimes too much to the prejudice of the later taker to leave him any inducement to minister even to the fundamental spiritual *needs* of the deceased.

Lastly, I agree with my learned brother in his view of *Srinivasa Rao* v. *Seshacharlu*[2] that the alienation in that case, which was of the whole property inherited by the widow, could not be upheld in its entirety consistently with the quantitative ratio test discussed in the foregoing.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAJAGOPALAN.

Rao Saheb Dr. Ananda Baliga .. *Appellant**

v.

Srimath Ananteswar Temple, Manjeswar, by its executive officer, Sri K. P. Kaurath and others .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927), section 84 (1)—Scope—Dispute which admits the institution to be a temple but that the temple is exclusively owned by particular religious denomination and not by the Hindu community as a whole—Jurisdiction of Civil Court if prohibited—Sections 73 (4), 79 and 79 (a)—Effect.

Section 84 (1) of the Madras Hindu Religious Endowments Act (II of 1927) (and the same applies to the corresponding section of Madras Act XIX of 1951) is intended to give jurisdiction to the Board to decide a dispute, when a dispute is raised, whether a particular institution is a math or temple as defined by the Act; and not a dispute which admits the institution to be a temple but that the temple is exclusively owned by a particular religious denomination such as the Gowd Saraswat Brahmin community and not by the Hindu community as a whole. In such a case the prohibition against the exercise of the jurisdiction by the Civil Court under section 84 (1) does not come into

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1. (1889) I.L.R. 17 Cal. 373.

2. (1941) 2 M.L.J. 406 : I.L.R. 1942 Mad. 42.

* Appeal No. 434 of 1948.

22nd January, 1952.

operation. As there is no provision in section 73 or any of the other provisions of the Act to obtain a declaration of the description asked for in the present case the bar contemplated by sub-clause (4) of section 73 does not apply.

Sections 79 and 79-A of the Act are not intended to provide a forum for the determination of the denominational rights of a community over the temple but are intended to apply to matters like the usage regarding the rituals, honours, perquisites, emoluments and so on.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, dated 2nd December, 1947, in O. S. No. 61 of 1947.

A. Narayana Pai for Appellant.

M. K. Nambiar, M. Sekhara Menon, C. F. Louis, M. Seshachalapathi, T. K. Raman Nambisan, the Government Pleader (*P. Satyanarayana Raju*) and *K. N. Karunakaran* for Respondents.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—The plaintiff whose suit has been dismissed on a preliminary point by the lower Court is the appellant in this appeal. The suit was instituted under Order 1, rule 8 of the Civil Procedure Code, with the leave of the Court on behalf of the Gowd Saraswat Brahmin community in South Kanara; and two reliefs were claimed in the plaint with reference to the suit temple which is at present being managed by an executive officer appointed by the Madras Hindu Religious Endowments Board in 1939 as the temple was notified under the Act (*vide* Ex. B-1). The reliefs which the plaintiff claimed in the plaint were two: (1) a declaration that the first defendant temple belongs to and it is the exclusive right of the members of the Gowd Saraswat Brâhmin community of South Kanara who alone have the exclusive right of management and performing the puja therein; (2) a permanent injunction restraining the second defendant from introducing any form of agama ritual or mode of worship in the said temple other than the existing form, contrary to the well-established custom and usage. The suit was instituted on the 16th of April, 1947, and the objection taken was that the suit was barred by the provisions of the Madras Hindu Religious Endowments Act (II of 1927). The contention was upheld by the lower Court. Hence this appeal.

Since the decision in the case, the Madras Hindu Religious Endowments Act (II of 1927) was repealed by the Madras Hindu Religious Charitable Endowments Act, 1951 (XIX of 1951), but the rules and the notifications issued under the repealed Act have been continued by section 103 of the new Act.

The suit being of a civil nature it remains to consider whether the jurisdiction of the Civil Court is taken away either expressly or impliedly by way of the provisions of Act II of 1927. Our observations regarding the provisions of Act II of 1927 which have been relied on as barring the jurisdiction of the Civil Court would equally apply to the corresponding provisions of the new Act. It is, therefore, unnecessary to refer in the course of the judgment to the provisions of the new Act.

The main provisions that have been relied on as barring the jurisdiction of the Civil Court are sections 84 (1), 73 (4) and 79 and 79 (*a*). Section 84 (1) provides:

"If any dispute arises as to—

(*a*) Whether an institution is a math or temple as defined in this Act,

(*b*) Whether a trustee is a hereditary trustee as defined in this Act, or not, or

(*c*) Whether any property or money endowed is a specific endowment as defined in this Act or not,

such dispute shall be decided by the Board and no Court in the exercise of its original jurisdiction shall take cognizance of any such dispute."

It is not claimed on behalf of the respondent that clauses (*b*) and (*c*) would apply in the present case. But he relies upon clause (*a*) and the contention is that the dispute raised in the plaint in respect of which the declaration is sought is a dispute which raises the question whether the institution is a temple as defined in the Act, or not; and therefore the relief sought for in the plaint is within section 84 (1) (*a*) of the Act and the cognizance of the suit by the Civil Court is barred. He refers

in this connection to the definition of "temple" in section 9, clause (12), of the Act It states:

"'Temple' means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community or any section thereof, as a place of religious worship."

The argument is, if a question arises whether a temple is owned by the Hindu community as a whole or whether it is owned only by a section of that community, the dispute would then be one which can aptly be described as raising the question whether the institution is a temple or not within the meaning of section 84 (1) of the Act. In our opinion, if the section is so construed, it would be placing a strained construction upon it and we think that the language of the section does not warrant such an interpretation. The section is intended to give jurisdiction to the Board to decide a dispute, when a dispute is raised, whether a particular institution is a math or temple as defined by the Act; and not a dispute which admits the institution to be a temple but that the temple is exclusively owned by a particular religious denomination such as the Gowd Saraswat Brahmin community and not by the Hindu community as a whole. Section 84 (1) (*a*) of the Act, therefore in our opinion, does not cover the dispute raised in the present suit, and, therefore, the prohibition against the exercise of the jurisdiction by the Civil Court under section 84 (1) does not come into operation.

It was then argued that the suit is barred by section 73 (4) of the Act which provides:

"No suit or other legal proceeding claiming any relief provided in this Act, in respect of such administration or management shall be instituted except under and in conformity with the provisions of this Act."

Section 73 was the subject of amendment several times and no useful purpose would be served by referring to decisions pronounced at a time when the language of this clause was not identical. Under this clause what is required is that if the Act itself provides for a relief which is claimed in the suit, the jurisdiction to entertain a suit for such a relief which has relation to the administration or management is taken away. The only method by which the aggrieved person could get redress in respect of such an infringement is to adopt the procedure laid down in the Act and achieve his object. In such a case where the relief itself is provided by the Act in respect of the administration or management, it is not open to a party to ignore the provisions of the Act and approach the civil Court by a suit for obtaining an identical relief. In such a case the jurisdiction is obviously barred.

This takes us to the question whether any provision has been made for adjudication or for granting a declaration of the nature now sought for in the suit under the provisions of the Act. Neither in section 73 nor in any of the other provisions of the Act is there any provision to obtain a declaration in a case of this description. The bar therefore contemplated by sub-clause (4) of section 73 does not apply in the present case in so far as it is confined to the relief of declaration.

The learned counsel for the respondent then relied on sections 79 and 79 (*a*) of the Act. His argument was that the declaration of the exclusive rights of the denomination was founded on usage and therefore it is a matter which falls within the purview of section 79, as a consequence of which the machinery provided for in section 79 (*a*) for an adjudication of that dispute is the only remedy provided for in such a case and no other. Sections 79 and 79 (*a*) of the Act, in our opinion, are not intended to provide a forum for the determination of the denominational rights of a community over the temple but are intended to apply to matters like the usage regarding the rituals, honours, perquisites, emoluments and so on. It is inconceivable that the Legislature could have intended to give jurisdiction to the Board to consider and adjudicate upon rights of such a magnitude as rights of a particular denomination over a temple whether founded on usage or on other grounds by the simple and summary machinery provided under section 79 (*a*) of the Act. We are, therefore, of the opinion that there is no bar laid down by section 79 (*a*) of the Act either, so far as the relief for declaration is concerned.

As regards the second relief, however, it no doubt falls within the purview of section 79 (*a*) and it is not open to the plaintiff to at once resort to a suit without going to the anterior process of getting an adjudication from the Board as provided by section 79 (*a*) of the Act. The learned advocate for the appellant (plaintiff) saw the force of this objection and was willing to give up this relief on behalf of his client. The relief must, therefore, be deleted from the plaint.

From the foregoing it follows that the plaintiff is entitled to maintain the suit for the first of the reliefs set out above and the total dismissal of the suit by the learned Judge is not justified. The appeal therefore must be allowed and the decree of the lower Court set aside, and the suit is remanded for disposal in the light of the observations contained in this judgment. The costs of this appeal will abide and follow the result of the suit in the trial Court. The appellant is entitled to a refund of the court-fee paid by him on the memorandum of appeal.

K.S. —————— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO.

N. Thirumaleshwara Bhatta .. *Appellant**

v.

Balike Govinda Bhatta and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), section 28 (as amended)—Insolvency of Hindu father—Power of disposition over son's share—If vests in Official Receiver—Sale by Official Receiver—When conveys son's share also.

On adjudication of the father as an insolvent not only the share of the father but also the power of the father to dispose of the share of the son would vest in the Official Receiver under section 28 of the Provincial Insolvency Act. The mere fact that the order of adjudication vested in the Official Receiver not only the share of the father but also the power of disposition possessed by the father over the son's share would not by itself convey to the auction-purchaser the share of the son unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that power of sale and did in fact sell the son's share as well. [In the instant case the son's share was held not to vest in the auction-purchaser.] Where prior to the sale the son sends a notice demanding partition of the property there will be a division in status which will prevent the Official Receiver from exercising the power of sale.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in O. S. No. 90 of 1946.

T. Krishna Rao for Appellant.

K. Y. Adiga and *K. P. Adiga* for Respondents.

The Court delivered the following

JUDGMENT.—The second defendant is the appellant in this appeal. The first plaintiff is the son of the first defendant. They were members of a joint undivided Hindu family. On the 27th of April, 1938 (Ex. B-25) the father and the son executed a trust deed in respect of their family properties in favour of their family deity, Shri Sankaranarayana Devaru constituting themselves trustees on behalf of the God. Thereupon the second defendant who was a creditor of the first defendant filed I.P. No. 11 of 1930, Sub-Court, South Kanara, on the 26th of July, 1938, Ex. B-25 to adjudicate the first defendant an insolvent. The deed of trust was relied on as constituting an act of insolvency. On the 15th of November, 1939, the first defendant was adjudicated an insolvent (Ex. B-27). The Official Receiver in whom the property became vested then filed R. I.A. No. 95 of 1940 to set aside the deed of trust under sections 4, 5, 53 and 54 of the Provincial Insolvency Act on the 10th January, 1940, Ex. B-28. The God was impleaded as a respondent represented by the first plaintiff as its trustee. The respondent was *ex parte* in that application and after examining one witness the trust deed was set aside as having been brought into existence to defraud the creditors of the first defendant. The order of the Court is dated 28th January, 1941. In April, 1941 the Official Receiver took steps to bring the properties to sale. The sale was fixed on 28th May, 1941

* Appeal No. 426 of 1948. 4th February, 1952.

and was actually held on 31st of May, 1951, in which the second defendant became the purchaser for a sum of Rs. 2,850 subject to a prior mortgage. On the 2nd of July, 1941, the Official Receiver executed the sale deed, Ex. B-39 in favour of the second defendant. On 13th August, 1941, the first plaintiff surrendered the entire property to the second defendant and the second defendant came into possession of the property.

On the 14th of October, 1943, the present suit was filed by the first plaintiff claiming a half share in the suit properties as the trust deed was set aside by the Insolvency Court. The second defendant resisted the suit. The Official Receiver was impleaded as the third defendant. The second defendant claimed that by reason of his purchase he was entitled not only to the share of the insolvent but also to the share of the son and that in any event the trust deed was valid at least between the first plaintiff and the second plaintiff to the extent of half a share and that the first plaintiff was not entitled to any relief. On this objection the second plaintiff was impleaded as a party. The learned Subordinate Judge held that the purchase by the second defendant was effective only to vest the father's *share* in him and that he was not entitled to the son's share. A decree for partition was granted in favour of the first plaintiff. The second defendant now appeals to this Court.

There are two points which arise for consideration in this appeal. The first point is whether the sale by the Official Receiver conveyed to the second defendant not only the share of the father but also the share of the son. At the time the suit was instituted in the lower Court the law was as laid down by the Full Bench of this Court in *Rama Sastrigal* v. *Balakrishnarao*[1], that the insolvency of the father would not vest in the Official Receiver the power of the father to sell the son's share for the discharge of the debts binding on the son either on the ground of necessity or on the ground of pious obligation. The law has since been altered by the Amending Act which has restored the position to what it was before the decision of the Full Bench. It must, therefore, be taken that the law is that on adjudication of the father as an insolvent not only the share of the father but also the power of the father to dispose of the share of the son would vest in the Official Receiver under section 28 of the Provincial Insolvency Act. The question that has to be decided in this case is not whether the power had vested in the Official Receiver but whether the Official Receiver in fact purported to exercise that power and intended to convey the share of the son as well to the purchaser. This has to be gathered from the proclamation of sale and from the sale deed actually executed by the Official Receiver. In Exhibit B-5 the sale list dated 28th May, 1941, it is said in the preamble that what was purported to be sold was the entire right possessed by the said insolvent in the immovable properties described in the schedule. The sale was, therefore, confined to the right of the insolvent in the property and did not extend to the share of the son. No doubt in the schedule the entire property was described. In the sale deed, Exhibit B-39 it is definitely stated that what was being conveyed was the property belonging to the insolvent under *muli mula geni and janmi* right of which the second defendant became the auction-purchaser. Reference, no doubt, was made to the cancellation of the trust deed in the insolvency proceedings but that would not affect the question if in fact what the Official Receiver intended to sell and did sell was only the insolvent's right in the property. If he had conveyed not merely the insolvent's right but also the right of the son it could very well be presumed that he purported to exercise the right to sell the right of the father to sell the son's share as well. But in the absence of any specific language in the deed conveying the interest of the son in the property or in the absence of any other indication in the deed from which the intention to convey the larger estate could be gathered it is impossible to uphold the contention urged on behalf of the second defendant by Mr. Krishna Rao that this deed vested in the second defendant not merely the share of the father but also the share of the son as well. In my opinion the mere fact that the order of the adjudication vested in the Official Receiver not only the share of the father but also the power of disposition possessed by the father

1. (1942) 2 M.L.J. 457 : I.L.R. (1943) Mad. 83 (F.B.).

ver the son's share would not by itself convey to the auction-purchaser the share of the son unless there is indication in the document or in the sale proceedings that the Official Receiver in fact purported to exercise that power of sale and did in fact sell the son's share as well. In these circumstances in my opinion the view taken by the lower Court that the son's share did not vest in the second defendant by virtue of the sale is correct.

There is also another objection which, in my opinion, is also well founded though it was not definitely taken on behalf of the plaintiff in the plaint. On the 19th of May 1941, that is, prior to the date of sale the first plaintiff issued a notice to the first defendant demanding partition of the property. This would bring about division in status and prevent the Official Receiver from exercising the power of [illegible] The power of sale of the father is dependent upon the existence of coparcenary and if that coparcenary is terminated by division in status, the power ceases to exist. This notice, no doubt, was produced by the first defendant when he was in the witness-box but I find absolutely no cross-examination on the point suggesting that it was ante-dated and brought into existence collusively which is the contention now urged on behalf of the appellant. It is a registered notice issued on behalf of the first plaintiff on the 19th of May, 1941 and received by the father. The learned Subordinate Judge notwithstanding the fact that this question was not specifically raised in the pleadings accepted the notice as genuine and I see no reason to differ from his conclusion. This is an additional reason for holding that the share of the son did not vest and could not vest by reason of the sale by the Official Receiver in the second defendant. The view taken by the lower Court on both the points is correct and the appeal fails and is dismissed with the costs of the first defendant.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMASWAMI.

Moyankutty and others .. *Petitioners.**

v.

Narayanan Nair and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 6, rule 17—Amendment of plaint—Right to—Suit for recovery of possession of properties held under mortgage sued on and for arrears of purappad—Stay of suit on deposit of arrears of rent under Madras Act XVII of 1946—Application for amendment of plaint by giving up claim for recovery of possession and adding prayer for extinguishment of mortgage—Right to amendment.

The plaintiff filed a suit for recovery of possession of the properties held under a mortgage sued on. There was also a claim for arrears of purappad. Defendants 3 to 7 were said to be tenants in possession under the mortgagees. Defendants 1 and 2 deposited the arrears of rent claimed in the suit and the suit was stayed under Madras Act XVII of 1946. The plaintiff thereupon filed an amendment petition giving up the claim for recovery of possession of the plaint property and adding a prayer for the extinguishment of the mortgage. The defendants objected to the amendment being allowed on the ground that it was a ruse to deny them the rights conferred under Madras Act XVII of 1946 and the application for amendment was not *bona fide*.

Held, the motive with which the plaintiff filed the amendment application is neither here nor there. The amendment has to be allowed so long as the plaintiff is within his rights and does not take away any valuable rights which had accrued to the opposite party. It is open to a plaintiff to give up a portion of his claim and after amendment the suit will cease to be one for the recovery of possession and will not prejudice rights conferred by Madras Act XVII of 1946 or the later Acts enacted for the protection of tenants. In considering the question of allowing or disallowing the amendment the fact that plaintiffs giving up the claim to possession may lead to some other result in regard to stay is not a matter which ought to weigh. Nor can the Court consider the *bona fides* of a petition for amendment so long as the amendment claimed is within the right of a plaintiff.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Munsif's Court, Manjeri, dated 12th June, 1950, in I.A. No. 668 of 1950, in O.S. No. 155 of 1949.

C. S. Swaminathan for Petitioners.

Respondents not represented.

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* C. R. P. No. 1039 of 1951. 29th February, 1952.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is filed against the order made by the learned District Munsif of Manjeri refusing to allow an amendment in O.S. No. 15 of 1949.

The short facts are: the plaintiff filed this suit for recovery of possession of the properties held under a mortgage sued on. The mortgage sued on here is for Rs. 400. There was also a claim for arrears of purappad. Defendants 3 to 7 are said to be tenants in possession under the mortgagees. Defendants 1 and 2 deposited the arrears of rent claimed in the suit and the suit was stayed under Act XVII of 1946.

This plaintiff thereupon filed an amendment petition (I.A. No. 668 of 1950) giving up the claim for recovery of possession of the plaint property and adding a prayer for the extinguishment of the mortgage, *i.e.*, he gave up a portion of his claim.

The respondents objected to the amendment being allowed on the ground that it was a ruse to deny them the rights conferred under Act XVII of 1946.

The learned District Munsif agreed with this contention and held that this application was not *bona fide* and that it was filed to get over the order of stay of the suit. He finally refused to allow the amendment.

I am unable to see either the logic or the force of the learned District Munsif's reasoning for denying the relief for amendment, because the motive with which the plaintiff filed the amendment is neither here nor there. The amendment has to be allowed so long as he is within his rights and does not take away any valuable rights which had accrued to the opposite party. This is not the case here. It is open to a plaintiff to give up a portion of his claim and after amendment the suit will cease to be one for the recovery of possession and will not prejudice rights conferred by Act XVII of 1946 or the later Acts enacted for the protection of the tenants. Secondly, we are not concerned here with the stay of this suit. The only point to be considered is whether the plaintiff can restrict his claim by stating that they only seek now to redeem that mortgage and seek its extinguishment and that they do not want to disturb the people who are in possession. This the plaintiffs are certainly entitled to do. The fact that the restriction may lead to some other result in regard to stay is not a matter which ought to weigh in considering the question of allowing or disallowing the amendment; nor can the Court consider the *bona fides* or *mala fides* of a petition for amendment so long as the amendment claimed is within the right of a plaintiff.

In these circumstances, I have no hesitation in setting aside the order of the lower Court and directing that the amendment be allowed and the suit be disposed of according to law. The costs of this application will be costs in the cause.

K.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE GOVINDA MENON AND MR. JUSTICE KRISHNASWAMI NAYUDU.

Kode Seshamma .. *Appellant.**

v.

Mandana Rattayya (died) and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), section 24—Scope—Compulsory setting aside of sale—Right of purchaser to refund of amount paid by him from judgment-debtor.

Section 24 of Madras Act IV of 1938 is a species of restitution specifically conferred upon a purchaser who has lost the fruits of his purchase by result of a compulsory setting aside of the sale not in accordance with the ordinary provisions of law but as a result of the special enactment of section 23 of the Madras Agriculturists Relief Act. Where the money paid by the purchaser can be

* S. A. No. 661 of 1948. 19th February, 1952.

deemed to have been paid over to the judgment-debtors who had accepted and had the benefit of such deposit the auction-purchaser is entitled to recover the amount from the judgment-debtor.

Appeal against the decree of the Court of the Subordinate Judge, Masulipatinam, in A.S. No. 170 of 1946, preferred against the decree of the Court of the District Munsif, Vijayawada, in O.S. No. 714 of 1943.

A. L. Narayana Rao for Appellant.

D. Munikanniah for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J.—In O. S. No. 84 of 1932 on the file of the Subordinate Judge's Court of Vijayawada, the present appellant obtained a decree against the respondents and their father for a sum of money on foot of a mortgage and the mortgaged properties were brought to sale. The appellant herself became the auction-purchaser and deposited the amount that remained after setting off the decree amount due to her, in Court. This balance amount was Rs. 995-12-0 and it stood to the credit of the judgment-debtors. A third party, one Tirupathiah, had a decree against the judgment-debtors in S.C. No. 107 of 1932 and in pursuance of that decree he attached the amount in Court to the credit of the judgment-debtors and drew out that sum in part satisfaction of his decree. Later on, the judgment-debtors applied under section 23 of the Madras Agriculturists Relief Act, 1938, to have the sale set aside and the same was accordingly set aside. The result was that the appellant, who had purchased the properties in Court auction, lost them, but the decree which she had against the judgment-debtors respondents was executable.

The suit out of which the present appeal arises was for recovery of the excess amount deposited by the plaintiff in Court to the credit of the judgment-debtors and taken over by Thirupathiah the decree-holder in S.C. No. 107 of 1932, on the ground that the judgment-debtors had benefit of that amount by reason of the fact that the claim against them in S.C. No. 107 of 1932 was satisfied by this amount being taken over by Thirupathiah. It has also to be stated that the respondents filed I.A. No. 379 of 1942 in S.C. No. 107 of 1932 alleging that by reason of the withdrawal of the sum of Rs. 995-12-0 by Thirupathiah, the decree-holder in S.C. No. 107 of 1932, more than double the principal amount had been paid up and that the decree in that suit must be entered up as satisfied. After enquiry, satisfaction of that decree was also entered up.

Various contentions were raised by the defendants against the maintainability of the suit and the trial Judge found that though the suit is not maintainable under section 24 of the Madras Act IV of 1938, the appellant is entitled to equitable relief against the judgment-debtors, because the decree against them was satisfied by the withdrawal of this amount by the decree-holder Tirupathiah. The learned District Munsif went into the question and found that the respondents had the benefit to the extent of a sum of Rs. 683-1-5 and to that extent they are bound to repay the same to the plaintiff-appellant. A decree for that amount with interest thereon was passed. The plaintiff not being satisfied with the decree for Rs. 683-1-5, preferred an appeal to the Subordinate Judge complaining that the decree should have been for the entire amount of Rs. 995-12-0 with interest etc. and the defendant filed a memorandum of cross-objections objecting to the decree of the District Munsif to the extent of Rs. 683-1-5. The lower appellate Court was of opinion that the plaintiff had no cause of action against the defendants and that the equitable relief granted was not sustainable. The appeal was therefore dismissed and the memorandum of cross-objections allowed. The present second appeal by the plaintiff is against this decision of the Subordinate Judge.

It has to be mentioned at the very outset that Thirupathiah, the decree-holder in S.C. No. 107 of 1932, was not made a party to the suit; nor was he made a party to the proceedings by which the plaintiff applied under section 24 of the Madras Agriculturists Relief Act for a refund of the purchase money when the

sale was set aside under section 23 of the Act. The order Exhibit P-4 shows that on the objection raised by the respondents when the plaintiff claimed refund of the purchase money, the executing Court held that the remedy of the plaintiff was a regular suit and not by means of execution proceedings. How far this order is correct need not be decided now though section 24 of Act IV of 1938 lays down that where a sale is set aside under section 23, a purchaser shall be entitled to an order for repayment of any purchase money paid by him against the person to whom it has been paid. This contemplates an application and not a suit. But since between the parties it is now final that a suit is the only remedy, the question regarding the maintainability of the suit need not now engage our attention any further.

Section 24 of Madras Act IV of 1938 is practically identical with Order 21, rule 93, Civil Procedure Code, which says that where a sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase money with or without interest as the Court may direct, against any person to whom it has been paid. The concluding words of both the provisions are practically the same except that in section 24 of Act IV of 1938 in qualifying the word "person" the definite article "the" is used whereas in Order 21, rule 93, Civil Procedure Code, the word "any" qualified "person". The argument put forward by the respondents, which found favour with the lower appellate Court is that the money has not been paid to them but that the same had been taken by Thirupathiah, the decree-holder in S.C. No. 107 of 1932, and that if at all the plaintiff is entitled to any remedy it is only against Thirupathiah, and this was accepted by the lower appellate Court despite the fact that in the application for scaling down the decree in O.S. No. 107 of 1932 the respondents have acknowledged and accepted the surplus amount deposited in Court by the decree-holder, *i.e.*, the appellant, and attached by Thirupathiah as money belonging to them, and contended that since such money was received by the decree-holder Thirupathiah in payment of his decree more than double the decree-amount had been paid over to him and the decree had therefore become completely satisfied. The learned Subordinate Judge thinks that when once the sale was set aside under section 23 of Act IV of 1938, the money which had been deposited in Court automatically becomes the money of the depositor and when Thirupathiah withdrew that money he should be deemed to have taken the money of the depositor, so that it cannot be said that the defendants-judgment-debtors had any use or ownership over that money. But this point of view has omitted to take note of the acceptance by the judgment-debtors of the deposited money as belonging to them and getting the decree against them satisfied on foot of such money being taken over by their decree-holder. This action of the judgment-debtors cannot be interpreted as disclaiming the right over the deposited amount or revesting the title in the money in the depositor plaintiff. The judgment-debtors under such circumstances will have to be estopped from thereafter contending that the deposited amount does not belong to them, or that they did not have the benefit of the amount. It is well-accepted principle of law that a party cannot both approbate and reprobate. In the words of Honyman, J., in *Smith* v. *Baker*[1], a party cannot

> "At the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that is valid, and at another time say it is void for the purpose of securing some further advantage."

Similar observations were made by Lord Kenyon, C.J. in *Smith* v. *Hodson*[2]. See also the observations of the Privy Council in *Ambu Nair* v. *Kelu Nair*[3].

On the footing that the deposited amount belonged to the judgment-debtors when the same was attached and taken away by Thirupathiah, the present respondents got the decree against them scaled down and satisfied, *i.e.*, they have used the money in Court deposit for getting the decree against them satisfied and such being the case they have obtained an advantage by the use of that money. We therefore

1. L.R. 8 C.P. 350, 357.
2. 2 Sm.L.C., 13th Edn., 140, 146.
3. (1933) 65 M.L.J. 103 : L.R. 60 I.A. 266 : I.L.R. 56 Mad. 737 (P.C.).

are of opinion that it is not open to the judgment-debtors now to contend that the money deposited in Court when once the sale was set aside, automatically reverts and becomes the money of the depositor and that the respondents have no interest or benefit in the same.

The learned Subordinate Judge relied upon the decision in *Koorapati Seshavatharam* v. *Thalasila Ramayya*[1], as authority for the proposition that the plaintiff can have no cause of action against the judgment-debtors. The facts of that case cannot, by any means, be said to be similar to those in the present case. What happened there was that after a sale was set aside under section 23 of Madras Act IV of 1938, the judgment-debtor applied for redelivery of the properties to him and the purchaser applied for repayment of the monies paid by him for purchasing the properties. The lower Court held that the judgment debtor should not be entitled to obtain redelivery of the properties without paying to the Court-auction-purchaser the whole of the amount which had gone in discharge of the decree. On appeal, Wadsworth and Patanjali Sastri, JJ., observed that no such conditional order can be made and say at page 35 :

> " . . . . the satisfaction of the decree out of the purchaser's money is cancelled just as the sale is cancelled. The decree-holder has to give back the money which he has drawn and he remains at liberty to execute any amended decree which may be passed in fresh proceedings. There can be no question in such circumstances of the payment made by the auction-purchaser having benefited the judgment-debtor. The decree towards which the payment was made is one that has been into the melting point and as a result of the application of section 19 it may well disappear entirely. The decree-holder is not debarred by reason of his having drawn the proceeds of the sale from executing any revised decree which may be passed, but he is required to refund the sale proceeds to the auction-purchaser. In such circumstances, there can be no question of any refund of the sale price by the judgment-debtor. Nor is there any necessity to allow the auction-purchaser to retain possession of the property pending a payment by the judgment-debtor of the amount due from him under the mortgage-decree."

We are not able to find how these observations can be said to fit in with the present case. It may be that when once the sale is set aside the money automatically becomes the money of the purchaser. But the difference is that whereas in the present case the judgment-debtors had claimed and accepted the money remaining in deposit as their own and obtained a benefit therefrom in the case in *Koorapati Seshavatharam* v. *Thalasila Ramayya*[1], there was no such acceptance. The decree-holder had taken away the money and the auction-purchaser had after the sale was set aside, withdrawn the surplus amount in Court. The judgment-debtor there had nothing to do with any of these moneys. We do not feel that this decision can really assist the respondents.

A somewhat similar question was considered by their Lordships of the Judicial Committee in the case reported in *Jai Barham* v. *Kedar Nath Marwari*[2], where the question arose whether the amount deposited by the auction-purchaser and distributed among the creditors of the judgment-debtors can be restituted or recalled from the judgment-debtors who had the benefit of the money by their liability being discharged. Their Lordships held, following the principle laid down by Cairns, L.C., in *Rodger* v. *The Comptoir d'Escompte de*[3], that such restitution was possible. Lord Carson in delivering the judgment says at page 739 :

> "The auction-purchasers have parted with their purchase money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to. This money has been distributed amongst creditors of the judgment-debtor who had attached the unencumbered property in question and could have realised their judgment-debts by a sale of this property in execution and it would be inequitable and contrary to justice that the judgment debtor should be restored to this property without making good to the auction-purchaser the moneys *which have been applied for his benefit.*"

The matter is made clear in the judgment of the Patna High Court from which the appeal was taken to the Judicial Committee in *Jai Barham* v. *Kedar Nath Marwari*[2]

1. (1943) 1 M.L.J. 34.
2. (1922) 44 M.L.J. 735 : L.R. 49 I.A. 351 I.L.R. 2 Pat. 10 (P.C.).
3. (1871) L.R. 3 P.C. 465 at 475.

The High Court judgment is reported in *Kedar Nath* v. *Jai Barham*[1], and in the second column of the second paragraph at page 868 of the report we find the following observation :

"It is not denied that the money paid to the decree-holders was due to them from the judgment-debtors. The decree-holders applied to the Court for a rateable distribution of the purchase-money and the Court directed the rateable distribution of the money. The decree-holders received the money from the Court and under the orders of the Court. The judgment-debtors are bound by the orders of the Court directing the payment. The auction-purchasers paid the money in Court and they have nothing to do with how the money was disposed of. The judgment-debtors have been benefited by the payments, and the payments made by the decree-holders will be considered to have been made to the judgment-debtors. The judgment-debtors are therefore liable to pay this money to the auction-purchasers before they can recover possession of the property."

If, in restitution proceedings, though the party to whom money has been paid is different from the party who has received the benefit thereunder, it has been held that it is the party who has received the benefit that is to restitute, we do not see any reason why the same equitable principle should not be applied to a suit of the present nature. After all section 24 of Madras Act IV of 1938 is a species of restitution specifically conferred upon a purchaser who has lost the fruits of his purchase by result of a compulsory setting aside of the sale not in accordance with the ordinary provisions of law but as a result of the special enactment of section 23 of the Madras Agriculturists Relief Act.

The learned counsel for the respondents stressed before us the point of view outlined in the judgment of the lower appellate Court that when the sale is set aside the auction-purcaser's deposit become revested in him and that the judgment-debtors could not be said to have had any interest or right over such amount. We have already expressed our opinion that in the circumstances of this particular case the money must be deemed to have been paid over to the judgment-debtors because they have accepted and had the benefit of such deposit.

In *Mangal* v. *Mathura Prasad*[2], Sulaiman, C.J., has held that under Order 21, rule 93, Civil Procedure Code, even though it is possible when the sale is set aside on account of the fact that the judgment-debtor had no saleable interest in the property, that the monies paid over, not to the decree-holder but to the creditors of the judgment-debtor, can be recalled in an application under that rule if made within time, a suit against persons to whom the deposited amount has been paid as being due from the judgment-debtor cannot be maintained. By implication it should be understood that the learned Judges intended to hold that a suit would lie against the judgment-debtor who had the benefit of the money by the decree against him being satisfied. The respondent contended that under Order 21, rule 93, Civil Procedure Code, it would not be possible for third parties to be paid the monies in Court deposit until the sale has been confirmed, *i.e.*, after thirty days of the completion of the sale and therefore Order 21, rule 93, Civil Procedure Code, does not contemplate payment to third parties, though the expression any person to whom the money is paid is found in that rule. Ordinarily it might be so, but there may be cases where even before the sale is confirmed monies are paid over to the decree-holders or the creditors of the judgment-debtors. See *Nafar Chandra Pal* v. *Gopal Chandra*[3].

The view taken by the learned District Munsif seems to be more in accord with justice and equity rather than the legalistic view adopted by the learned Subordinate Judge. We do not think that the decision in *Koorapati Seshavatharam* v. *Thalasila Ramayya*[4] on which the learned Subordinate Judge relies can be applied to the facts of the present case.

Nothing could be urged before us to show that the conclusion arrived at by the District Munsif to the effect that the respondents had the benefit of the deposit only to the extent of Rs. 683-1-5 is incorrect. In these circumstances the plaintiff-

1. (1916) 37 I.C. 863.
2. A.I.R. 1935 All. 470.
3. (1911) 22 I.C. 946.
4. (1943) 1 M.L.J. 34.

appellant will be entitled to a decree for that amount only. The appeal is therefore allowed, the decree of the Subordinate Judge is set aside and that of the District Munsif restored with proportionate costs throughout.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

The State of Madras, represented by the Collector of West Godavari .. *Appellant**

v.

Nadimpalli Subbaraju .. *Respondent.*

Darkhast grant made by Collector as agent of Government—Finality—Government if can intervene—Board's Standing Orders—Scope.

The Government has not got any supervening power to interfere for whatever reason it may be in the orders passed by the subordinate revenue authority in accordance with the provisions of Board's Standing Orders in the grant of darkhast. Where the Collector has no power to cancel an order after it has become final the Government itself has no power to cancel an order validly and duly made by the Collector. There is no provision for review or revision by the Government.

Appeal against the decree of the Court of the Subordinate Judge, Narasapur, in A.S. No. 161 of 1945, preferred against the decree of the Court of the District Munsif, Narasapur, in O.S. No. 246 of 1944.

N. S. Srinivasan for the Government Pleader (*P. Satyanarayana Raju*) for Appellant.

D. Narasaraju for Respondent.

The Court delivered the following

JUDGMENT.—Mr. Narasaraju for the respondent conceded that the learned Subordinate Judge is in error in thinking that the order in question is one made by the Collector ; but it is really and in essence one passed nominally by the Collector but under the directions of the Board of Revenue who themselves have ordered the Collector to act in the manner he did under the behest of the Government. The result comes to this, that when under Exhibit B-20 the Board of Revenue refused to interfere with the order passed by the Collector, the Panchayat Board President had exhausted his remedies and subsequently whatever action has been taken by the Collector the same must be deemed to be passed under the orders of the Government. The question then arises, whether the Government has got any all-pervading or supervening power to interfere, for whatever reason it may be, in the orders passed by the subordinate revenue authority in accordance with the provisions of the Board's Standing Orders in the grant of darkhast. That the Government cannot have any such power and cannot set aside an order of the lower authority when it has become final is evident from the judgment of Bhashyam Aiyangar, J., in the *Secretary of State for India in Council* v. *Kasturi Reddi*[1]. There are many passages in that illuminating judgment at pages 273, 277, 278, 279, 280, 281 and 283 wherein the various aspects of the question have been discussed in great detail to show that there is no such residuary or supervisory power vested in the Government. At page 283 the learned Judge observes as follows :

> "When the proposal of any applicant is accepted by an officer duly authorised in that behalf by the darkhast rules and the acceptance is communicated to the applicant, there is a valid contract and disposal of the land, unless the grant was procured by fraud, misrepresentation or mutual mistake as to any matter of fact essential to the agreement (Indian Contract Act, sections 17, 18 and 20). The grant, therefore, cannot be annulled or revoked by the officer who made the grant, by his successor in office or even by the Governor-in-Council."

I wish especially to emphasise the words "or even by the Governor in Council." The learned Judge thinks that when there has been valid assignment under dhark-

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* S. A. No. 1691 of 1948. 22nd February, 1952.

1. (1902) 12 M.L.J. 453 : I.L.R. 26 Mad. 268.

hast rules and patta granted to the applicant, the title becomes complete and vested in such assignee and the Government cannot later on revoke or change it. It is as if the Government through its agent the Collector or the Revenue Divisional Officer or the Tahsildar, as the case may be, has sold away or assigned rights in certain land by means of a duly stamped and registered document though according to the Crown Grants Act then in force no such registration or stamp for the document was necessary. The grant of a patta is tantamount to assignment by a registered document and when it is done the title becomes complete in the assignee and cannot later on be revoked by the Government. Mr. N. S. Srinivasan for the learned Government Pleader strenuously contended that this decision in the *Secretary of State for India in Council* v. *Kasturi Reddi*[1] should no longer be considered as a binding authority because of certain observations in *Devaramani Bhogappa* v. *Pedda Bimakka Gowd.*[2]. He further contended that at the time the *Secretary of State for India in Council* v. *Kasturi Reddi*[1], was passed, Board's Standing Order No. 15 did not contain rule No. 18 which empowered the authorities who made the grant to revise their own orders. The fact that rule 18 has later on been incorporated in Standing Order No. 15 would not make any difference because it is conceded here by the respondent that the Collector himself in this case has not revised or reviewed his earlier order. So the only question as I have already stated is whether the Government can set aside an order which has been validly made, for any reason whatever and in my view *Devaramani Bhogappa* v. *Pedda Bimakka Gowd*[2] does not say that Government has got that power. As stated by Napier, J., the *Secretary of State for India in Council* v. *Kasturi Reddi*[1] decided two points :

> "First, that where Government has given authority to a Tahsildar to grant land subject only to a right of appeal, the grant of such land within the scope of his authority is binding on Government. The other is that a grant like any other disposition arising out of contract can be set aside if it is procured by 'fraud' . . . . . ."

This decision does not lay down that when the agent of the Government, say the Tahsildar, Revenue Divisional Officer or the Collector has exhausted his rights under the orders, the Government can intervene and what cannot be done by an agent, the principal can. If the contention put forward on behalf of the learned Government Pleader is accepted, then it comes to this, that the Government as the principal can revoke an agreement or grant made by its duly constituted agent without giving any reasons whatever. I do not think that I should go to the extent contended by the learned counsel. When the learned Subordinate Judge found that the Collector has no power to cancel his earlier order after it has become final, I would hold that the Government itself has no power to cancel an order validly and duly made by the Collector. There is no provision for a review or revision by the Government. The second appeal fails and is dismissed with costs. No leave.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE SOMASUNDARAM.

Ravipati Sitaramayya .. *Appellant**

Criminal Procedure Code (*V of* 1898), *section* 378—*Reference to third judge on difference between the two judges one favouring conviction and other acquittal—Scope of third judge's jurisdiction.*

Where there is a difference of opinion in a referred trial one judge favouring conviction and the other acquittal and the case is referred to a third judge the whole case is before the third Judge whose duty is to examine the whole evidence himself and come to a final judgment. It is not a case of merely weighing the opinion of one judge against that of the other and deciding which of them the third judge should accept.

Per *Mack, J.*—But the third judge cannot pass a death sentence in a case where the judge favouring conviction thinks a sentence of transportation is appropriate with the other judge favouring acquittal. The Bench referring the case can always express their opinion that in the event of the conviction being confirmed a sentence of transportation is the appropriate one, in which case the third judge would be bound by the opinion as regards which there would be no difference to resolve.

1. (1902) 12 M.L.J. 453 : I.L.R. 26 Mad. 268. 2. (1915) M.W.N. 148.

* Criminal Appeal No. 104 of 1951. 5th December, 1951.

Per *Somasundaram, J.*—When on a difference of opinion a case is referred to a third judge no fetter can be placed on the third judge. He is at liberty to express and act upon the opinion which he himself arrives at. If he chooses he can pass a sentence of death, even though one judge favours an acquittal and the other gives a sentence of transportation for life when convicting the accused.

Appeal against the order of the Court of Session of the Guntur division in C.C. No. 49 of 1950.

V. Rajagopalachari, *J. Krishnamurthi* and *Sambasiva Rao* for Appellant.

The Assistant Public Prosecutor (*A. C. Muthanna*) for the State.

The Court delivered the following

JUDGMENTS : *Mack, J.*—This is a case, which has given us anxious consideration. Appellant, a man aged 43, has been found guilty under section 302, Indian Penal Code, of the murder of his 17 year old wife, Balakotamma, by strangling her to death during the night of 29th May, 1950, in his house in Vetapalam village in which there were admittedly no other inmates. The next morning appellant asked a washerman (P.W. 7) to take a message to his wife's uncles, P.Ws. 1 and 5 and her maternal uncle and foster father P.W. 6 who all lived at Vadlamudi, a village three miles away to the effect that she was found lying speechless and unconscious in his house. On receipt of this message at 7 A.M. P.Ws. 1, 5 and 6 hastened to Vetapalam and found Balakotamma lying dead on a cot. According to P.W. 1, appellant when questioned first made no reply and then denied knowledge of anything. There were no visible injuries on the body. Suspecting that appellant and his concubine one Subbamma had poisoned her, they made a complaint to this effect Exhibit P-1 at the Vadlamudi Police Station at midday. The only evidence that the village munsif of Vetapalam (P.W. 9) gives is that he was a panchayatdar at the inquest held by the Circle Inspector (P.W. 11) who reached Vetapalam at 4 P.M. Near the corpse was lying a rice pounder M.O. 3. On the body was a blouse M.O. 1 put on, as is described, inside out and a sari M.O. 2. P.W. 1 says when he saw it was slightly wet. *Post mortem* held by Miss Annapoornamma, Assistant Surgeon of Tenali, the following morning at 8 A.M. showed that death was due to asphyxia as a result of strangulation. An echymosed patch was found on the neck extending upwards to the lower jaw and downwards to the upper part of both collar bones. The trachea and larynx were congested, oesophagus cynosed and the hyoid bone broken. There can be no doubt about the cause of death, which was strangulation by great pressure on the throat.

The Circle Inspector returned with the *post mortem* certificate to Vetapalam and arrested the accused on the 2nd June. He produced him before the Sub-Magistrate of Tenali (P.W. 4) on the evening of the 3rd of June with a requisition Exhibit P-3 to record his confession. As it was after lock up time, the Magistrate asked him to be produced the following morning and he was then kept in the sub-jail after being given the necessary warnings. He was produced again before the Magistrate on 5th June 1951 and after giving clear warnings to the appellant in full conformity not only with section 164, Criminal Procedure Code, but also with rule 85 of the Criminal Rules of Practice, the Magistrate recorded a long detailed confession from the appellant in which he confessed that he squeezed his wife's throat, while she was asleep with his own hands. Appellant's statement was to the effect that he returned home at midnight and found his wife asleep, that in view of domestic troubles she was giving him he strangled her, that he slept in the house till the morning, that he fetched his mother, that neighbours gathered and that he sent word to his brothers-in-law. He said that one of them, when he came to the house, kicked him on the head, which struck against the wall and poked him with a stick near the abdomen. The domestic troubles he detailed there related to complaints his wife made to her brothers, who continually interfered in his domestic life and, that when he protested his wife scolded him and said she would get him killed by her brothers. The gist of his confession is that he killed her thinking that after doing so, he would also die at the hands of the Government rather than be killed by her brothers. This confession was retracted in the committing court where the appellant pleaded that he was coerced by

the Circle Inspector and the Deputy Superintendent of Police into making the confession, that the wording was not his and that he repeated what he was asked to say like a parrot. He adopted the same attitude at his trial. There is no other evidence against the appellant.

A curious feature about the confession is that it mentions nothing about the concubine Subbamma, who the appellant continued to keep after he married Balakotamma as his second wife three years ago, after his first wife died. There is evidence to show much domestic unhappiness between the appellant and Balakotamma on Subbamma's account. According to P.Ws. 1, 5 and 6 about four months before this offence the appellant, who was ill-treating Balakotamma, drove her out of the house. There was a mediation in the course of which appellant and Subbamma are said to have executed two pronotes Exhibits P-6 and P-7 each for Rs. 500 in favour of one Venkatasubbayya, who has not been examined, both dated 12th February, 1950. They have been produced from the custody of the writer P.W. 8. The understanding apparently was that if appellant and his concubine, who promised to have nothing further to do with each other, were to renew association, they should pay the amounts mentioned in the pronotes. The existence of the concubine Subbamma was known to the Police and it is extremely difficult to imagine a confession concocted by the Police and put into the mouth of the appellant, which made no mention of Subbamma at all. According to the Circle Inspector, Subbamma lived in a house 50 yards away from that of the appellant.

In his statement in the committing Court, the appellant said that he had gone for weighing work and returned late in the night, that when he did so his wife did not respond when called, that when he tried to wake her up she did not move and that he sent word to his mother and called near relations and neighbours. In his confession he said he sent word to his mother at dawn and that after strangling his wife, he stayed in the house with her. His mother has not been examined, as she should have been, by the prosecution as a witness to evidence exactly when she received the message and when she came to her son's house nor has she been examined as a defence witness to bear out the accused's statement that not only she but neighbours gathered. Not a single neighbour has been examined as a witness. Not merely this Subbamma should, in my opinion, most certainly have been examined as a witness to depose to her relations with the appellant and to say all she knew about the promissory note Exhibit P-7. It is most unfortunate that this trial was taken to a conclusion without the examination of Subbamma or the appellant's mother.

The main contention of Mr. Rajagopalachari for the appellant is that no conviction is possible in the absence of any evidence to corroborate the confession which, he has asked us to reject as not being a true and voluntary one in view of its mentioning several facts, opposed to the evidence in the case. I am myself unable to see any reason for rejecting the finding of the learned Sessions Judge that this confession by the appellant despite its suppression of the existence of Subbamma, and the possibility of other inaccuracies of fact set out there, was voluntarily made by the appellant on being confronted with the results of the *post mortem* examination. Mr. Rajagopalachari has suggested in his able argument the possibility of the concubine Subbamma, having entered the house in the absence of the appellant, and having strangled Balakotamma without the assistance or even the knowledge of the appellant who when he returned home and found her dead, in consternation at his discovery with a moral conviction as to who the guilty person was, adopted the course he did of sending a message to his mother and his wife's relations only the next morning, and then making this confession, when the *post mortem* showed the cause of death, in the manner he did, to shield the real culprit, who was his concubine Subbamma. The material does indeed show that Subbamma did have a strong grievance against Balakotamma whose resentment and protests at her continued association with the appellant had provoked mediation and led to solemn undertakings by her to have nothing to do with the appellant. I do not

find any suggestion in the learned Sessions Judge's judgment of any such theory, which has been made for the first time in this Court on the basis of the retracted confession and the statements made by the appellant in the committing Court and at his trial. A defect, in my view, in the material placed before the Court arises from the unfortunate state of our law, under which the first statement made by the appellant to the police regarding the discovery of his wife's corpse, the time at which he found it and what he did immediately afterwards is completely shut out in evidence under section 162, Criminal Procedure Code. The shutting out of what an accused person tells a police officer particularly in a case of this kind, when first questioned, opens the way for all kinds of statements being made in the committing Magistrate's Court and also at the trial in conformity with advised lines of defence, which are, of course, impossible to verify and places the prosecution at a great disadvantage. The view that I have no hesitation in taking is that in cases of this kind, the police would do well to take an accused person before a Magistrate, whether he makes a confession or not, and have a statement recorded under section 164, Criminal Procedure Code, so that the accused person can be fixed to one explanation when placed in a position which becomes incriminating unless he can offer a satisfactory explanation for his behaviour. This is a case in which a man and his wife are the sole occupants of a house, in which the wife is found suddenly dead and *post mortem* has proved conclusively that it is the result of violent strangulation. A *prima facie* strong suspicion points to the husband. It is in this back ground that the confession made before the Magistrate, without any appreciable delay in the circumstances has to be appreciated. Although this line of defence has not been raised in the trial Court, I have carefully considered the possibility of the concubine Subbamma being the sole culprit. There are cases in which an innocent person may take upon himself full responsibility for a crime, even murder, to save some one whom he dearly loves from punishment. My own view is that this is not such a case and that the appellant's confession that he and no one else strangled his wife can be safely acted upon.

Some decisions have been placed before us in which it has been held that a conviction on the uncorroborated confession of an accused is unsafe. There is no authority to the effect that conviction on an uncorroborated but retracted confession before a Magistrate is illegal and each case has to be dealt with on its own facts. I am unable to find any decision in which where a man, whose wife has been strangled to death at night in a house occupied solely by them, who has voluntarily confessed before a Magistrate to his guilt, being acquitted.

The learned Sessions Judge and all the four assessors who have heard the evidence were of the opinion that the appellant strangled his wife. My own view, which is in agreement with them, is that the case is free from reasonable doubt and that the appellant can safely be convicted of murder. My learned brother, for whose opinion I have the greatest respect, has shared my anxiety in this case and has considered it unsafe to convict the appellant on the basis of this retracted confession. I have however agreed to enter a judgment of acquittal in this case and not to refer the matter to a third Judge in view of the approach made by a learned third Judge sometime ago on a difference of opinion between us in Karuppa Thevan and four others in R. T. No. 31 of 1951. Rajagopalan, J., to whom our difference of opinion was referred under section 378, Criminal Procedure Code, before going into the merits and delivering an opinion in favour of acquittal expressed the following view as the method of approach to such a reference :

> "Where the main question at issue is identity of the assailants .... the very fact, that one of the two learned Judges, who had to decide that question was of the view, that the identity of the accused with those assailants had not been established beyond all reasonable doubt, should suffice to establish the basis for such a reasonable doubt, the benefit of which, of course, the accused have to get. In my opinion, a third Judge to whom the question is referred under section 378, Criminal Procedure Code, should normally accept that finding, unless the compelling necessity of conclusive evidence on record drives him to deny the existence of any basis for a reasonable doubt."

It would be a sheer waste of time if I were to ask for a reference of our difference of opinion to a third Judge in this case on the basis of this line of approach by a

third Judge to a reference made to him. My learned brother and I are in complete agreement that this is not correct and legal method of approach by a third Judge and we say this with the greatest respect to Rajagopalan, J. Section 429, Criminal Procedure Code, which would apply in this case of an appeal from a sentence of transportation for life, is identical in terms with section 378, which provides for a resolution of differences of opinion in what are known as referred trials on the submission of sentences for confirmation. Section 429 reads as follows:

> "When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinion thereon, shall be laid before another Judge of the same Court, and such Judge after such hearing (if any) as he thinks fit shall deliver his opinion, and the judgment or order shall follow such opinion."

The opinion, which Rajagopalan, J., expressed, *viz*., that the normal disposal by a third Judge should be one of agreement with the opinion of acquittal is one which we are quite unable to share. It would be tantamount to a judgment of acquittal in practice prevailing over a judgment for conviction. Had the statute intended to lay this down it would have done so.

There is a dearth of case-law defining the scope of the third Judge's method of approach to such a reference. Both sections 429 and 378 make it mandatory for a judgment or order of the Court to follow the opinion of the third judge. The only authority, which supports the view of Rajagopalan, J., is the view taken by Mr. Justice Mahmood in *Empress* v. *Debi Singh*[1], a decision of the year 1886. In that case, Mahmood, J., expressed the view that when one Judge differs from his brother Judge on a pure question of the weight of evidence as to the propriety of a conviction, the opinion of the Judge for acquittal should, as a general rule, prevail. This view was considered by Edge, C.J., in *Empress* v. *Bundu and another*[2] and rather emphatically dissented from. We must express ourselves in complete agreement with the following view expressed by Edge, C.J.:

> "When Judges unfortunately differ in opinion, I conceive it to be the duty of each Judge to express and act upon the opinion which he himself has definitely arrived at. Before so expressing himself he should of course carefully weigh the reasons adduced by his brother Judge for forming a different opinion; but if those reasons do not commend themselves to his mind, he must not, in the exercise of his duty, allow the fact that his brother Judge has arrived at a different conclusion, to influence his conduct whether his view—to take a criminal case—be in favour of a conviction or of an acquittal. There would be no meaning in sections 378 and 429 if it was intended that the opinion of one Judge in favour of an acquittal should prevail."

We need scarcely say that a difference of opinion in referred trials, and murder cases involving life and death, arises in exceptional cases and after much anxious deliberation. References are never lightly made and when we, as a criminal Bench, make them, we do expect the legal disposal of a reference in accordance with the sections of the statute under which we make the reference. Otherwise, if a Judge is to exercise his own independent view in accordance with his own conscience, the view taken by Mahmood, J., with great respect, would mean that he has to subordinate his own independent conviction in favour of a conviction in favour of an acquittal and sign a judgment to which he is not really a party.

There have been several instances in our own High Court where differences of opinion have been resolved by a third Judge in favour of a death sentence on a murder charge, though one Judge was in favour of acquittal. *Ramaswami Goundan* v. *Emperor*[3], was one of the cases which went to the other extreme, in which the Sessions Judges sentenced an accused person on a charge of murder to death. Subramania Aiyar, Officiating Chief Justice, was of the opinion that the accused was guilty but that the sentence should be one of transportation for life. Boddam, J., disagreed and was in favour of acquittal. Bashyam Aiyangar, J., to whom the difference of opinion was referred not merely confirmed the conviction for murder but also the sentence of death passed by the Sessions Judge. When the opinion of Rajagopalan, J., in the previous reference was placed before us, the matter came up

1. (1880) A.W.N. 287.
2. (1887) A.W.N. 137.
3. (1903) 14 M.L.J. 226: I.L.R. 27 Mad. 271.

for some discussion and Mr. Ethiraj who appeared for the five appellants in that referred trial expressed to us his anxiety as regards the possibility of the third Judge following the precedent of Bhashyam Aiyangar, J., and restoring the sentences of death on two of the appellants passed by the Sessions Judge. The judgment of conviction, which I favoured found them both young men guilty only under section 326, Indian Penal Code and would have sentenced them to a Borstal School for three years.

As a criminal Bench, we are, of course, vitally interested in the method of approach by a third Judge to these references. We would like to take the opportunity here as a Bench of expressing our views as to how we would like these references approached by a third Judge. The system of referred trials from the moffussil tried by a Sessions Judge and assessors, with whole individual opinions the trial Judge is free to disagree, places an extremely heavy burden on criminal Benches, who do not themselves hear the witnesses. It is inevitable that differences of opinion should arise in the discharge of this extremely heavy responsibility in which two Judges finding themselves unable to agree on a difficult case, require and welcome the opinion of a third Judge to alleviate their responsibilities. It is in this spirit that we hope future differences of opinion in criminal cases will be resolved and it is also the method of approach the statute requires. In *Md. Illias Mistri* v. *The King*[1], Biswas, J., to whom a difference of opinion was referred, made the following approach to section 429, to which we are unable to take the slightest exception.

> "There can be no doubt upon the wording of the section that the whole case is now before me, which means not only that I am at liberty, but that it is also my duty to examine the whole of the evidence for myself and come to a final judgment. It is not a case of merely weighing the opinion of one learned Judge against that of the other deciding which of these opinions I should accept."

I however think, though on this point my learned brother does not agree, that the learned third Judge cannot with great respect to the decision in *Ramaswami Gounden* v. *Emperor*[2], pass a death sentence in a case, where the Judge favouring conviction thinks a sentence of transportation is appropriate with the other Judge favouring acquittal, on the simple ground that it is only a Bench of two Judges, who should confirm a death sentence in agreement with each other. Although the law may not be specific on this point, this extreme can always be guarded against by the Bench referring the case expressing their opinion that in the event of the conviction being confirmed, the sentence of transportation is the appropriate one, in which case, the third Judge would be bound by such an opinion as regards which there would be no difference for him to resolve. I have thought it necessary to give expression to these views in this judgment, in which I for my part, agree for the reasons I have given supra to my learned brother's judgment of acquittal.

Somasundaram, J.—The Sessions Judge of Guntur has found the appellant guilty of murder and setence him to transportation for life, for causing the death of Balakotamma, the wife of the appellant.

The occurrence is said to have taken place on the night of the 29th May, 1950, and before dawn of the 30th of May, in the house of the accused in a village called Vetapalem. The accused married the deceased about three years before the occurrence, he having lost his first wife about 5 or 6 years before the occurrence. The accused appears to have been keeping a concubine by name Subbamma for about 20 years prior to the occurrence. The accused is aged 43 and the concubine is alleged to be aged about 32 at the time of the occurrence. The accused and his wife (the deceased) appear to have got on well for about a year after the marriage. But soon presumably on account of the influence of Subbamma, trouble started between the accused and the deceased; and it is alleged that the accused started ill-treating the deceased. About four months or so, before the occurrence when

1. I.L.R. (1949) 1 Cal. 43.

2. (1903) 14 M.L.J. 226 : I.L.R. 27 Mad. 271.

P.Ws. 1 and 5, the brothers of the deceased went to Thirupathi, they wanted to take the accused and his wife also but the accused refused to go and his wife alone was taken. When they returned from Thirupathi, P.W. 5 took his sister to leave her in her husband's house. It appears that the door was bolted against her and the accused remaining inside refused entrance to her. P.W. 5 therefore wanted to take her away but the wife preferred to stay on in spite of all the difficulties. Subsequently, after sometime on receipt of information that the accused had turned out his wife, P.Ws. 1 and 5, the brothers and P. W. 6, their maternal uncle who is said to have brought up this girl came to the village and finding that all was not well with the accused and the deceased, they wanted to take her away with them. They found that the articles that were presented to her at the time of the wedding were missing in the house; and when she was being questioned about it, it is stated that the concubine Subbamma threw them out in the street from her house which is said to adjoin the accused's house. Thereupon P.Ws. 1 and 5 put the samans in a cart and wanted the deceased also to come with them. There is some discrepancy as to whether the deceased actually got into the cart or whether she still preferred to remain in the house; but the fact remains that ultimately on account of the deceased preferring to live with her husband, they left all the samans with the accused. At this time, a neighbour by name Ravipati Venkatasubbayya is said to have interfered and brought about a settlement. The understanding arrived at was that the accused should stop his illicit intimacy with Subbamma and that neither of them should visit the other or even talk to each other. Subbamma also appears to have been a party to this arrangement and by way of securing the performance of the promise, two promissory notes were executed, one by Subbamma and another by the accused, each for Rs. 500 in favour of Ravipati Venkatasubbayya, the arrangement being that if either of the party commits a breach of the understanding then the party shall pay a penalty of Rs. 500 the sum for which the promissory note was taken. This appears to have produced a lull in the otherwise a bit of stormy life led by the accused and the deceased. The accused did not like the brothers of the deceased to visit her. Suddenly on the morning of the 30th May, P.W. 7 a washerman by profession carried a message from the accused to P.Ws. 1 and 5 that the deceased was found lying speechless and unconscious in the house. They immediately went to the village with P. W. 6 and found the deceased lying dead. They saw the accused sitting in the house and it is stated that when questioned he did not make any reply; but finally he stated that he knew nothing. They thereupon suspected that the deceased was killed by poisoning either by the accused or his concubine as they did not find injuries on the body and as they learnt from the neighbours that she was alive the previous night till about 9 P.M. P.W. 1 immediately went to the police station and gave the report, Ex. P-1. This was at about 12 noon. On express report being sent to the Circle Inspector which was received by him at 2-30 P.M., he came to the village at about 4 P.M. He held the inquest between 4 and 7 P.M., at which he examined P.Ws. 1, 5, 6 and 7 others who were not called as witnesses. The body was then sent for *post mortem* and the autopsy was held the next morning at 8 A.M. on 31st May. The *post mortem* certificate, Ex. P-2 was received by the Sub-Inspector on the 1st June. Till then no one knew the cause of death. Every one was under the impression that the deceased was poisoned to death.

The *post mortem* revealed that the woman must have died of asphyxia as a result of strangulation. There was an echymosed patch round the neck extending upwards to lower jaw and downwards to upper part of both collar bones. The tissues underneath were red and congested. The trachea and larynx were red and congested. The oesophagus was cynosed and the hyoid bone was broken. There were thus clear indications of death being the result of strangulation. The doctor, P.W. 2, gave it as his opinion that the strangulation was by pressure on the throat and death must have been instantaneous; and that the echymosed patch round the neck must have been due to pressing with some force.

The accused was suspected and he was arrested on the 2nd of June. At the time of the occurrence the only persons who were living in the house were the accused and the deceased, the evidence being that Subbamma was living at a distance of about 50 yards away. The Circle Inspector produced the accused on the 3rd June, at 6 P.M., before the Sub-Magistrate P. W. 4, but the Magistrate asked him to produce the accused the next morning. He was, therefore, produced the next morning and was remanded to the sub-jail, after giving the necessary warnings to the accused. He was again brought on the 5th. The Magistrate after putting the necessary questions and after satisfying himself that the accused making a confession voluntarily recorded Ex. P-5, the confessional statement of the accused. In Ex. P-5, the accused set out the circumstances under which he committed the murder. According to the confession, his brothers-in-law wanted him to come and live with them but he would not go; and when they once took his wife to Thirupathi and came back he was away on work. She got into the house and closed the door against him when he returned from the fields. He was sleeping outside and next morning he gave her a blow in anger. She sent word to her brothers and maternal uncle who were living in a village called Vadlamudi which is about 3 miles from his village. They came and beat him and took away his samans and also his wife in a cart. He accompanied them till they reached the outskirts of the village asking for his cloth box to be given to him, but, ultimately, for some reason not known to himself they brought back his wife and the samans to his house. Then he asked his wife not to allow her people to come. In spite of it, she allowed them stealthily; and this he came to know from her subsequent conduct towards him. It appears she would not serve food for him on the day when they came and met her. Whenever he scolded her, she used to tell him that she would get him killed by her elder brothers. On the 29th when he returned home at 8 P.M., she was abusing him and served food with chilli powder. When questioned as to why she gave that she asked him to get away if he did not like it. He says he took his meal with buttermilk and went to the field and returned at 12 midnight. He found his wife sleeping in a room keeping the door open. He thought that on account of the troubles she was giving and threatening him, it would be better to be killed by Government rather than be killed by her brothers and so he squeezed the throat of his wife who was sleeping and that she died without raising any cry. He says he did this because he became vexed in life and then he slept thereafter for sometime in the house and about dawn he fetched his mother who after coming and seeing the girl, pronounced that she was dead. Neighbours gathered and he sent word to his brothers-in-law and he says they came and kicked him on the head and hit him against a wall. According to his statement, the pain continued till the day before he gave the statement to the Magistrate. This in short is his confession and the case for the prosecution against the accused.

In the committing Magistrate's Court he entirely went back on this statement and said that the Circle Inspector and Deputy Superintendent of Police took him from his village to Tenali and from Tenali to Ponnur and coerced and threatened him and said that evil would happen to him if he did not give a statement in the manner wanted by them. He says that the wording of the statement is not his and he repeated their words like a parrot. In this statement before the committing Magistrate he says that himself and his wife lived amicably and that on that day when he had gone out for work and returned he found his wife did not respond to his call. He tried to wake her up; she did not move. Thereafter he sent word to her mother and called near relations. In short, his statement in the Magistrate's Court is a direct contradiction of what he stated in the confession, and a protestation of innocence and he throws the entire blame for making the confessional statement on the Circle Inspector and the Deputy Superintendent of Police. In the trial Court he simply denied the offence and did not add anything to what he stated in the committing Magistrate's Court. He reiterated that the Deputy Superintendent of Police and the Circle Inspector compelled him to make the confessional statement which he made before the Magistrate.

The learned Sessions Judge believed the confession and found the accused guilty and sentenced him as aforesaid.

In appeal it is contended that the confession was not a voluntary one and is also not true; and, as this is a case depending entirely upon the confessional statement only which has been retracted and as there is no corroboration, the accused cannot be convicted on this evidence. So far as the voluntary nature of the confession is concerned, it is difficult to believe the allegation that the Deputy Superintendent of Police and the Circle Inspector tutored him to say what was stated. It is true that after the arrest of the accused on the 2nd till about 6 P.M. on the 3rd he was not produced before the Magistrate. But, this does not, in my opinion, by itself, lead to the inference that the accused either was threatened or persuaded to make a confession by the Deputy Superintendent of Police or the Circle Inspector. The Circle Inspector says he was investigating into this case. He was camping in the village and he was expecting to examine P.W. 8 who speaks about the promissory note affair and he was examined on the 5th June. Now, if the confession was going to be tutored by them, it is unlikely that the police would have dropped Subbamma as there was a strong suspicion that she might have poisoned her and as all the troubles between the husband and wife were due to her. I am not prepared to accept the contention that this accused did not make the statement voluntarily. But as regards the truth of the averments contained therein, there is considerable force in the contention of Mr. Rajagopalachari. The confession does not make any reference whatsoever to Subbamma. The accused appears to have scrupulously avoided all mention about Subbamma. This, by itself, raises some suspicion whether the making of such a confession is not an attempt to suppress all his connections with Subbamma. Apart from this, according to the confession, the wife was not treating him properly. His version about the incident when she was brought by her brothers after the Thirupathi trip is that she came in and closed the door against him; and that he was sleeping outside till the next morning whereas, the prosecution evidence is that he closed the door against her as a result of which her brothers wanted to take her away, but she would not go and she preferred to stay with her own husband in spite of the difficulties. This shows that the evidence of the witnesses was that she was attached to the husband and that is why she preferred to remain with the accused in spite of the difficulties, whereas the confession makes it the other way about. According to the confession, the brothers of the deceased wanted him to come and live with them in their house. The evidence of the brothers is a total denial of it. Again, according to the confession, regarding the incident, when they came to take the deceased in a cart, she was put inside the cart as also all the samans but for some reason or other, they came back and left her and the samans. According to the evidence she would not accompany them and the samans were thrown out in the street by Subbamma from her house. There is absolutely no reference to Subbamma throwing out the samans in the street in the confessional statement. Again, after the message was sent to his brothers-in-law after the occurrence, the accused states in his confession, they came and kicked him on the head and they also hit his head against a wall. But they denied having ever done so and nobody appears to have noticed any injury on the head of the accused. The police also do not appear to have noticed any injury and the Magistrate also says that he made no attempt to examine the person to find out any injuries.

It is clear from the above circumstances that there is a great variation between the evidence given and the averments in the confessional statement. For the above reasons, I am not prepared to rely on the confessional statement. The question whether a retracted confession can be acted upon without material corroboration will arise only when the confession is true and can safely be acted upon. That question does not arise in this case, as in my opinion though the confession is a voluntary one, it contains allegations which contradict the main aspect of the prosecution case and so it is unsafe to act upon it without further corroboration.

According to the confessional statement itself, the accused took his food at 3 P.M. and came back at 12 in the night. The door was open when he came. There is nothing to prevent Subbamma coming into the house and causing the death of this young girl in the manner in which it has been caused; and it must not be forgotten that there was 20 years of intimacy between the accused and this woman, Subbamma and this was sought to be put an end to on account of this young girl, the deceased. Though one may not be sure as to what really happened that night, still the circumstances do not rule out the possibility of the woman committing this offence either by herself or in conjunction with the accused. The scrupulous omission on the part of the accused to make any reference whatsoever to Subbamma enhances the suspicion that he is trying his best to shield her.

In the circumstances, in my opinion, the prosecution has not proved its case beyond all doubt against the accused. The conviction and sentence are set aside and the accused is acquitted.

I have since perused the judgment of my learned brother. The case has given us great anxiety. My learned brother is however of the opinion that the appellant can be safely convicted on the evidence in the case. I fully appreciate his observations and the reasons he has given for not making a reference to a third Judge under section 429, Criminal Procedure Code. I entirely agree with him that it is the duty of the Judge who is asked to resolve the difference of opinion to examine the whole evidence himself and come to a final judgment after giving due consideration and weight to the reasons given by the two Judges on whose difference of opinion the case comes before him for his opinion. I do not think either section 378 or 429, Criminal Procedure Code, contemplates the dice being loaded heavily in favour of either view. I am in agreement with the view expressed by Edge, C.J., in *Empress* v. *Bundu and another*[1] and *Md. Illias Mistri* v. *The King*[2]. To that extent I agree with the view of my learned brother.

As regards the other view expressed by my learned brother that the third Judge cannot pass a death sentence in a case where the Judge favouring conviction thinks a sentence of transportation for life is appropriate with the other Judge favouring acquittal, with great respect to my learned brother I am unable to agree with him. It looks odd and strange that when one Judge favours acquittal and the other Judge even if he convicts would sentence him only to transportation for life, a third Judge can hang. But that in my opinion is the correct interpretation of section 378, Criminal Procedure Code. When on a difference of opinion a case is referred to a third Judge no fetter can be placed on the third Judge. He is at liberty to express and act upon the opinion which he himself arrives at. If he chooses he can pass a sentence of death, even though one Judge favours an acquittal and the other gives a sentence of transportation for life when convicting the accused.

Somasundaram, J.—NOTE in R. T. No. 84 of 1951 which has been directed to be appended to this appeal, as per orders of the Chief Justice, President of the Law Reporting Conncil: As this case has to be laid before another Judge on account of difference of opinion, I would like to make it clear what I meant and intended when I expressed my opinion in the case of Seetharamayya (Crl. Ap. No. 104 of 1951). It will be clear from that case that the opinions which I expressed about the powers of a third Judge were purely obiter. I happened to express that opinion because my learned brother expressed his opinion. I did not intend to lay down any guiding principle for the third Judge nor did I intend to indicate the lines on which the third Judge should approach, as I have no jurisdiction to do so. In my opinion even a Bench cannot give any such directions to the third Judge. I only intended to say what I would do if I were the third Judge and not what others should do. It is to make this position clear that I am adding this note to this judgment.

K.S. *Accused acquitted.*

1. (1887) A.W.N. 137. 2. I.L.R. (1949) 1 Cal. 43.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Alapati Subbarayudu .. *Appellant**

v.

Jallipalli Lakshmayya .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rules 91 to 93—Scope—Purchaser in Court auction dispossessed of one of the items of property sold by person with superior title—Right to claim refund of money paid from decree-holder by separate suit—Interest on amount and costs of defending suit by person with superior title—Right to.

Where an auction-purchaser of two items of property sold separately in execution of a decree loses possession of one of them as a result of a suit filed by a third party with superior title, then he has a right to recover the purchase money from the decree-holder by a separate suit. *Macha Koundan* v. *Kottara Koundan*, (1935) 69 M.L.J. 750 : I.L.R. 59 Mad. 202 (F.B.), followed. There has been a "complete failure of consideration" as regards the one item dispossessed. *Narasingi Vannachanu Firm, Guntur* v. *Suryadevara Narasayya*, (1945) 1 M.L.J. 312 : I.L.R. (1945) Mad. 789, considered *Nagalingam Chettiar* v. *Guruswami Aiyar*, (1930) 59 M.L.J. 232, applied ; *Bhimavarapu Butch Reddi* v. *Bharitpadi Sri Lakshmivenkata Suryaprakasarao*, (1944) 2 M.L.J. 272, not followed.

But the auction-purchaser in such a suit is not entitled to any interest on the purchase money till the date of the suit. Nor is he entitled to the costs incurred by him in defending the suit by the person with superior title.

Appeal against the decree of the Court of the Subordinate Judge of Tenali in A. S. No. 91 of 1946, preferred against the decree of the Court of the District Munsiff, Tenali, in O. S. No. 200 of 1945.

V. Rangachari for Appellant.

A. V. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—In execution of the decree in O. S. No. 154 of 1931, against one Ramabrahmam, the appellant, who was the decree-holder, brought certain items of properties to sale, and in Court auction, they were purchased by the respondent. The sale certificate shows that two items were sold in two separate lots, the first lot having been knocked down for Rs. 625 and the second lot for Rs. 1,340, the entire purchase money being Rs. 1,965. Subsequently, one Veerabrahmacharlu filed O. S. No. 156 of 1935 on the ground that this Ramabrahmam had no title to some of the properties sold. To that suit, the present respondent, who was the purchaser, was a party. The decision therein was that in the first lot, the judgment-debtor Ramabrahmam, had not title and, therefore, the properties were delivered over from the possession of the respondent to the plaintiff therein. Thereafter, the present respondent-plaintiff, filed the suit out of which this second appeal arises, for the refund of the purchase money of lot No. 1 with interest thereon from the date when he paid the money, as well as the costs incurred by him in defending O.S. No. 156 of 1935.

The learned District Munsiff found that the plaintiff-respondent was entitled to refund of the purchase money alone and that he was not entitled to recover the costs or the interest from the earlier date, but only from the date when O.S. No. 156 of 1935 was decreed by the Court of appeal. Against that decision, there was an appeal by the defendant, who was the decree-holder in O. S. No. 154 of 1931. A memorandum of cross-objections was filed by the plaintiff, who was the purchaser in Court auction. The lower appellate Court dismissed the appeal and allowed the memorandum of objections, and thereby gave the purchaser in Court auction, not only the purchase money deposited by him but also the costs which he had incurred in defending O. S. No. 156 of 1935, as well as interest on the purchase money from the date of the deposit.

The decree-holder at whose instance the items of properties were sold, comes to this Court in second appeal, and it is contended on his behalf by Mr. V. Rangachari

* S.A. No. 2660 of 1947. 3rd December, 1951.

that in view of the provisions of Order 21, rules 91 to 93, Civil Procedure Code, it is not open, under the general law, for a purchaser in Court-auction, whose property had been taken away from him by a person with superior title, to file a fresh suit for recovery of the purchase money. The learned counsel urges that the only remedy open to such a defeated purchaser is to apply under Order 21, rule 91, Civil Procedure Code, for a refund of the purchase money within the period allowed by law under Article 166 of the Limitation Act, and if no such application has been filed in time, a suit under the general law is not sustainable. Unfortunately for the learned counsel the point at issue has been set at rest by a Full Bench of this Court in *Macha Koundan* v. *Kottara Koundan*[1], where it is held that where an auction-purchaser in execution of a mortgage decree loses possession of the property as a result of a suit filed by a third party, then, he has a right to recover back the purchase money from the decree-holder by a separate suit and not by proceedings in execution. The principles decided in that case apply to the facts of the present case. But Mr. Rangachari wants, first of all, to contend that the decision of the Full Bench requires reconsideration and secondly, even if that is not to be allowed, the dicta contained in the Full Bench decision ought to be restricted to the facts of the case, namely, where it has been held that the judgment-debtor had no kind of right whatever in all the properties sold. For this, reliance is placed upon a decision in *Narasinghi Vannachand Firm, Guntur* v. *Suryadevara Narasayya*[2], where Leach, C.J., and Lakshmana Rao, J., distinguished the decision in *Macha Koundan* v. *Kottara Koundan*[1]. The learned Judges held that having regard to the provisions of Order 21, rules 91 and 92, Civil Procedure Code, a suit for refund of purchase money paid in respect of a court-sale does not lie unless there is a total failure of considera-tion or a total want of title in the judgment-debtor in regard to the property sold. At page 793 the learned Judges observe as follows :

> " We will now turn to *Macha Koundan* v. *Kottara Koundan*[1]. There the property was sold in execu-tion of a mortgage decree and it was subsequently discovered that the mortgagor had no interest at all in the mortgaged property. The question was whether the auction-purchaser had, in addition to the right given to him by Orde 21, rule 91, a right to file a suit to recover what he had paid. The Full Bench (Beasley, C.J., Ramesam and King, JJ.) held that a suit did lie. In delivering the judgment of the Court Ramesam, J., pointed out that the Legislature had recognised a right in the auction-purchaser to a refund of the money paid if the judgment-debtor's interest in the property trumed out to be nothing. The right having been recognised and there being nothing in the Code to prohibit a suit for the recovery of the purchase money when there had been a total failure of consideration, a suit lay under the general law. The Court was considering a case whe e there had been a total failure of consideration and the judgment, cannot, in our opinion, be read as laying down that there is a right of suit in a case of partial failure of consideration."

Somayya, J., considered the *ratio decidendi* of the Full Bench decision in *Bhimavarapu Butchi Reddi* v. *Bharitpadi Sri Lakshmivenkata Suryaprakasa Rao*[3]. The learned Judge observed that there were weighty considerations for reconsidering the Full Bench decision adverted to above. Those considerations were those enumerated by himself and Krishnaswami Aiyangar, J., in A. S. No. 90 of 1942. I have perused the judgment in A. S. No. 90 of 1942, and it seems to me that, with due deference to the learned Judges the principles laid down in the decision of the Full Bench cannot be doubted in the way in which the learned Judges have done. Whatever that might be, I am bound by the observations of the Full Bench, unless it is dis-sented from or overruled by a Fuller Bench. I do not, therefore, propose to discuss or reconsider the points considered by Somayya, J.

Such being the case, the question is whether the principles enunciated in *Nara-singi Vannachand Firm, Guntur* v. *Suryadevara Narasayya*[2], regarding failure of partial consideration should be applied to the facts of the present case. It is urged by Mr. Rangachari that there has been a partial failure of consideration and not a total failure of consideration, because a third party, at whose instance O. S. No. 156 of 1935, was filed, claimed only one of the items of properties, and the res-pondent has been deprived of only that item. If that is so, it has to be held that

1. (1935) 69 M.L.J. 750 : I.L.R. 59 Mad. 202 (F.B.).
2. (1945) 1 M.L.J. 312 : I.L.R. (1945) Mad. 789.
3. (1944) 2 M.L.J. 272.

there was only a partial failure of consideration with the result that the observations in *Narasingi Vannachand Firm, Guntur* v. *Suryadevara Narasayya*[1], must be held to apply. On the other hand, it is urged by the respondent relying upon *Nagalinga Chettiar* v. *Guruswami Aiyar*[2], that since the properties were sold in separate lots and that there was a separate purchase for each of the lots, the result is that there has been complete failure of consideration for one of the lots. The learned District Munsiff discussed the matter in paragraph 13 of his judgment and in his opinion, the failure of consideration mentioned in *Narasingi Vannachand Firm, Guntur* v. *Suryadevara Narasayya*[1], can be separated as regards each of the items and that, if there was failure of consideration regarding one of the items and no failure as regards the other item, then it has to be held that there was complete failure of consideration only so far as one item alone is concerned. The distinction is that in my opinion : if this judgment-debtor has full interest in the property that is, all the totality of the bundle of rights are in him, and if only some of the rights were taken from the judgment-debtor, while other rights still remain in him, in such a case it cannot be said that there has been a complete failure of consideration. The principle is inapplicable to a circumstance like this, where, so far as one item is concerned, the judgment-debtor had complete title in him. That being the case, each of the lots has to be judged by itself and the test is whether the judgment-debtor had interest in each of the lots. It cannot be said that so far as the first lot is concerned, the judgment-debtor has any interest at all. I am, therefore, of opinion, that the observations of the learned Judges in *Nagalinga Chetti* v. *Guruswami Aiyar*[2], should be applied to the present case. In that view, the suit as framed is maintainable and the decision of the lower Court is correct on that point.

The next question is whether the lower Court was justified in decreeing in favour of the respondent the costs incurred by him in O. S. No. 156 of 1935, as well as the interest on the purchase money. A Full Bench of this Court has laid down in *Kandappa Mudaliar* v. *S. R. Muthuswami Aiyar*[3], that where there is no contractual obligation and when the Interest Act does not apply, in the absence of any custom or usage or any liability as to damages, no interest can be allowed. Here is a case where the basis of the suit is on the footing of money not received. In such a suit, it cannot be said that the plaintiff is entitled to any kind of interest. The English law on the point, as observed by the Chief Justice in the Referring Order in *Kandappa Mudaliar* v. *S. R. Muthuswami Aiyar*[3] is explicit and clear. There is no difference so far as the Indian law is concerned. I would, therefore, hold that the respondent is not entitled to the interest on the amount till the date of the suit. Nor is he entitled to the costs incurred by him in O. S. No. 156 of 1935.

Therefore, in modifications of the decree of the lower appellate Court, it is ordered that the plaintiff-respondent will be entitled to the refund of the purchase money paid by him with interest thereon from the date of the suit. As both parties have succeeded and failed partially, each party still bear his own costs in this Court and in the lower appellate Court.

K.S. *Decree modified.*

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1. (1945) 1 M.L.J. 312 : I.L.R. (1945) Mad. 789.
2. (1930) 59 M.L.J. 232.
3. (1926) 51 M.L.J. 765: I.L.R. 50 Mad. 94 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

The Union of India, owning the South Indian Railway by the General Manager .. *Petitioner**

v.

S. P. Nataraja Sastrigal and others .. *Respondents.*

Payment of Wages Act (IV of 1936), sections 15, 16 and 17—Single group application under sections 15 (2) and 16 filed on behalf of a number of employees belonging to the same unpaid group—Amount directed to be paid by employer exceeding Rs. 300—Right of appeal to Court of Small Causes—Writ of certiorari—*Maintainability.*

A single application can be filed on behalf of a number of employees belonging to the same unpaid group under sections 15 and 16 of the Payment of Wages Act. If the amount directed to be paid in such application exceeds Rs. 300 there is a right of appeal to the Court of Small Causes given to the employer. The employer thus having an adequate alternative remedy a writ of *certiorari* to quash an order of the Commissioner cannot issue.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for records of the Commissioner of Wokmen's Compensation, Madras, in payment of wages case No. 21 of 1951 (on the file of the Additional Commissioner for Workmen's Compensation, Madras).

S. S. Ramachandra Aiyar for Petitioner.

R. Desikan for Respondents 1 and 2.

The Government Pleader (*P. Satyanarayana Raju*) for the 3rd Respondent.

The Court made the following

ORDER.—This is an application for issuing a writ of *certiorari* to quash the order of the Additional Commissioner for Workmen's Compensation, Madras.

The respondents, S. P. Nataraja Sastrigal and S. Padmanabha Rao, were Assistant Masters in the South Indian Railway, each in charge of Northern area school and Eastern area school respectively, of the Golden Rock colony. They were allowed to draw a duty allowance of Rs. 2 each per mensem. The appointments were made on 5th July, 1941. Subsequently their designation was changed to that of head masters. In the year 1950, the Central Pay Commission sanctioned a revised scale of pay and allowance to the head masters which was to be given retrospective effect from January, 1947. In implementation of the above, the duty allowance of the head masters was raised to Rs. 15 per month. After the revision of the scales of pay C. S. Krishnamurthy Aiyar and M. G. Venkatarama Aiyar in whose places the respondents were appointed, were posted as head masters of the said two elementary schools. The respondents were reverted to their posts as assistant masters and posted to work in the High Schools and Elementary Schools respectively. As they were reverted to their original posts they were ordered not to draw the special pay of Rs. 15 per mensem. Pursuant to that order, their wages were reduced by Rs. 15 per mensem. There was also a proportionate deduction in their dearness allowance by another sum of Rs. 5. They applied by a group application under section 15 (2) and section 16 of the Payment of Wages Act, 1936, for payment of their delayed wages and also for compensation. They estimated their relief in a sum of Rs. 310-10-8. The Additional Commissioner for Workmen's Compensation allowed their claims. The Union of India has filed the present application for issuing a writ of *certiorari* to quash that order of the Commissioner.

Learned counsel for the petitioner contended that the Additional Commissioner for Workmen's Compensation, Madras, had no jurisdiction to question the validity of any reversion or transfer made by the administration of any of their employees but that his jurisdiction was confined to direct the refund to the employed person of the amount deducted, or the payment of the delayed wages, together

* Writ Petition No. 731 of 1951. 13th February, 1952.

with the payment of such compensation as the authority may think fit, within the prescribed limit only on the basis of his existing appointment. But learned counsel for the respondents raises a preliminary objection and contends that the writ would not issue as the petitioners have an effective remedy by way of an appeal to the Court of Small Causes against the order of the Commissioner and that they had not preferred the same.

To appreciate the preliminary objection, the following two relevant provisions of the Act may be read :—

" Section 16 (1). Employed persons are said to belong to the same unpaid group if they are borne on the same establishment and if their wages for the same wage-period or periods have remained unpaid after the day fixed by section 5.

(2) A single application may be presented under section 15 on behalf of or in respect of any number of employed persons belonging to the same unpaid group, and in such case the maximum compensation that may be awarded under sub-section (3) of section 15 shall be ten rupees per head.

(3) The authority may deal with any number of separate pending applications, presented under section 15 in respect of persons belonging to the same unpaid group, as a single application presented under sub-section (2) of this section, and the provisions of that sub-section shall apply accordingly.

" Section 17 (1). An appeal against a direction made under sub-section (3) or sub-section (4) of section 15 may be preferred, within thirty days of the date on which the direction was made, in a Presidency-town, before the Court of Small Causes and elsewhere before the District Court—

(*a*) by the employer or other person responsible for the payment of wages under section 3, if the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees, or

(*b*) by an employed person, if the total amount of wages claimed to have been withheld from him or from the unpaid group to which he belonged exceeds fifty rupees, or

(*c*) by any person directed to pay a penalty under sub-section (4) of section 15.

(2) Save as provided in sub-section (1), any direction made under sub-section (3) or sub-section (4) of section 15 shall be final."

Under section 16 of the Act a single application may be filed on behalf of any number of employed persons belonging to the same unpaid group, and even if a number of applications are filed by members belonging to the same unpaid group, the Commissioner is authorised to consolidate them and treat them as one application. Under section 17, an employer as well as an employee can file an appeal against the order of the Commissioner to the Court of Small Causes. Section 17 (1) (*a*) restricts the right of appeal at the instance of the employer only to cases where the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees. A combined reading of the provisions of section 16 and section 17 of the Act indicates that for the purpose of the pecuniary limit the total amount awarded by the Commissioner in a single application is the guiding factor. In a single application, whether filed by one employee or by employees belonging to the same unpa d group, the Commissioner can direct payment of wages or award compensation. When a single application can be filed by an unpaid group, it is reasonable to hold that for the purpose of appeal, the total amount awarded in that application should be taken into consideration. That this is so is clear from the provisions of section 17 (1) (*b*) for under the provision, in the case of an employee, the total amount of wages claimed to have been withheld from him or from the unpaid group to which he belonged would govern the right of appeal by him. If in the case of an employee the total amount of wages withheld from him, as well as from the other members of the unpaid group, governs the right of appeal, there is no reason why in the case of an employer, in the same application, different considerations should prevail. But it was said that clause (*b*). of section 17 (1) itself makes the distinction. The presence of the words "unpaid group" in clause (*b*) and their absence in clause (*a*) was strongly relied upon in support of the contention that in the case of an employer the total sum paid only to one employee should exceed Rs. 300. In my view no such inference flows from the absence of the said words in clause (*a*). Clause (*a*) of section 17 (1) confers a right of appeal on an employer if the total amount directed to be paid by him in a single application should exceed Rs. 300. As he is directed to pay a sum exceeding

Rs. 300 awarded in a single application and as that fact confers on him a right of appeal, the Legislature perhaps thought that it would be unnecessary to state further that that amount should be the total amount payable to the entire unpaid group. The employer satisfies the pecuniary limit conferring a right of appeal on him and it is irrelevant to consider for that purpose how and in what proportion that amount was shared by the recipients. But in the case of an employee, it is necessary to state in the provision that the amount paid on behalf of the entire group would govern his right of appeal; for, otherwise it may lend scope for the argument that the employee preferring the appeal must satisfy the condition. Therefore the absence of the words "unpaid group" in clause (*a*) will not establish that in the case of an employer the total amount paid by him to each of the employees alone should exceed Rs. 300. I therefore accept the preliminary objection and hold that the petitioners had a right of appeal to the Court of Small Causes against the order of the Commissioner. The writ asked for will not issue as the petitioners who have got an adequate remedy have not availed themselves of it. In this view it is not necessary to express my opinion on the question raised by the learned counsel for the petitioners. This application is therefore dismissed with costs—Advocate's fee Rs. 100.

V.P.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BASHEER AHMED SAYEED.

Lakshmana Prasada & Sons .. *Appellant**

v.

A. Achuthan Nair .. *Respondent.*

Contract Act (IX of 1872), Section 72—Purchase of motor car at a price in excess of the controlled price—Payment made in the belief that it is controlled price—Right to recover difference.

The power to fix the price of Motor vehicles vests only with the Provincial Government under the Madras Civil Motor Vehicles Control Order, 1947, and not with the Provincial Motor Transport Controller.

A contract for purchase of a motor car from a dealer must be deemed to be to sell the vehicle at the controlled price as notified by the Provincial Government because the vendors are not expected to commit an offence by selling it at a price other than the controlled price. When it is later on discovered that a transaction had taken place not on that basis but on something different the vendors are bound to return the difference in the price which they had received in excess of the controlled price. It is a case where money has been paid in excess of the controlled price under a mistake of fact and the case comes directly under section 72 of the Contract Act. The purchaser is not bound to rescind the contract and return the vehicle.

Case-law discussed.

Appeal against the decree of the City Civil Court, Madras, dated 28th September, 1948, in O. S. No. 365 of 1948.

K. Bashyam and *P. V. Subramanyam* for Appellant.

K. P. Raman Menon for Respondent.

The Court delivered the following

JUDGMENT.—The defendants are the appellants in this appeal. They have preferred this appeal against the judgment and decree of the learned Additional City Civil Judge decreeing the suit brought by the respondent for recovery of a sum of Rs. 1,555 alleged to have been collected illegally from the respondent.

The defendants are dealers of "Hindustan—10" motor vehicles and on the 22nd January, 1948, the appellants sold one "Hindustan—10" car to the respondent for the sum of Rs. 9,350 which they believed and represented to be the controlled price for the said vehicle exclusive of taxes and other charges. The respondent also paid the price in the belief that the price represented by the appellants was the controlled price, but subsequently the respondent learnt that the price fixed by the Government was only Rs. 8,195 for the said "Hindustan—10" motor

* C.C.C.A. No. 10 of 1950. 4th December, 1951.

vehicles and that the appellants had collected in excess a sum of Rs. 1,155. After this knowledge, the respondent called upon the appellants by notices to refund the excess collected by the appellants over and above the controlled price fixed by the Government. The appellants declined to refund the said excess denying that they collected any excess over the controlled price and stating that they collected only the price approved by the Provincial Motor Transport Controller, that there was no misrepresentation by the appellants in the matter of the price and that even if there was any such misrepresentation, the respondent not having rescinded the contract, he was not entitled to recover the excess now claimed, either by way of damages or otherwise and that interest was also not payable. The learned Additional City Civil Judge after framing the issues referred to in his judgment, accepted the case of the respondent and decreed the suit.

The learned counsel appearing for the appellants now contends that there was no evidence adduced to show that the price of the vehicle in question was only Rs. 8,195 on the date when the vehicle was sold and that in so far as the appellants acted in pursuance of circular No. 61 contained in Ex. A-4 (*a*), which was approved by the Provincial Motor Transport Controller, they were justified in relating the entire sum paid by the respondent towards the price of the vehicle. On this point, two Gazette Notifications have been produced by the respondent's counsel. They are dated 6th June, 1947, published on the 17th June, 1947 and 17th April, 1948, published on the 27th April, 1948. A reading of these two notifications makes it clear that the price fixed by the Provincial Government for a vehicle of the kind in question was only Rs. 8,195 and not Rs. 9,500 paid for by the respondent. From a reading of clauses 4 and 5 of the Madras Civil Motor-cars Control Order, 1947, it is also evident that the power to fix the price for motor vehicles vests only with the Provincial Government and not with the Provincial Motor Transport Controller. Such a price having been fixed by the notifications referred to above, the first notification fixing the price at Rs. 8,195 and the second notification fixing the price at Rs. 7,700 and the second notification superseding the previous notification and there being no other notifications in between the two notifications referred to above, it is fairly clear that the price for which the motor vehicle in question should have been sold in December 1947 was only Rs. 8,195 and not anything in excess thereof. Therefore circular No. 61 referred to in Ex. A-4 (*a*) relied upon by the appellants was of no avail as it could not be considered to be an authorised fixation of the price for the vehicle in question. Nothing has been produced to show that the Provincial Government had delegated the power to the Provincial Motor Transport Controller to fix the price at the figure given in the circular and approved of by him. In these circumstances, it has to be held that the authorised price for which the vehicle could have been sold was only Rs. 8,195 so that when the respondent paid a sum of Rs. 9,350 the difference collected by the appellants is in excess of the controlled price. There is therefore no substance in the contention on behalf of the appellants that they had sold the vehicle for the proper price.

The next contention raised by the learned counsel for the appellants is that the respondent having alleged misrepresentation on the part of the appellants in inducing the respondent to pay more than the controlled price, section 19 of the Indian Contract Act came into operation and under that section, the agreement between the parties was voidable, and the respondent not having avoided the contract by returning the vehicle which he had purchased from the appellants which it was open to him to do, he cannot now claim the excess amount paid by him over and above the controlled price. I cannot agree that there is any force in this contention, for though there are certain allegations in the plaint which might lead to an inference that the respondent has relied upon the ground of misrepresentation, still in my opinion, the general tenor of the plaint, as I read it, is not that the respondent relies solely upon any misrepresentation on the part of the appellants in inducing him to part with the excess sum but that he has simply made use of his argument as an additional ground to strengthen his claim for the excess, the actual

basis of the claim being that while the price actually fixed by the Provincial Government was only Rs. 8,195, the appellants had collected a sum which was over and above the price actually fixed and that such collection was not justifiable and that the appellants cannot retain the said excess for themselves. That accounts for the reason why the plaintiff-respondent did not think of avoiding the contract by returning the car to the appellants. If he had really conceived that the vehicle had been sold to him under a misrepresentation, he would have certainly returned the car and claimed the entire amount paid by him. The fact however is that at the time when the car was purchased by the respondent and sold by the appellants, both the parties were under the *bona fide* belief that the price of the car was as collected by the appellants and as exhibited by the appellants on their notice board in their show room. It was only after the purchase had been made and the respondent had taken delivery of the vehicle, that the respondent came to know that the price was much lower than what was actually paid by him. The evidence on the record in this case does not support the view that the respondent was led into any belief that the price was Rs. 9,350 by means of any misrepresentation made by the appellants. The appellants had in their possession the circular No. 61 contained in Ex. A-4 (*a*) and they were under the impression that that was the price at which they were entitled to sell their vehicle; and the respondent also at that time was under the impression that the correct price was the one demanded by the appellants. Therefore, it cannot be said that there was any consent obtained from the respondent by the appellants for the sale and purchase of the vehicle by means of any fraud or misrepresentation so as to make the contract voidable and so as to make it necessary for the respondent to return the car. I therefore think that it was not necessary for the respondent to return the car and claim back the entire price paid by him to the appellants.

The next contention raised by the learned counsel for the appellants is that in so far as the appellants sold the car in contravention of the price fixed by the Provincial Government under their notification, the contract itself was an illegal one being against the Control Order, and therefore section 65 of the Contract Act would attract itself to the contract in question. Section 65 of the Contract Act reads thus:

> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."

The contention of the learned counsel for the appellants is that inasmuch as during the period when the contract came into existence there was great scarcity of cars in the market and the respondent having taken delivery of the car from the appellants which he would not have ordinarily got in those circumstances, and there being no compulsion on the part of dealers in motor vehicles to sell their vehicles to any particular individuals, though the Government had reserved to itself only the right to fix the price at which the car could be sold, it was therefore incumbent upon the respondent to have returned the car to the appellants if he had discovered that the contract was void in that it was against the Control Order, and the respondent not having restored the advantage he got to the appellants he is not now entitled to claim the excess which he had paid to the appellants. His contention is that the respondent having received an advantage in that he was the person who purchased the car in difficult circumstances he should have restored that advantage to the appellants if he were to claim back the price which he paid and he not having done so in spite of the fact that he discovered the contract to be void as being against the Control Order, the appellants are not called upon to pay back any excess over and above the controlled price. The learned counsel for the appellants has invited my attention in this connection to the decision in *Jagadish Prasad* v. *Produce Exchange Corporation*[1]

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1. A.I.R. 1946 Cal. 245.

and contends that inasmuch as the respondent has not rescinded the contract and has retained the car to himself and he not having been in a position to return the car either as he had used it for his benefit, he cannot be allowed to claim the refund. The point urged by the learned counsel is that when there is an illegal or a void contract both the parties to the contract must be put back to the original petition in which they were before the contract and since that has become impossible in the circumstances of the present case, the respondent alone could not be permitted to claim the excess that he is said to have paid towards the price of the car without restoring the car itself to the vendor. I do not think that it is possible for me so accept this contention of the learned counsel for the appellants, nor could I agree that the facts in the present case lend themselves to the application of the reasoning contained in the decision referred to by the learned counsel for the appellants. For the price the respondent paid he got the car and it cannot be said that he got any extra advantage by the transaction. On the other hand the extra advantage gained by the appellants would seem to be the excess over the controlled price which he is bound to refund. The learned counsel for the appellants had also invited my attention to certain decisions such as *Seddon* v. *North Eastern Salt Co., Ltd.*,[1] and *Oriental Govt. Security Life Assurance Co., Ltd.* v. *Narasimhacharry*[2], in this connection. I do not think these decisions apply to the facts of the present case, for, I think, this case is one which comes directly under section 72 of the Contract Act. The simple fact in this case is that money has been paid in excess of the controlled price under a mistake of fact. Both the parties, as I have already observed, have *bona fide* been under the impression and belief that the price at which the vendor could sell and the vendee could purchase was Rs. 9,350, but it later transpired that the sum of Rs. 9,350 had been received by the vendor and paid by the vendee under a mistake, while the controlled price was only Rs. 8,195 on the date of the transaction as fixed by the Provincial Government in their notifications referred to above, about both of which the parties were not aware. Money having been paid under a mistake of fact that the price was what was quoted by the appellants and not otherwise, and when it became known to both the parties that the price that should have been collected was only a lesser sum than what was actually paid, it was open to the respondent to claim the excess and it was reasonable and proper that the excess paid should be refunded by the appellants. The sum of Rs. 9,350 was paid as the amount legally due to the appellants and it was received by the appellants under such belief, though the belief was a mistaken one. There is no evidence or proof that the money paid in excess of the controlled price was intended to be given away as a gift or a present to the appellants by any means, and such being the case, I am of opinion that section 72 of the Indian Contract Act comes into operation and applies to the facts of this case. It must be stated that when the motor vehicle was delivered by the appellants to the respondent, it was delivered only on the basis that the price which was paid and received was only the controlled price. If that were so, it cannot be said that there was any illegal contract entered into between the parties. The contract itself must be deemed to be to sell the vehicle at the controlled price, because the vendors were not expected to commit an offence by selling it at a price other than the controlled price. When it was later on discovered that the transaction had taken place actually not on the basis of the controlled price, but on something different therefrom, certainly the appellants would be bound to return the difference in the price which they had received in excess of the controlled price. The evidence of D.W. 1 also is to the effect that it was intended and the vehicle was actually sold for the controlled price which he believed was Rs. 9,350 on the basis of the circular contained in Ex. A-4 (*a*). Therefore in such circumstances, money that has been paid under a mistake of fact must be recoverable by the party who parted with it. The mistake is only about actual price fixed by the Provincial Government for the car. This cannot be said to be money that has been paid under a mistake of law. The

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1. (1905) 1 Ch. 326.

2. (1901) 11 M.L.J. 379 : I.L.R. 25 Mad. 183.

reasoning therefore in *Shiba Prasad Singh* v. *Srish Chandra Nandi*[1], would seem to apply to the facts of this case. Even so, the decision in *Sowdra Baid* v. *Saraswati*[2], would apply to the facts of this case in full force. In *Audinarayana* v. *Munagapaka Panchayat Board*[3], it has been held that a payment under a mistake of fact cannot be considered to be voluntary payment so as to enable the receiving party to retain the benefit thereof. Section 72 is clear and it is in the following terms :

> "A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

Mr. Bashyam, learned counsel for the appellants, has invited my attention to certain passages in *Jagadish Prasad* v. *Produce Exchange Corporation*[4]. It was held in that decision on the facts of that case that no mistake arose and I do not think the arguments advanced in that case would apply to the facts of the present case. I am unable to agree that the exception mentioned in these decisions would cover the present case ; nor does any question of splitting up the contract would arise in the present case. True, there cannot be any new contract substituted in place of the old contract under which the vehicle was sold ; but what actually took place was that both the vendor and the vendee were transacting the business on the basis of the controlled price and when it turned out that the controlled price was less than the price actually paid and received, the simple thing that followed was that the excess received over and above the controlled price could not be retained by the vendor and the vendee was entitled to claim it back, because the money was paid under a mistake as to the fact of the price. The argument of the learned counsel for the appellants that the appellants not being under any compulsion that the respondent should be sold a car and the respondent having received the benefit under the sale in that he got the car and therefore must restore back the car to be entitled to claim the balance overpaid, does not appeal to me ; nor does the argument that the respondent should either return the car and get back the entire amount or get nothing at all appear to be valid, in my opinion. I am therefore inclined to hold that what the learned City Civil Judge has done in the circumstances is but the correct thing, and his decision has therefore to be upheld.

In the result, this appeal fails and the decree and judgment of the lower Court are confirmed. The appellants will pay the costs of this appeal to the respondent.

V.P.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE RAGHAVA RAO.

Seethalakshmi Achi and others .. *Appellants**

v.

V. T. Veerappa Chettiar .. *Respondent.*

Debtor and Creditor—Agents of both doing money-lending business in Burma—Payment by debtors' agent to creditors' agent in Japanese currency while Burma was in Japanese occupation—Validity—Defence of India Rules, 1939—*Rules* 2 (2) *and* 98, *scope—Prohibition of intercourse between residents of belligerent States—Limits.*

The "enemy" character of a person attaches to him irrespective of his nationality or his domicile if he is living or residing in enemy territory or enemy occupied territory and the test is an objective test depending upon facts. An enemy subject is denied access to the national Courts and trading with him and all intercourse or communication across the line of war are prohibited. When a creditor and his agent and the debtor are not across the line of war there is no reason prohibiting the payment of the debt by the debtor and a receipt by the creditor.

Without evidence and proof of facts establishing the change of national character of the country into "enemy territory" cannot be assumed. Tests of "enemy territory" reviewed elaborately. The evidence in the case did not establish that Burma was an occupied enemy territory at the relevant time. Burma during the period it was occupied by Japan in the war was not an enemy territory as defined by section 2 (2) of Defence of India Rules as the territory was in the previous occupation.

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1. (1949) 2 M.L.J. 657 (P.C.).
2. (1942) 1 M.L.J. 441 : I.L.R. (1942) Mad. 669.
3. (1940) 1 M.L.J. 582.
4. A.I.R. 1946 Cal. 245.

*Appeal No. 344 of 1947 and (C.M.P. No. 7477 of 1948.) 3rd April, 1951.

of His Majesty. Even if Burma be treated as enemy territory during the relevant time none of the disabilities contemplated by Rule 98 of the Defence of India Rules would apply as the transaction was between "enemies" *inter se*, the creditors' agent and debtors' agent residing and doing money-lending Business in Burma both being "enemies" for the purpose of Rule 98. The payments made by the debtors' agent to the creditors' agent in Burma towards the loan are not hit at by the Defence of India Rules.

In view of the subsequent enactment of Burma Act XXXVI of 1947 (Japanese Currency Evaluation Act) the payment in Japanese currency was valid.

Appeal against the decree of the Court of the Subordinate Judge, Devakottah, in O. S. No. 83 of 1945.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Appellants.

R. Rangaswami Iyengar for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—This appeal by the defendants raises an interesting and difficult question of law, and we have taken time to consider our judgment. The case was ably and elaborately argued by both sides and we are indebted to counsel for the assistance rendered by them.

The plaintiff instituted the suit to recover Rs. 4,900 the balance of principal and Rs. 990-7-6 interest calculated according to the vaddi chittai making a total of Rs. 5,890-7-6 as balance due under a promissory note, Ex. P-1 dated 19th October, 1939, executed by one Meyappa Chettiar, in favour of V. T. Veerappa Chettiar for Rs. 17,696-8-6. This Meyyappa Chettiar, the executant of the note, is the husband of the first defendant, undivided father of defendants 2 and 3. He carried on money-lending business at Dedaya in Burma under the style of S.M.A.M.S. The plaintiff, the payee under the note, carried on also money-lending business at Rangoon under the style of V.T. Firm. In respect of transactions between the two firms in Burma Meyyappa Chettiar became indebted to the plaintiff in a sum of Rs. 34,500 as per settlement of account dated 30th July, 1934. On 7th April, 1935, the defendants' agent at Dedaya executed a promissory note to the plaintiff, and under this promissory note there were payments made in 1935 and 1936. The promissory note was lost and on 17th March, 1937, for the balance due under the lost promissory note Meyyappa Chettiar executed a promissory note in favour of the plaintiff and also gave a varthamanam letter of even date. The promissory note was for a sum of Rs. 26,579-8-1 which was executed in British India at Pallathur. Under this note also payments were made in 1939. and for the balance due under that promissory note, on 19th October, 1939, the suit promissory note Ex. P-1 was executed by Meyyappa Chettiar in favour of the plaintiff at Pallathur. There were subsequent payments admittedly made towards this promissory note.. The plaintiff filed the suit in 1945 ignoring a further payment of Rs. 5,786-5-6, made in Burma by the agent of the defendants to plaintiff's agent Viswanathan Chettiar (P.W. 2) for which a voucher, Ex. D-1 dated 5th October, 1944, was given by the plaintiff's agent to the defendant's agent. A payment of Rs. 100 was made at Pallathur to save the promissory note from limitation and according to the defendants the understanding was that if the note was already discharged by payment in Burma this amount should be refunded.

The dispute between the parties is with reference to the payment by the defendant's agent to the plaintiff's agent at Burma. In the suit the plaintiff denied the receipt of this amount and also disputed the validity of the payment made to the plaintiff's agent on the ground that after the invasion of Burma by Japan on 7th March, 1942, the agency of Veerappa Chettiar, the plaintiff's agent, came to an end and that he had no right to give a valid discharge. It was also pleaded that as the payment was in Japanese currency there was no valid payment. It has now been found by the trial Court that the plaintiff's case that no payment was made in Burma is false and that, in fact, the plaintiff's agent received the amount and credited the same in the account of the plaintiff, Ex. D-2 maintained by Viswanathan Chettiar, P.W. 2 at Burma. It is also further found that this amount was utilised by the agent to discharge the V.T. Firm 's liability due to Moulmein

S.T.M.N.R.M.N.N. This finding is not now seriously challenged by the respondent-plaintiff, and indeed could not be in view of the unimpeachable evidence on which the case of the defendants rests. The plaintiff therefore undoubtedly received the amount and had the full benefit of it, but for reasons best known to himself he has chosen to take up the attitude of calling upon the defendants to pay the amount twice over. The learned Subordinate Judge who tried the suit came to the conclusion that at the material time Burma was not an enemy territory, but as the payment was made in Japanese currency it was not a valid payment. In the result he decreed the plaintiff's suit, as prayed for and disallowed the claim of the defendants for a refund of the sum of Rs. 100 based on an agreement to refund the same. This question however is not now in appeal and need not be considered.

The questions raised in the appeal are :

(1) Whether Burma was an enemy territory at the time of the payment?

(2) If Burma was an enemy territory whether the plaintiff's agent who admittedly resided in Burma during the occupation of that territory by Japanese had authority to give a valid discharge?

(3) Whether the payment in Japanese currency is valid?

The last question does not present any difficulty, as it has now been brought to our notice by the learned Advocate for the appellants, that after Burma was restored to British Government an Act entitled the Japanese Currency (Evaluation) Act, 1947 (Burma Act No. XXXVI of 1947), was passed which validated payments made in Japanese currency during the occupation of Burma by the Japanese. Copies of this and other Acts were filed in this Court as additional evidence with a petition to admit them in appeal. As these Acts have a material bearing, we think that this petition to admit these Acts as additional evidence should be granted. Section 4 of this Act says :

"Notwithstanding anything contained in any other law for the time being in force, where any debt or obligation, whether contracted or incurred before or during the Japanese occupation of Burma, had been paid or discharged wholly or partially in Japanese currency notes during the Japanese occupation of the area where the payment was made and the payment had been accepted such payment shall be deemed to be payment in legal currency notes of the same face value, as if the Japanese currency notes were legal currency notes at the time the payment was made."

It therefore follows that if otherwise the payment is to a person having authority to receive payment on behalf of the plaintiff, it cannot be treated as invalid on the ground that it was paid in Japanese currency. The real question therefore is whether P.W. 2 had authority to receive payment on behalf of the plaintiff and to give a valid discharge. The contention urged on behalf of the respondent-plaintiff is that by reason of the Japanese occupation of Burma at that time it became an "enemy territory," that P.W. 2, the plaintiff's agent who lived in Burma at that time became an "enemy" and therefore under law the agency of P.W. 2 terminated.

The following dates are material in considering the question whether Burma became an enemy territory, and these dates were agreed to by both parties as correct. On 8th December, 1941, war was declared against Japan by Britain and America. On 7th March, 1942, Japan occupied Rangoon. On 4th May, 1945, the British Army retook Rangoon. On 6th August, 1945, and 8th August, 1945, Hiroshima and Nagasaki were destroyed by atom bombs by the Americans. On 14th August, 1945, the war in the East terminated.

The most important question is whether the agent of the plaintiff, P.W. 2, at the time he received payments from the agent of the defendant on 5th October, 1944, had authority to give a valid discharge on behalf of the plaintiff. That P.W. 2 was the duly constituted agent of the plaintiff to carry on money-lending business at Rangoon on behalf of the plaintiff at the time war broke out and that he had continued to act on behalf of the plaintiff by collecting debts and doing other acts on behalf of the plaintiff as his agent during the period Burma was in the occupation of Japanese cannot now be seriously doubted. The evidence of P.W. 2, the agent

is clear and unambiguous to establish that he was collecting rents and paying taxes in respect of the property of the plaintiff during the period of war. He was also liquidating the debts of the business. Notwithstanding this evidence, however, an attempt was made by the learned Advocate for the respondent to reopen the question and repudiate the agency in fact but that attempt has failed in view of the evidence of P.W. 2. It is significant that the plaintiff himself did not go into the witness box to repudiate the agency and even the power of attorney, if any, under which P. W. 2 acted was not produced. The evidence of D.Ws. 1 and 2 to a large extent supports the case of the defence and the account maintained by P.W. 2 during the period, produced by the plaintiff but exhibited on the side of the defendants as Ex. D-2 puts the matter beyond any doubt. The plaintiff made no serious attempt in the trial Court to deny the agency and the case, therefore, must proceed on the basis that P.W. 2 was an agent in fact. Whether that agency continued in law notwithstanding the fact that war broke out between England and Japan and Burma was occupied by Japan is the only question that remains to be determined.

The argument that the agency of the agent terminated by reason of the occupation of the territory by Japan is founded on the common law doctrine of England which it was contended, applies to British India at least by way of justice, equity and good conscience. Reliance was also placed upon the Defence of India Rules made by the Government of India prohibiting trading with the enemy by virtue of the power vested in the Government under the Defence of India Act, 1939.

For a proper appreciation of the contentions urged on either side it is necessary to have a correct perspective of the English common law doctrine relevant for the purpose of the case.

The English common law was recently subjected to a critical and, if one may say so with respect, to a careful examination by the House of Lords in *Sovfracht (V/O) case*[1] and the masterly exposition of the subject, particularly to the classic speeches of Lord Wright and Lord Porter, has lightened to a large extent, our task. It is unnecessary therefore to traverse the same field once again by subjecting the authorities on the subject to a detailed examination.

Total war with its incidence of massacre of innocent men, women, and children and large scale destruction of property by perverting the knowledge of science for devising ways and means of destruction in a brutal manner is the product of modern civilisation, if civilisation it can be called. The principles regulating intercourse between residents of belligerent States are not part of international law but are part of the municipal law of every country. They are to a large extent supplemented and modified very often by trading with the enemy Acts and the rules, regulations and proclamations promulgated under the power conferred under such Acts..

There are two fundamental principles of English common law which are made applicable to enemy subjects in time of war. These principles though separate are closely connected as the basis on which they are founded is common. As stated by Lord Wright in *Sovfracht (V/O) case*[1], these principles are :

> "One is that he (enemy subject) is denied access to the English Courts, the other is that British subjects are prohibited from trading with him and from all intercourse or communication across the line of war. Both principles depend on rules of English Municipal law, and both have their foundation in the ancient common law."

In their origin these principles seem to have been founded on public policy and they have now obtained such an absolute character that it is not now open to reject this application by a scrutiny of public policy. The rule against trading with an enemy is considered as a belligerent weapon of self-protection and is aimed at crippling the resources of the enemy. In Openheim's International Law, Vol. II, at pp. 258 and 262, these rules are summarised as follows :

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1. (1943) A. C. 203.

"Formerly the rule prevailed everywhere that an enemy subject had no *persona standi in judicio* and was, therefore, *ipso facto* by the outbreak of war, prevented from taking or defending proceedings in the Courts. This rule dated from the time when war was considered such a condition between belligerents as justified hostilities by all the subjects of one belligerent against all the subjects of the other, the killing of all enemy subjects irrespective of sex and age, and, at any rate, the confiscation of all private enemy property. War in those times used to put enemy subjects entirely *ex lege*, and it was only a logical consequence from this principal that enemy subjects could not sustain *persona standi in judicio*. Since the rule that enemy subjects are entirely *ex lege* has everywhere vanished, the rule that they might not take or defend proceedings in the Courts had in many countries, such as Austria, Hungary, Germany, Holland and Italy, likewise vanished before the world war. But in Great Britain and the United States of America the general rule that enemy subjects are prevented from taking legal proceedings still survives, though qualified, as we shall see, by many exceptions." (The exceptions are omitted as not being relevant).

* * * *

"Before the world war, following Bynkershock, most British and American writers and cases, and also some French and German writers asserted the existence of a rule of International law that all intercourse, and especially trading, was *ipso facto* by the outbreak of war prohibited between the subjects of the belligerents, unless it was permitted under the custom or war (as, for instance, ransom bills) or was allowed under special licences, and that all contracts concluded between the subjects of the belligerents before the outbreak of war became extinct or suspended. On the other hand, most German, French, and Italian writers denied the existence of such a rule, but asserted the existence of another, according to which belligerents were empowered to prohibit by special orders all trade between their own enemy subjects.

These assertions were remnants of the time when the distinction between International and Municipal law was not, or was not clearly drawn. International law being a law for the conduct of States only and exclusively, has nothing to do directly with the conduct of private individuals, and both assertions are, therefore, nowadays untenable. Their place must be taken by the statement that, States being sovereign, and the outbreak of war bringing the peaceful relations between belligerents to an end, it is within the competence of every State to enact by its Municipal Law such rules as it pleases concerning intercourse, and especially trading, between its own and enemy subjects."

It would be seen on an analysis of these principles that the very foundation or the basis for them is that, if there is war between belligerents, a person is an "enemy subject" which implies that he is in some way connected with the enemy territory or enemy occupied territory.

What is war? Hall in his International Law defines "War" at page 60, as follows :—

"When differences between States reach a point at which both parties resort to force, or one of them does acts of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant."

This definition has judicial approval in *Driefontein Consolidated Gold Mines* v. *Janson*[1]. War, therefore is a contest between two or more States through their armed forces with the ultimate object of each contestant or each contestant group vanquishing the other or others and imposing his own conditions of peace.

Who is an Enemy? It is important to consider the test which determines the enemy character of a person. Under the law in England the test of enemy character is not nationality but residence or even living in enemy territory for whatever purpose it may be. It is not necessary that the person, even if he is a British subject, should have a domicile in the sense of the civil law, *viz.*, the place of a man's permanent house, or even of an indefinite residence. If a person, whether a neutral or a British subject, lives in enemy territory even for purposes of business, he is treated in law as an "enemy subject." Of course what applies to enemy territory applies equally to enemy occupied territory. The test of enemy character has nowhere been so clearly laid down as by Lord Lindley in *Janson* v. *Driefontein Consolidated Mines, Ltd.*[2], where the learned Lord summarised the tests in these words :

"When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as alien enemy in considering the validity or invalidity of his commercial

1. (1900) 2 Q.B. 339 at 343. — 2. (1902) A.C. 484 at 505.

contracts, *McConnell* v. *Hector*[1]. Again, the subject of a State at war with this country, but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy; the validity of his contracts does not depend on his nationality nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses, *Wells* v. *Williams*[2]. As observed by Sir William Scott in *The Yonge Klassina*[3], a man may have mercantile concerns in two countries, and if he acts as merchant of both he must be liable to be considered as a subject of both with regard to the transactions originating, respectively in those countries. That he has no fixed counting house in the enemy's country will not be decisive. See also *The Portland*[4]."

From this passage it is evident that the term "domicile" is used in a twofold sense; one is in relation to the person without reference to his commercial intercourse and the second is in regard to the place of business which is styled by Dicey as a "commercial domicile" of a person. In particular cases the two domiciles of persons may be the same or may be different, but it is impossible to ignore the distinction. The subject is more elaborately discussed by Professor Mcnair on Legal Effects of War in Chapter II. In Halsbury's Laws of England, Volume I 2nd Ed., (Lord Hailsham) at page 447, it is stated that:

"An alien enemy is one whose Sovereign or State is at war with the Sovereign of England, or one who is voluntarily resident or who carries on business in an enemy's country even though a natural born British subject or a naturalised British subject."

In the case of a company incorporated in the United Kingdom as stated in Volume I, of Halsbury's Laws of England at page 447:

"It does not become an alien enemy merely because its shares are held by alien enemies but becomes an alien enemy if its agents or the persons in *de facto* control are alien enemies or if it carries on business in an enemy country. *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.*[5]. The same applies to a company incorporated in an allied State. A company incorporated in an enemy country is an alien enemy regardless of how its shares are held."

In *Soufracht (V/O) case*[6] Viscount Simon, L.C., defined a subject of a State at war with England as a

"person of whatever nationality who is carrying on business in, or is voluntarily resident in, the enemy's country"

and he pointed out at page 211:

1. "The test of 'enemy character' is fundamentally the same whether the question arises over a claim to sue in our Courts, or over issues in a Court of Prize, or over a charge of trading with the enemy at common law."

2. The test is an objective test, turning on the relation of the enemy power to the territories where the individual voluntarily resides or the company is commercially domiciled or controlled. It is not a question of nationality or of patriotic sentiment."

In the same case, Lord Wright at page 219 stated:

"Before examining the relevant authorities I should explain that the test which has been taken of enemy character in English law is not nationality, but domicil in the sense of settled residence or in the case of traders commercial domicil. Domicil in the strict legal sense is not necessarily relevant. Some of these cases were decided in the Prize Court, others in Courts of common law. However the right to sue or prosecute an action in Court, the right to claim to be exempt from seizure and condemnation in prize, the liability to punishment for the offence of trading with the enemy, all depend alike on whether the person has enemy character in what has been called the technical or territorial sense. The test is objective and depends on facts, not on the person's prejudice or passions, his patriotism, or his determination to free his country whenever he can."

It follows from these authorities that the enemy character of a person under English common law attaches to a person, irrespective of his nationality or his domicile, if he is living or residing in enemy territory or enemy occupied territory and the test is an objective test depending upon facts. The domicile of a person may be in the civil law sense or a commercial domicile, but is used in both cases in technical or territorial sense and not necessarily in the sense in which it is understood under civil law. Webber in his book on the Effect of War on Contracts, 1946 Ed., discusses this topic in Chapter III at page 89.

It becomes now necessary to consider the more difficult question of the nature of occupation required for purposes of these rules to change the national character

1. (1802) 3 B. and P. 113: 127 E.R. 61,
2. (9 W. 3) 1 Ld. Raym. 282.
3. (1804) 5 Ch. Rob. 302-3.
4. (1800) 3 Ch. Rob. 41.
5. (1916) 2 A.C. 307.
6. (1943) A.C. 203.

of a State to constitute an anemy occupied territory. There is no difficulty in determining an "enemy territory." It is the area under the sovereignty of a power at war and of which it is the owner of the soil. What is the quality of occupation required to make a territory occupied by an enemy "an enemy occupied territory" for the purpose of the common law? The Trading with the Enemy Act, 1939 and its counterpart in India, sub-R. (2) of rule 2 of the Defence of India Rules, substantialy agree and include within the definition the area "in the occupation of a power with whom His Majesty is at war." The occupation required to constitute a territory an enemy occupied territory has been the subject-matter of judicial decisions, English and American and the opinions of Sir William Scott, who was later Lord Stowell, and of Marshall, C.J., of the United States, as well as of Lord Kingsdown in the well-known *Gerasimo's case* (*Cremidi* v. *Powell*[1]), have been subjected to a critical examination by Lord Wright and Lord Porter in the *Sovfracht* (*V/O*) *case*[2] and the House of Lords in a way differed from the view of Lord Kingsdown in *Gerasimo's case*[1].

An occupation of a territory by the enemy may be an occupation for military or strategic purpose and the territory may be subjugated by the hostile force which occupies it so as to subject it to such control as it may think fit to exercise, or it may having occupied it by cession or conquest or some other means permanently or temporarily incorporate it with the territory over which the enemy has undisputed sovereignty. There may yet be an intermediate position where the enemy without actual and formal annexation of the territory may hold the dominion and control over the territory for a sufficiently long period and the occupation may be of such relatively permanent character as to indicate an intention to hold it. The belligerent State may in such a case assume some kind of administration over it. An occupation of this character is something more than mere occupation for military purposes and falls short of complete annexation or incorporation with its own territory. Of these three possibilities, Mr. Lushington, a Judge of the Admiralty Court, who decided the case in *Gerasimo's case*[1], in the first instance accepted the first position. He said:

> "So long as any territory is in possession of the enemy, I apprehend that the law declares that all the inhabitants thereof, and all the persons resident therein and carrying on trade are to be considered as enemies in respect of that trade."

This view has been regarded by all the authorities as erroneous and an occupation of such a nature has not the effect of altering the natural character of the territory. The second view was held by the Right Hon. T. Pemberton Leigh, afterwards Lord Kingsdown, in the *Gerasimo's case*[1]. The intermediate view has been established by the decision of the House of Lords in *Sovfracht* (*V/O*) *case*[2]. Wheaton on International Law, Volume II, 6th Ed., at page 780 points out the distinction between "occupation" and "conquest" in these words:

> "Further, just as invasion must be accompanied by certain essential conditions in order that it may be transformed into occupation, so must military occupation be accompanied by certain necessary conditions in order that it may ripen into conquest. Formerly, as we have pointed out above, the invader assumed the larger rights of an occupant, and the occupant assumed the still larger rights of a conqueror. But now there is a line of demarcation between these stages. Conquest or complete subjugation implies the permanent subjection of the occupied country to the sovereign of the occupying forces, with the intention that this territoy shall be annexed to the dominions of the new sovereign and shall henceforth be considered as a constituent portion thereof: that is, conquest depends on "firm possession" together with the intention and the capacity to hold the territory so acquired.
>
> The rights under occupation, then, cannot be co-extensive with those of sovereignty. The rights acquired are due to the military exigencies of the invader, and consequently are only provisional. The local inhabitants do not owe the occupant even temporary allegiance; and the national character of the locality is not legally changed.
>
> This view has long been adopted by British Courts. Thus in the *Gerasimo's case*[1], the Privy Council pointed out that in order to convert a friendly or neutral territory into an enemy territory, it was not sufficient that the territory in question should be under hostile occupation and subjected to the

1. (1857) 11 Moo. P.C. 88: 14 E.R. 86. 2. (1943) A.C. 203.

control of a hostile power ; some additional element was necessary, *e.g.*, cession or conquest, whereby the territory was incorporated with and made part of the dominions of the invader. This principle was adopted not only by the British Prize Courts, but also in the Courts of common law. Lord Stowell emphasised the distinction between a hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by lapse of time."

In the 7th Ed., to Wheaton's International Law, Volume II, pages 233 and 234, the same definition of conquest is retained. The point for consideration therefore is, is there a substantial difference between the view of Lord Kingsdown in *Gerasimo's case*[1], as to what is required to be established to change the national character of the territory and the view expressed by the House of Lords in *Sovfracht (V/O) case*[2].

In the *Gerasimo's case*[1], a cargo of corn owned by certain residence of Galatz in Moldavia was shipped by a ship carrying Wallachian colours and when the ship was coming out of the mouth of the Danube was seized by the British for a breach of the Black Sea blockade and one of the questions was whether the seizure was justified. In the Court of Admiralty, Right Hon. Dr. Lushington held that Moldavia was in the possession of the Russians who were then enemies and as trade by the enemies was prohibited the seizure was justified. On appeal to the Privy Council, this decision was reversed by Lord Kingsdown. The Russian minister made a declaration that the occupation of Moldavia and Wallachian by Russia was only for a military purpose connected with strategical considerations and disclaimed an intention on the part of Russia either to prolong indefinitely the occupation or to establish herself there in a permanent manner or to incorporate the principalities with her own dominions or throwing the sovereignty of the Ottoman Government. On these facts the Privy Council had to consider whether by reason of such occupation the national character of the territory was altered so as to constitute it an "enemy occupied" territory. In arriving at a contrary conclusion, differing from that of Dr. Lushington, Lord Kingsdown relied upon the law as stated by Lord Stowell in some of the decisions. In *Gerasimo's case*[1], it is observed :

"Upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the power under whose dominion he carries it on and, of course, as an enemy of those with whom that power is at war. Nothing can be more just than this principle, but the whole foundation of it is, that the country in which the merchant trades is enemy's country.

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile power, so far as such power may think fit, to exercise control ; or is it necessary that, either by cession or conquest, or some other means, it should either permanently or temporarily, be incorporated with, and form part of the dominions of the invader at the time when the question of national character arises?

It appears to their Lordships that the first proposition cannot be maintained. It is impossible for any Judge, however able and learned, to have always present to his mind all the nice distinctions by which general rules are restricted ; and their Lordships are inclined to think that, if the authorities which were cited and so ably commented upon at this Bar had been laid before the Judge of the Court below, he would perhaps, have qualified in some degree the doctrine attributed to him in the judgment to which we have referred."

In order to establish the meaning of the term "dominions of the enemy" the Privy Council relied upon the opinion of Lord Stowell in the case of the "*Fama*"[3] thus :

"In order to complete the right of property, there must be both right to the thing and possession of it, both *jus ad rem and jus in re*. "This," he observes, "is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, when a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements may be informed under whose dominion and under what laws they are to live."

1. (1857) 11 Moo, P. C. 88 : 14 E.R. 86.
2. (1943) A.C. 203.
3. 5 Rob. 115.

It was pointed out later in the course of the judgment, that the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force and that this principle was acted upon by the Lords of Appeal in the St. Domingo cases of the "*Dart*" and "*Happy couple*" where the rule operated with extreme hardship. The same is the opinion of Lord Stowell in the "*Manilla*,"[1] where it was held on the facts of that particular case that there was no declaration of any sort by the British to constitute the Island of St. Domingo an enemy territory. In order to further reinforce this conclusion, the Judicial Committee relied on *Donaldson* v. *Thompson*[2] and the opinion of Lord Stowell in the case of the *Bolletta*[3]. At page 100 it is pointed out that Lord Stowell recognised in the "*Bolletta*,"[3], the distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time. As the occupation by the Russians in the case before the Privy Council was only a military occupation for strategical considerations, it was held that Moldavia was not an enemy territory. No doubt the Judicial Committee in that case did not refer to the other cases decided by Lord Stowell, particularly the *Hoop*[4], and the other decisions adverted to in the judgment of Lord Wright in the *Sovfracht (V/O) case*[5]. In the *Sovfracht* (*V/O*) *case*[5], Lord Wright summarised the opinion of Lord Stowell after an examination of the decisions in these words:

"It is, I think, clear that in these and other like cases Lord Stowell's opinion was that a territory changed its national character and acquired that of the conqueror if there were effective subjugation and firm possession with the intention of keeping the conquest, even though in the event the dominion of the conqueror was temporary and even though there was not either formal annexation or cession. What had to be considered was the nature of the occupation. A mere occupation in the course of and for purposes of military operations did not change the national character. These were cases in prize in which the issue was enemy or not enemy, but the same test was applied in a different connection in the *Foltina*[6].'

Marshall, C.J., in *Bentzon* v. *Boyle*[7], known as Thirty Hogsheads of Sugar case stated the principle thus:

"Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and Government of them. The island of Santa Cruz, after its capitulation, remained a British Island until it was restored to Denmark."

To the same effect was the opinion of Story, J., also of the Supreme Court of the United States, in the case of *United States* v. *Rice*[8]. Lord Wright and the other law-lords, particularly Lord Porter disagreed with the view of Lord Kingsdown. The extreme view of Lord Lushington was rejected as stating the law too widely without any qualification. Lord Wright pointed out that Lord Kingsdown did not consider the view of Lord Stowell in the *Hoop*[4] and Marshall, C.J., in *Thirty Hogsheads of Sugar*[7]. He however did not dissent from the ultimate conclusion of Lord Kingsdown on the facts of the case as the occupation in question by the Russians of Moldavia was purely of a temporary nature and for strategical purpose. After quoting the statement of law by Lord Kingsdown in *Gerasimo's case*[9], which is already extracted in this judgment, the learned Lord in his speech observed:

"The former sentence may be taken to describe what has been called belligerent occupation, which would not generally be regarded as changing the notional character of the territory, but one reading of the alternative contained in the second sentence would seem to exclude cases like the occupation by the British of Heligoland and the captures in the West Indian islands in the French war or the subjugation of European countries by the Germans in the present war. A conquest during war may in a sense be temporary, as was that of Demerara by the French, and may be reversed either by reconquest or by surrender, but if while it lasts there is what is called firm possession for a sufficient period with the intention of keeping it unless it is reconquered or surrendered the national character of the place will generally, at least for the time, be changed. Perhaps Lord Kingsdown's language means no more than that when he speaks of a territory being temporarily incorporated with and forming part of the dominions of the invader at the material time. If it is so construed

1. (1808) Edw. 1.
2. (1808) 1 Camp. 429 : 170 E.R. 1010.
3. 1 Edw. 171.
4. (1799) 1 C. Rob. 196.
5. (1943) A.C. 203.
6. (1814) 1 Dod, 450.
7. 9 Cranch 191.
8. (1819) 4 Wheat 246.
9. (1857) 11 Moo. P.C. 88 : 14 E.R. 628.

it is in harmoney with the earlier decisions and is unexceptionable. It is clear on the facts that the Russian occupation of Moldavia was no more than a temporary military and strategical occupation. But if Lord Kingsdown makes the change in national character depend on formal acts or declarations it would not, in my opinion, be consistent with recognised authorities. The issue depends on fact, not on form."

The test laid down by Lord Wright in this speech practically amounts to what is described by Wheaton as the essence of "conquest." Lord Kingsdown by himself did not insist upon any particular form or a formal act of declaration in order to bring about a change in the character of the territory. It was Lord Stowell in the "*Fama*" *case*[1] that stated that there should be some public act in order to bring about the transfer the object being to give due publicity to the inhabitants of such settlements who are certainly interested in knowing under whose dominion and under which laws they were to live. What is insisted on by Lord Wright is not mere occupation, but subjugation.

"This would show," to quote Lord Wright again, "that a mere temporary occupation, for instance, by a military force in the conduct of belligerent operations, is not enough. If the territory is to be deemed enemy territory, it must be subjugated, not merely occupied. It must be held under the dominion and control of the enemy for a period sufficient to give the occupation a settled and relatively permanent character and to show the intention to keep it. I do not think that the cases require that there should be formal acts, such as a cession by treaty or a public declaration of annexation. The matter must be decided as a question of fact with due regard to the character, purpose and intention of the occupation and the degree of dominion exercised. All acquisitions in war may be temporary. They may be abandoned on peace being declared, or surrendered or retaken under the pressure of superior force, but there is a sharp distinction between an occupation of territory by armed forces for strategical and temporary purposes and an occupation of territory as being a settled acquisition."

On the facts of the case before the House of Lords there was no difficulty in coming to the conclusion that Holland was an enemy occupied territory as no evidence was given as to the actual status of Holland at that time, and the case proceeded up to the stage of the House of Lords on the footing that Holland was occupied and was under the dominion of the Germans. No doubt, as in the case of Burma whose Governor shifted to Simla so the Dutch Government was established in and recognised by Great Britain, and, in fact continued its *de jure* existence in Great Britain. It was also found that the Germans did not intend to relinquish their possession of Holland unless forced to do so. The subjects of Holland, therefore, were forced to submit to the German yoke much against their will and had to wait for their day of deliverance. Lord Porter in dealing with the question opined that it was difficult to give a definite answer to the question so as to cover all cases:

"The solution," according to him, "depends on the quality of the occupation, to be judged by the time it endures, the amount of control exercised, and the extent to which the former Government is superseded." "These considerations are" in his opinion, "the solution of the apparent conflict between the cases in which the inhabitants of occupied territory have been held to be alien enemies and those in which the opposite view has been taken."

After quoting the passage from the judgment of Lord Kingsdown in the *Gerasimo's case*[2], Lord Porter expressed his disagreement with the statement of the law contained in that judgment in the following words:

"In terms this statement would seem to require a formal cession of conquest followed by a permanent or temporary incorporation of the occupied territory with the enemy State to make the inhabitants of the occupied territory enemy aliens as regards a country at war with the occupying power, and would seem to assert that to bring about this result it is not enough that the territory is occupied and controlled by the enemy, however complete the occupation and unlimited the control. If this be the meaning of Lord Kingsdown's words, I should not agree with them, but he was speaking with reference to the facts of the case under consideration in which it could not be said that there was even an attempt at civil control of the occupied provinces. It is enough, in my view, if it appears from the known circumstances, that the civil and military jurisdiction of the country is being exercised by the enemy to the exclusion of the former civilian rulers. Indeed, I can imagine a case where, though lip service was paid to the legal Government of a country, yet in practice control was so exercised by an occupying power that in substance the territory formed part of the dominion of the enemy. At the present time when in international affairs formal acts have been largely dispensed with either as a preliminary to or during the course of a war, when declarations of war have ceased

1. 5 Rob 115. 2. (1857) 11 Moo. P.C. 88 : 14 E.R. 628.

to be made and invasion follows immediately on declarations of friendship or neutrality. it is, in my view, essential to regard substance and not form."

Viscount Simon, L.C., expressed his view on this question in proposition 4 in *Sovfracht (V/O) case*[1], thus :

"But this is not always or absolutely so. It depends on the nature of the occupation, and on the facts of each case. If, as a result of the occupation, the enemy is provisionally in effective control of an area at the material time and is exercising some kind of government or administration over it, the a ea acquires 'enemy character.' Local residents cannot sue in our Courts and goods shipped from such an area have enemy origin ; see Marshall, C.J., in *The Thirty Hogsheads of Sugar. Bentzon* v. *Boyle*[2]. If, on the other hand, the occupation is of a slighter character—for instance, if it is incidental to military operations and does not result in effective control the case is different, as in *Cremidi* v. *Powell (the Gerasimo)*[3]. I would adopt the observations of my noble and learned friend Lord Wright on this decision, for I agree that, while Dr. Lushington's statement of the law went too far in one direction, Lord Kingsdown (then the Right Hon. Thomas Pemberton Leigh) in delivering the judgment of the Privy Council reversing the decision of the Prize Court, in one passage went unnecessarily far in the other. In the present case, the occupation of Holland by Germany is plainly, as things stand, of the more absolute kind."

From the foregoing discussion it would follow that the only difference between the House of Lords and Lord Kingsdown is this, that a formal declaration of a conquest, cession or annexation is not needed to change the national character of the territory according to the House of Lords. Lord Kingsdown in terms does not himself express and insist on such formality though Lord Stowell laid down that requirement in the case of the "*Fama.*"[4] The essence, however, of the two views is that the occupation must be an effective occupation with the intention to hold it as if by conquest. It must be total subjugation. The civil and military administration over the country must be exercised by the enemy to the exclusion of the former Government. The occupation should not be of the slightest character for military or strategical reasons, but of the more comprehensive nature. The enemy must have effective control though provisional and must treat it as a settled acquisition. If the occupation is in a fluid state, swinging backwards and forwards, as in the case of Korea at present, the national character of the territory would not be altered. This approximates to the test laid down by Wheaton in defining what constitutes conquest.

The question of change of the character of the territory, therefore, must be determined on the facts of each case and inferred from the evidence available in the case. The decision in *Sovfracht (V/O) case*[1], proceeded practically on the assumption that the control by Germany of Holland was effective. The intention to keep the territory as an acquisition and the character of occupation must be inferred from the facts as satisfied by evidence as pointed out by Lord Greene, M.R., in the later decision in *Anglo International Bank, Ltd.*, In re[5]. He states at page 241 :

"Such an intention was, Lord Wright says [in *Sovfracht (V/O) case*[1]] one of the matters which before the House were treated as of 'common notriety.' On what facts or information this treatment was based does not appear, but if an intention of this character is a necessary element we are not sure to what extent the Court is entitled in a case like the present where there is no opposition to treat as notorious matters on which it has no information except what may be gathered from official publications and the public press. Thus, we do not see how we can assume that the enemy intends to 'keep' France or Belgium, or Greece, or the Channel Isles, in the sense of incorporating them permanently in his possession. We cannot, however, think that the expression 'keep' was intended by Lord Wright to be used in this sense. One object of the common law rule is to prevent advantage to the enemy. Such an advantage may accrue if the occupation is of a character which enables the enemy to deal with the inhabitants of the occupied country and their civil rights in such a way as to secure profit to himself, whatever his ultimate intentions as to the future of the occupied country may be. It is for this reason that a mere military occupation is insufficient to brand the inhabitants as alien enemies since such an occupation does not affect the civil rights of the inhabitants beyond what may be necessary for the purpose of conducting military operations. That we are right in construing the word 'keep' as used by Lord Wright in a restricted sense is, we think, shown by a consideration of the opinions of the other members of the House."

1. (1943) A. C. 203 at 211.
2. 9 Cranch 191; 195.
3. (1857) 11 Moo. P.C. 88 : 14 E.R. 628.
4. 5 Rob. 115.
5. (1943) Ch. 233.

Then he quotes the opinions of Lord Atkin, Lord Thankerton and Lord Porter and then concludes :

"In view of these expressions of opinion we hope that we are justified in reading the language of Lord Wright in a way which will bring it into conformity with that used by the other members of the House who, while agreeing with his opinion, expressed their own views in different language. But even so, apart from the special case of Monaco, we have no evidence of the nature of the occupation."

In view of the fuller exposition of the law on the subject by the House of Lords in *Sovfracht (V/O) case*[1], it is unnecessary to refer to the decisions in the *Gutenfels*[2]. *Societe Anonyme Begle Des Mines D'Aljustrel (Portugal)* v. *Anglo Belgian Agency, Ltd.*[3], and *The Leonora*[4]. McNair discusses the topic of what amounts to belligerent occupation of a territory by the enemy at pages 322 to 329.

The common law of England has established the doctrine of non-intercourse between residents in belligerent States during a state of war. In America however the prohibition against intercourse is confined to commercial intercourse, though the decisions cannot be said to be altogether uniform. In the *Rapid*[5], and the *Emules*[6] there are dicta to the effect that all intercourses is prohibited between citizens of belligerent States. Gray, J., however in *Kershaw* v. *Kelsey*[7], the leading case on the subject, which has been since followed, restricted the intercourse of their citizens with their enemy, to commercial intercourse. After reviewing the principal English and American authorities, the learned Judge stated the law in these terms :

"The law of nations as judicially declared, prohibits all intercourse between subjects of the two belligerents which is inconsistent with the state of war, between their countries. This includes any act of voluntary submission to the enemy, or receiving his protection as well as any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delibery of either between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or, by contracts in any form looking to, or involving such transmission, or by insurances upon trade by or with the enemy."

"Beyond the principle of these cases the prohibition has not been carried by judicial decisions. At this stage of the world when all the tendencies of the law of nations are to screen individuals and private contracts from injury or restraint in consequence of war between their Governments we are not disposed to declare such contracts unlawful as not having been heretofore judged to be inconsistent with a state of war."

It has been authoritatively decided, however, by the Court of Appeal in England in *Robson* v. *Premier Oil and Pipe Line Co., Ltd.*[8] that the prohibition of common law of intercourse with an alien enemy is not limited to commercial intercourse and the view of Gray, J., in *Kershaw* v. *Kelsey*[7], was dissented from.

The opinion of Lord Stowell in the *Hoop*[9] and *The Cosmopolite*[10] and that of the President of the Probate Division in the *Panairidos*[11] have been taken in England as establishing the wider prohibition of intercourse and the basis of the prohibition is stated by Pickford, L.J., in unambiguous terms thus :

"The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction."

All kinds of intercourse, therefore, according to the English common law, whether commercial or otherwise is inconsistent with a state of war between two belligerent countries and is therefore absolutely forbidden. It need not be established, that in fact there was intercourse with the enemy. It is enough if there is a possibility of intercourse. This decision was approved by the House of Lords in *Ertel Bieber & Co.* v. *Rio Tinto Co.*[12].

1. (1943) A.C. 203.
2. (1916) 2 A.C. 112.
3. (1915) 2 Ch. 409.
4. (1919) A.C. 974.
5. 8 Cranch 155.
6. (1813) 1 Gall 563.
7. 100 Mass. 561.
8. (1915) 2 Ch. 124.
9. (1799) 1 C. Rob. 196.
10. 4 C. Rob. 8.
11. 84 L. J. Pro. 140 : 138 L.T.J. 484.
12. (1918) A.C. 260.

It follows as a corollary of the principle of prohibition of intercourse that an executory contract which either involves intercourse or whose continued existence must in some way operate against public policy is abrogated as a rsult of war. Of course, it is not permissible during a state of war to residents of belligerent States to enter into contracts. Such contracts are prohibited by law. The law interferes with executory contracts by dissolving them. Lord Dunedin in *Ertel Biebar & Co.* v. *Rio Tinto Co.*[1] enunciated the principles relating to this matter thus :

"The proposition of law," says the learned Lord, "on which the judgment of the Courts is based is that a state of war between this kingdom and another country abrogates and puts an end to all executory contracts which for their further performance require, as it is often phrased, commercial intercourse between the one contracting party, subject of the King, and the other contracting party, an alien enemy, or any one voluntarily residing in the enemy country. I use the expression 'often phrased commercial intercourse' because I think the word 'intercourse' is sufficient without the epithet 'commercial'."

The learned Lord agreed with the judgment of the Court of Appeal in *Robson* v. *Premier Oil and Pipe Line Co.*[2] and quoted the passage already cited from that judgment, and examined and considered in detail the case in *Hoop*[3], *Futado* v. *Rogers*[4] the judgment of the Queen's Bench in 1857 in *Esposito* v *Bowden*[5] and the opinion of Lord Reading, C.J., in the case of *Porter* v. *Freudenberg*[6]. At page 269, dealing with the effect on contracts he says that war does not avoid all contracts between subjects and enemies and that accrued rights are not affected though the right to sue in respect thereof is suspended. Another exception recognised is in the case of contracts which are really concomitants of rights of property which even if executory are not abrogated. The executory contract which is abrogated must involve intercourse or its continued existence must in some way be against public policy. To the same effect are the observations in the speeches of the other Lords. A learned discussion of this subject is to be found in Chapter IV of Professor McNair's Book and in Chapter V of Webber on Effect of War on Contracts.

We are only concerned in this case with the restricted narrow question of the effect of War on a contract of agency. It is therefore unnecessary to consider its effect on other contracts and the rights and the liabilities of the contracting parties thereunder. As pointed out by Lord Wright in *Sovfracht (V/O) case*[7] persons residing in enemy territory, so long as the enemy occupation lasts, are on the wrong side of the line of war and therefore they are shut off from communication and intercourse and from commercial dealing in the same manner and to the same extent as if they were original enemies such as the nationals or residents in the enemy territory. The learned Lord says at page 230 in *Sovfracht (V/O) case*[7] that,

"This rule is only concerned with relations across the line of war. So far as concerns the internal commerce and ordinary activities of those in the occupied territory, such as those activities which the Master of the Rolls enumerates, the rule has no application, even though these activities go to promote the advantage of the German State and strengthen its war effort."

Both Lord Wright and Lord Porter agree that the agency of the solicitor in that case to act on behalf of his client who is an enemy subject terminated with the enemy occupation of the territory. Lord Porter at page 254 states the rule to be

"Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse"

and relies for this view upon the decision of the House of Lords in *Hugh Stevenson and Sons* v. *Aktiengesellschaft Fur Cartonnagen Industrie*[8] which related to a case of partnership. But the learned Lords differ from the view taken in *Tingley* v. *Muller*[9] and express their concurrence with the dissenting speech in that case and the view of Lord Sumner in *Rodriguez* v. *Speyer Brother*[10]. Viscount Simon, L.C., agrees with the view expressed by Lord Porter. It may, therefore, be taken that so far as the

1. (1918) A.C. 260 at 267.
2. (1915) 2 Ch. 124.
3. (1799) 1 C. Rob. 196.
4. 3 Bos. and P. 191.
5. 7 E. and B. 763.
6. (1915) 1 K.B. 857, 866.
7. (1943) A.C. 203.
8. (1918) A.C. 239.
9. (1917) 2 Ch. 144.
10. (1919) A.C. 59 at 130.

English common law is concerned the principle of abrogation of agency when either the principal or the agent becomes an alien is firmly established notwithstanding the view expressed in the earlier decision. The decision in *Tingley* v. *Muller*[1] might perhaps be justified on the peculiar facts of that case as the power of attorney empowered the agent in England to sell the property of the principal who left for Germany and that practically amounted to a sale or a conveyance of the equitable interest and no further intercourse was contemplated or was necessary. *Hugh Stevenson and Sons* v. *Aktiengesellschaft Fur Cartonnagen Industrie*[2] related to a case of partnership between two companies one a German and the other an English trading in England and carrying on business there. By reason of the declaration of war in 1914 the partnership was dissolved and the English partner continued the business and made use of the property of the partnership, including the interests of the German partner in the business. The question that had to be considered was whether after the termination of war the German company was entitled to a share of the profits made by the English company with the help of the German company's assets. The answer given by the House of Lords was naturally in favour of the German company. Though the declaration of war had the effect of abrogating or dissolving an executory contract it did not forfeit private property of the enemy partner in England. The law of England does not recognise the principle that as a result of the war the property of an enemy subject in England is confiscated. The property has to be restored to the person entitled to it after restoration of peace. The question, therefore, in that case, did not relate to a contractual right but related entirely to right to property. The preservation for the benefit of an alien enemy of property situated in England together with its profits until the war terminated for the purpose of being restored to him, it was held, did not constitute trading with the enemy. Nor is it within the purview of the prohibition against doing anything for the benefit of the enemy during the continuance of war. What is prohibited under this last principle is doing something for the benefit of the enemy at a time when he continued to be an enemy and not an advantage to be restored to him after the establishment of peace.

The intercourse prohibited is across the line of war, and, as pointed out by Lord Wright in the passage already cited, the common law of England, which of course cannot apply to the enemy country, does not and cannot prohibit intercourse or internal commerce and ordinary activities of these in the enemy occupied territory *inter se* so long as they are on the same side of the line of war, even if such activities and such trade have the effect of conferring an advantage upon the enemy and strengthening his war effort. To this class of cases I should think, belongs the decision in *Otoman Bank* v. *Jebara*[3]. The facts of that case were somewhat peculiar. A British subject residing in Manchester was in the habit of consigning goods to customers in Beyrout in Syria. The course of trade followed by him was that he drew the bills on correspondents and handed them to the Ottoman Bank in Manchester together with the bills of lading of the goods which were shipped. On presenting the bills, the bank made an advance to the Manchester merchant about 80 per cent. on the amount of the bill. The bills and the bills of lading were thereafter transmitted to Beyrout. On arrival at Beyrout of the goods, the person on whom the bill was drawn paid the bill and received the bill of lading if the goods had not already been cleared from the ship. If the goods were removed from the ship, however, he used to receive the goods on the advice of the Beyrout branch of the Ottoman Bank after paying the price. The amount so realised was credited by the bank at Beyrout to the Manchester merchant who was the respondent before the House of Lords. War was declared between England and Turkey on 5th November, 1914, by which date several consignments of goods arrived at Beyrout, but the documents of title and the bills were still in the lands of the branch of the Ottoman Bank of Beyrout. The customers to whom the goods were destined, paid the bills and obtained the goods. Though the bills were in sterling the customers

1. (1917) 2 Ch. 144.
2. (1918) A.C. 239.
3. (1928) A.C. 269.

paid actually in Turkish currency at the rate of exchange obtaining on that date at London. It was at that time impossible for the Beyrout Branch to remit the amount to the Ottoman Bank at London. The respondent brought the action for the realisation of the amount due as per the bills. The appellant, the Ottoman Bank, refused to pay the amount but was willing to pay the number of Turkish piastries actually received calculated at the exchange rate on that date. There was also an alternative claim in the action for damages for wrongful conversion. Rowlatt, J., who tried the action gave judgment for the respondent as the Bank was bound to pay in sterling as they had been paid in sterling. This judgment was reversed in appeal on the ground that at the moment the Beyrout Bank dealt with the goods they had no authority, the agency having terminated, and, in handing the goods to the Syrian merchant they acted without authority and therefore they were liable for conversion. The respondent was willing to accept payment as directed by the judgment of Rowlatt, J. and was not anxious to press for damages for wrongful conversion though it would have been to his advantage. On appeal Viscount Dunedin held that the Bank in Beyrout accepted the payment in lawful money from the Syrian merchant when he handed over the goods and therefore was a debtor for this sterling amount as indicated in the bill. He also pointed out that war did not abrogate every contract.

> "It is only a contract which is still executory and which for its execution requires intercourse between the English subject and the enemy. Now this contract had been partially carried out, the bills had been indorsed and the bank had been handed them and the indorsed bills of lading. From that a subsidiary contract arose, *i.e.*, the contract that on payment of the bills the shipping documents should be handed over. Now to execute that no intercourse between an English subject and the enemy was necessary. The bank was a Turkish subject and the Syrian merchant was a Turkish subject. The Bank therefore was in my view perfectly entitled to do what it did; nay more it might have been forced to do it by the Syrian merchant on producing proof that he was the real consignee of the goods and profiteering payment of the bill. That, in my view, shuts out any idea of conversion."

To the same effect are the observations of Lord Shaw of Dunfermline at page 280:

> "It is to be observed that there was no bar whatsoever to the acceptance in sterling or in the full market equivalent of the day of a cheque upon London from another Turkish subject . . . . . . namely, the customer in Beyrout. Both bank and customer were Turkish subjects there; and the legitimacy of the payment to the bank in Beyrout is, therefore, beyond question, there being no international equality about that part of the transaction."

Again lower down,

> "Prohibitions against doing business with English or other enemy nationals cannot apply to a case of a payment made between two Turkish nationals and goods delivered on the head of a payment, documents and goods passing from one Turkish national in Beyrout to another."

There were similar observations in the speeches of the other Lords. The decision in *Antoine* v. *Morshead*[1], is not of much assistance as the remarks of the learned Judge were expressly restricted to the facts of that case and the learned Judge did not intend to lay down a general rule of law. That an executory contract for the sale of goods becomes void after the outbreak of war was also held in *Arnold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.*[2] That a contract involving intercourse with and conferring benefit on the enemy would be dissolved after the outbreak of war is illustrated by a decision in *Schering, Ltd.* v. *Stockholms Enskilda Bank*[3], on somewhat peculiar facts. The American law takes a more liberal view regarding the effect of war on the relationship between a principal and agent, particularly with reference to the collection of debts. In *Kershaw* v. *Kelsey*[4], Gray, J., of the Supreme Judicial Court of Massachusetts said:

> "When a creditor, although a subject of the enemy remains in the country of the debtor or has a known agent there authorised to receive the amount of debt throughout the war, payment there to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to the principal in the enemy's country; if he should do so, the offence would be attributable to him and not to the person paying him money."

1. (1815) 6 Taunt. 237: 28 E.R. 1025.
2. (1915) 2 K. B. 379.
3. (1943) All. E.L.R. 418.
4. 100 Mass. 561.

In *Ward* v. *Smith*[1], it is stated :

"When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receives the money, will violate the law by remitting it to his alien principal. The rule, says Mr. Justice Washington in *Conn* v. *Penn*[2], can never apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor or has a known agent there authorised to receive the debt, because the payment to such creditor or his agent could in no respect be construed into a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal. If he should do so, the offence is imputable to him, and not to the person paying him the money. Nor can the rule apply when one of several joint debtors resides within the same country with the creditor, or with the known agent of the creditor. It was so held in *Paul* v. *Christie*[3]."

In *United States* v. *Henry Grossmayer*[4], Davis, J., who delivered the opinion of the Court observed :

"A prohibition of intercourse with an enemy during the war affects debtors and creditors on either side, equally with those who do not bear that relation to each other. We are not disposed to deny the doctrine that a resident in the territory of one of the belligerents may have, in time of war, an agent residing in the territory of the other, to whom his debtor could pay his debt in money, or deliver to him property in discharge of it, but in such a case the agency must have been created before the war began, for there is no power to appoint an agent for any purpose after hostilities have actually commenced, and to this effect are all the authorities. The reason why this cannot be done is obvious, for while the war lasts nothing which depends on commercial intercourse is permitted."

These authorities of the American Courts establish undoubtedly that if the creditor has an agent in the enemy territory payment to such an agent by the debtor also living in the same enemy territory is good. The view of the American Courts are criticised by Professor McNair at page 208 of his book on the ground that many of the decisions arose from the Civil War and that they are not reliable guides when international war is in question. Trotter in the Law of Contract during and after War, 3rd Edn., page 96 cites *War* v. *Smith*[5] and *United States* v. *Grossmayer*[4], with approval and does not question the correctness of the views expressed in those decisions.

Bowstead on Agency, at page 275, 10th Edn., states on the basis of the view of Lord Porter in *Sovfracht (V/O) case*[6] that,

"Where the continuance of the agency may require intercourse with the enemy during a war the agency is determined by the outbreak of war ; so that the retainer of a solicitor ceases when his client becomes an enemy alien."

In *Eichengruen* v. *Mond*[7] it has been held that so long as the solicitor remains on record service upon him is sufficient although his client had become an enemy agent. We do not think that the decision in *Eichengruen* v. *Mond*[7] is good law after *Sovfracht (V/O) case*[6], because the solicitor could no longer have any authority to represent the principal resident in enemy territory.

Of the two fundamental principles of the common law of England which have been under consideration till now in India the procedural incapacity of an alien enemy to sue, *i.e.*, to sustain a *persona standi in judicio* is enacted in section of 83 of the Civil Procedure Code and had received statutory recognition. For the limitations therefore for the application of that principle, one has to look to the provisions of section 83 of the Civil Procedure Code. It seems to have been adopted and applied to India even under the Code earlier to the Code of 1882. This section itself has been judicially interpreted after the second World War in this Court in three decisions, to two of which Chandrasekhara Aiyar, J., was party, *i.e.*, *Thennappa Chettiar* v. *Indian Overseas Bank, Ltd.*[8] and *Manasser Film Co.* v. *Gemini Picture Circuit.*[9] The view of Chandrasekhara Aiyar, J., has been accepted and followed by Leach, C.J. and Lakshmana Rao, J., in *Chem Abbheong* v. *Packiri Mahomed Rowther*[10]. We

1. 16 U.S. Sup. Ct. Rep. 207.
2. Pet. C.C. 496.
3. 4 Harr. & M.C.H. 161.
4. 9 Wall. 72 : 19 U.S. Law Ed. 627.
5. 19 U.S. S.R. 207.
6. (1943) A.C. 203.
7. (1940) 1 Ch. 785.
8. (1943) 2 M.L.J. 201.
9. (1944) 1 M.L.J. 58: I.L.R.(1944) Mad. 124.
10. (1946) 1 M.L.J. 222 : I.L.R. (1946) Mad. 768.

are not concerned in this case with the right of the plaintiff to institute the present suit as he is not an alien enemy but a person residing in British India and the suit itself was instituted after the termination of the war. It is therefore unnecessary to examine the decisions in detail and consider some of the criticisms levelled against them. In the course of this judgment we shall have occasion to consider some aspects of the questions dealt with in these cases.

The other branch of the English common law regarding prohibition against intercourse between residents in belligerent States and its effect on contracts has not been applied to India by any Statute. It can only apply to India by way of justice, equity and good conscience in the absence of any rule applicable to the situation and enacted by any Statute.

How far and to what extent the English common law generally applies to India, both in the Presidency towns of Madras, Bombay, or Calcutta, and in the moffussil, has been subject matter of judicial decisions. The net result of these decisions is that the English common law does not apply when there is statutory law covering the point, and even when there is no rule of Statute, the common law of England is applied *sub modo* having regard to the conditions of the society and the customs and manners of the people of India. Where however, the principles of common law in England are themselves in a state of uncertainty there is nothing to preclude a Judge in adopting that rule of English common law which is in accordance with justice and equity. It is unnecessary, in our opinion, to consider in detail all the decisions as the ground is covered by *Gopal Naidu* v. *King Emperor*[1], *Balammal* v. *Palandi Naidu*[2]. The principle of adopting other rules when there is no law covering the point was made possible by giving liberty to a Judge to act according to justice, equity and good conscience. There was for the first time recognised in this Presidency by Regulation II of 1802, section 17. Section 16 of the Regulating Act, 1873, also directs that in cases enumerated in the section where there is no specific rule the Court is at liberty to act according to justice, equity and good conscience, It is on this basis that the common law of England relating to torts has been applied to this country even though there is no statutory law of torts in British India. The other authorities relied on in the course of the arguments before us are : *The Advocate General of Bengal* v. *Ranee Surnomoye Dossee*[3], *Parvathi* v. *Mannar*[4], *Narayana Sah* v. *Kannamma Bai*[5], and the opinion of Illbert in Government of India, 1916 Edn. at page 360, where it is stated :

"In matters for which neither the authority of Hindu or Mohamedan text books or advisers nor the regulations and other enactments of the Government supplied sufficient guidance, the Judges of the Civil Courts were usually directed to act in accordance with 'justice, equity and good conscience.' An Englishman would naturally interpret these words as meaning such rules and principles of English law as he happened to know and considered applicable to the case; and thus, under the influence of English Judges, native law and usage were, without express legislation largely supplemented, modified and superseded by English Law."

In two decisions of this Court the English common law, which prohibits intercourse between hostile subjects, has been considered. Of these, the most important decision which considered the authorities as they then existed, is the decision of Srinivasa Aiyangar, J. in *Muthrik* v. *David*[6]. In that case an agent of the Basel Mission who was a German leased certain lands in British India to the plaintiff. After the outbreak of war between Great Britain and Germany, that is the first World War, a suit by the succeeding secular agent of the mission was instituted for the recovery of the rent under the lease. The lease in question was granted after the outbreak of War and the contention was that the lease was void. Following the opinion of Gray, J. in *Kershaw* v. *Kelsey*[7] Srinivasa Aiyangar, J. sitting as a single Judge held that the prohibition as regards intercourse was confined only to commercial intercourse and did not render illegal all contracts whatever be their nature. He also referred to the opinion of Lord Davey in *Janson v. Driefontein Consolidated*

1. (1922) 44 M.L.J. 655 : I.L.R. 46 Mad. 605 (F.B.).
2. (1938) 2 M.L.J. 340.
3. (1863) 9 M.I.A. 387.
4. (1884) 8 Mad. 175.
5. (1931) 55 Mad. 727 : 62 M.L.J. 608.
6. (1916) 31 M.L.J. 860.
7. 100 Mass. 561.

Mines, Ltd.[1] and of Lord Stowell in the *Hoop*[2]. The opinion of Story, J. in "*The Julia*"[3] in which a wider prohibition was accepted was considered as purely obiter by the learned Judge. As the lease could not be considered a commercial transaction it was held that the suit for recovery of rent on the basis of the lease was sustainable and was decreed. No dispute was raised in that case that the common law of England should not be applied in India. The other decision is the judgment of Abdur Rahim, O.C.J. and Burn, J. in *Soorthingjee Sakalchand* v. *Mahomed Nasuruddin*[4] which related to a contract of sale of goods. The action was for the recovery of certain quantity of glass bangles from the defendants. The first defendant was the agent of an Austrian firm and in that capacity entered into a contract in April, May, 1914, to supply glass bangles of a particular quantity. The plaintiff accepted two drafts representing the price of the goods on 22nd July, 1914. War was declared with Austria on 12th August, 1914. The goods were shipped by the steamer "Steinturm" which arrived in Ceylon on 15th August, 1914, that is three days after the war was declared. The bills of lading were kept in the possession of the National Bank of India in Madras who were agents for the collection of the drafts and for handing over the documents of title relating to the Austrian firm. The bills were payable on the 22nd August, but the goods were not delivered to the plaintiff and the drafts were not paid. Bakewell, J. who tried the action in the first instance on the Original Side held that the contract became wholly void on account of the outbreak of War and by virtue of Royal Proclamation of 5th August, 1914 and 12th September, 1914, it became unlawful to trade with the enemy and that therefore the plaintiff's action for recovery of the value of the goods was not sustainable. Apart from the question of common law a proclamation made it unlawful for the plaintiff to pay money and obtain the delivery of the goods. The property in the goods did not pass to the plaintiff as the *jus disponendi*, i.e., power of dealing with the goods was retained by the defendant. It was held that the contract could not be enforced. The Calcutta High Court also considered the principles after the First World War in *G. C. Sett* v. *Madhorma Hurdeodass*[5]. At that time, it must be observed, there was some doubt whether such contracts for the sale of goods, which were executory in nature were merely suspended during the war or became abrogated and dissolved altogether. Chaudhury, J. of the Calcutta High Court was of opinion that the rights under the contract were only suspended during the war but that the contract was not avoided or dissolved. This view may not be correct under the present law. There are two decisions of the Bombay High Court reported in *Padgett* v. *Jamshetji*[6] and *Valli Mahomed* v. *Berthold Reif*[7] in both of which the question raised was whether the interest on a debt was not suspended during the war. In *Valli Mahomed* v. *Berthold Reif*[7] the view of the Supreme Court of the United States that where the debtor resides in the same country as the creditor or his duly authorised agent provided such agent was appointed before the War, interest on a debt was not suspended by the War as laid down in *United States* v. *Grossmayer*[8]. *Ward* v. *Smith*[9] was followed. In that case the branch firm of the plaintiffs to whose representative the defendant paid interest was established long before the war. In *Padgett* v. *Jamshetji*[6] Macleod, J. held that,

> "The accrual of interest is suspended even when the alien enemy creditor remains in the country of the debtor, until the debtor has actual notice that the principal debt can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities."

There is no ground therefore to uphold the contention that the English common law should not be applied to this country to any extent. The House of Lords in *Sovfracht (V/O) case*[10] differed from the opinion of Lord Kingsdown in *Gerasimo's case*[11] a Privy Council case, on the question of the test to be applied to determine the change of the nationality of territory. While Lord Kingsdown took the view

1. (1902) A.C. 484.
2. (1799) 1 C. Rob. 195.
3. 8 Cranch 181 at 193.
4. (1916) 32 M.L.J. 146.
5. 33 I.C. 540.
6. (1916) 18 Bom.L.R. 190.
7. (1919) 44 Bom. 1.
8. 9 Wall. 72 : U.S.L.Ed. 627.
9. 10 U.S. Sup. Ct. Rep. 207.
10. (1943) A.C. 203.
11. (1857) 11 Moo. P.C. 88=14 E.R. 628.

that it was necessary that for the territory, either by conquest, cession or annexation of a permanent or temporary nature to become part of the territory of the enemy there should be a formal declaration changing the national character of the territory, the House of Lords thought that effective control with a view to hold the territory in question by an establishment of civil and military administration would be sufficient to bring about a change of nationality of the territory. There is also a difference between the English common law and the law of the United States on the nature of the intercourse prohibited during the war. The English view is that all intercourse is prohibited while in America the prohibition is restricted to commercial intercourse. Further, the House of Lords expressed a different opinion that the relationship of principal and agent is terminated by war for all purposes. While in America if the creditor or his agent and the debtor reside on the same side of the line of War, that is in the enemy territory, there is no objection to payments of the debts to the creditor or his agent and the interest on the debt is not also suspended. The American view has been accepted in this Court in *Wuthrik* v. *David*[1] and regarding the debts by the Bombay High Court in the two Bombay decisions already referred to. As it is open to this Court to accept the English common law only to the extent to which it accords with justice, equity and good conscience, and, as the decisions of the Judicial Committee were considered till the Constitution came into force as binding on this Court in preference to the House of Lords, if we have to choose between the tests laid down by Lord Kingsdown and the House of Lords, we would prefer the former to the latter. The test laid down by Lord Kingsdown is definite and precise and as Lord Stowell pointed out in the "*Fama*"[2], the subject residing in enemy occupied territory is entitled to know to which State he should look to for protection, and, it is therefore incumbent upon the enemy State occupying the territory to hold it and treat it as part of the territory of which he is the sovereign. The test laid down by the House of Lords requires an investigation into the facts of each case in order to determine the nature and extent of occupation, and, it is not always easy to decide whether the occupation was effective or not. It may be in a fluid condition and the occupation might change hands from time to time. To embark into an enquiry in each case whether the occupation in a given period was effective or not, would be difficult and leave the person residing in such territory in an uncertain state regarding his business and his occupation and his dealings with the residents in friendly territory. The law should not be left in our opinion, in such an uncertain and nebulous state, and, should be, as far as possible, definite and precise. For these reasons we would prefer with great respect the test laid down by Lord Kingsdown, though, we must say that the opinion of the House of Lords is entitled to the highest respect. In our view, the rigorous test of absolute prohibition of intercourse adopted in England is too severe a punishment for the person who has the misfortune of residing in an enemy occupied territory. As pointed out by Wheaton, this principle itself is not followed in other countries than the Anglo-American countries. The object of prohibition being to prevent trade between residents of two belligerent States, it is unnecessary in our opinion, to extend the prohibition beyond the necessary requirement. This Court has already adopted the opinion of Gray, J. in the decision in *Wuthrik* v. *David*[1]. The view of the Supreme Court of the United States, in our opinion, is more in accordance with justice, equity and good conscience. Both on principle and on authority, it seems to us that when a creditor and his agent and the debtor are not across the line of war but in the same belligerent State and on the same side of the line of war there is no reason prohibiting the payment of the debt by the debtor and a receipt by the creditor. In fact, as has been referred to already, the decision of the House of Lords in *Ottoman Bank* v. *Jebara*[3], seems to be consistent with the principle recognised by the American Courts and adopted by the Bombay High Court in this country.

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1. (1916) 31 M.L.J. 860.
2. 5 Rob. 115.
3. (1928) A.C. 269.

It remains now to consider in the first place whether Burma was an enemy occupied territory. So far as this case, it is of no consequence whether we adopt the test in the *Gerasimo's case*[1], or the test in *Sovfracht (V/O) case*[2], as in our opinion the evidence adduced in the case does not necessarily support the inference that Japan acquired effective control over the territory and established civil administration with a view to hold possession of the territory in *de facto* sovereignty. Proclamation or even a declaration to hold the territory in its own right was never made. The British Government the *de jure* sovereign of the State, did not abandon their sovereignty and cede the territory to Japan. It can be seen by a reference to the decision of the Privy Council in *Chittambaram* v. *Emperor*[3] that the Governor of Burma shifted to Simla and was carrying on the *de jure* Government of Burma from that place. He declared a state of emergency under the Government of Burma Act, 1935, assumed to himself legislative and executive functions and promulgated certain Ordinances constituting Special Courts for the trial of criminal offences. The evidence in this case is very meagre regarding the nature of the occupation by Japan. P.W. 2 the agent of the plaintiff says that there was Japanese Government and also Burma Government and that there were British and Japanese currencies then prevalent in the country. The Japanese currency that was introduced was not backed up either by silver or gold. The currency notes, actually issued, were not signed by any authority on behalf of the Japanese Government and a Rs. 10 note issued by the Japanese Government was produced before us; and all that appears on the face of the note is "Japanese Government. Ten Rupees". There is no promise to pay; there is no signature of any person authorised to issue the currency, and, what is more significant, it is not the Japanese Yen that was mentioned in the Note; but the British rupee. It is a misnomer to call such notes currency notes, though there is evidence that people were forced to accept these notes on pain of punishment by the military authorities. D.W. 1, an agent of another Nattukottai Chettiar, who then resided in Burma stated that from 1942 after the Japanese occupation and till the re-occupation by the British, regular administration of the Government was going on. Courts were functioning, the magisterial officers were functioning and the revenue officers were functioning. The head of the Government was Ba Ma, a Burman. Administration was being carried on by Burmans under Japanese control. We do not know from this evidence what the nature of this control was and what the relationship between Ba Ma and the Japanese Government was. It must be remembered that it was the policy of Japan when it entered war to establish what was then styled a co-prosperity sphere of Asians and it promised independence to Burma. The Ba Ma Government, as it is called, may have been an independent Government by Burmans; we do not know the details. This witness D.W. 1 describes the nature of the paper notes that were issued by Japan and he adds that no coins were issued in the territory though a branch of their Yokohama Bank was established. The Ba Ma Government was running all the departments of the administration. D.W. 2 also gives evidence on the same lines and he deposes that if any one refused Japanese currency he would be arrested by the Burma Government under the Japanese control. It is therefore difficult to conclude on this meagre evidence that the Government of Japan has established anything like a civil administration under its control and authority besides the military occupation which could effectively exercise dominion and control over the territory. As pointed out by Lord Greene M. R. in *Anglo International Bank Ltd., In re*[4] without evidence and proof of facts establishing the change of national character of the territory it cannot be assumed. Of this proof there is none in this case. Applying therefore either of the tests the plaintiff, in our opinion, has failed to establish that at the time the payment was made by the defendants' agent to the plaintiff's agent, Burma was an "occupied enemy territory". This conclusion is sufficient to dispose of the case.

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1. (1857) 11 Moo.P.C. 88 : 14 E.R. 628.
2. (1943) A.C. 203.
3. A.I.R. 1947 P.C. 85.
4. (1943) Ch. 233.

But even otherwise the payments in our opinion, will be good and valid as the defendants' agent and the plaintiff's agent were both living in the same enemy occupied territory and as the creditor had an admitted agent in Burma and the debtor had also an agent in Burma who made the payment and both being enemies. there is no ground for treating the payment as invalid. Applying the principle of the American decisions, there is nothing to indicate that there was any possibility of intercourse or any intercourse between the plaintiff and his agent. The plaintiff himself did not venture to go into the witness box and speak to the facts. P.W. 2 does not say that at that time there was any possibility of any intercourse between him and his principal. There is no question therefore of his remitting the money to the plaintiff but there is no objection to his remitting the funds to India as it is not an enemy territory. The reverse of course is not permissible. If there is an attempt to remit funds from British India to Burma it would be prohibited both under the Common law, and, as it would be seen later, under the Defence of India Rules. The question, therefore, viewed from the point of the common law must be answered in favour of the defendants and against the plaintiff and the payment must be upheld.

It remains to consider the position under the Defence of India Rules. The Defence of India Rules were made by virtue of the power conferred upon the Central Government under section 2 of the Defence of India Act, 1939. Part XV of the Rules relating to control of trading with the enemy and the definition of "enemy" and "enemy territory" are framed on the same lines as the corresponding provisions in the English Trading with the Enemy Act, 1939 (2 and 3 Geo. 6, Chap. 89). As pointed out by Lord Wright in *Sovfracht (V/O) case*[1] these statutory definitions dealing with trading with the enemy and the custody of enemy property are limited to the purposes of the Act and regulations and do not impinge on the common law in regard to the separate question of an enemy's competence to sue. On the whole, however, we think that these definitions at least in the latest form, do substantially agree with the definitions of "enemy" and "enemy occupied territory" reached by the common law in the authorities. The purpose of these rules, therefore, is to provide the limitations under which trading with the enemy is permitted and the object is to control such a trade. Section 15 (1) of the English Act contains the definition of "enemy territory".

> "Enemy territory" means any area which is under the sovereignty of, or in the occupation of, a Power with whom His Majesty is at War, not being an area in the occupation of His Majesty, or of a Power allied with his Majesty."

Sub-section (2) of section 2 of the Defence of India Rules defines "enemy territory" in the same terms. According to this rule

> "Enemy territory means—
>
> "(a) any area which is under the sovereignty of, or administered by, or for the time being in the occupation of, a State at war with His Majesty, not being an area in the occupation of His Majesty, or of a State allied with His Majesty."

The only variation in this definition is the inclusion of "Area administered by a State at war with His Majesty" and also the addition of the words "for the time being" before the words "in the occupation of." The expression "not being an area in the occupation of His Majesty or of a State allied with His Majesty" is common to both the definitions and this was not modified or omitted in England by any subsequent amendment. This is made clear by a perusal of the Defence (Trading with the Enemy) Regulations, 1940, issued by the Order in Council dated 26th January, 1940 made under the Emergency Powers (Defence) Act, 1939, and 1940 (S. R. and O. 1940 No. 1092) by which certain amendments in the main Act of 1939 were introduced. This definition as contained in the English Act is also to be found printed at page 329 of McNair's book published in 1944, and, therein also the last clause of the definition "not being an area in the occupation

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1. (1943) A.C. 203 at 219.

of His Majesty or of a power allied with His Majesty" is not omitted. This definition is also found printed in *Sovfracht (V/O) case*[1] at page 205 of the report as a footnote but there the last clause is omitted. Lord Wright refers to this definition at page 218 but there also the last clause is omitted, and, in both places after the words "a Power with whom His Majesty is at War" a full stop is to be found. This, I think, has misled Leach, C.J. who delivered the judgment of the Court in *Chem Abbheong* v. *Packiri Mohamed Rowther*[2] to infer that the rule under the Defence of India Rules is different in materials respects from the corresponding provisions in the English law as the latter does not include in the definition of "Enemy territory" the words "not being an area in the occupation of His Majesty or of a State allied with His Majesty." He therefore thought this omission justified his conclusion that the English law in *Sovfracht (V/O) case*[1] should not be followed as the English law was different. But of course the learned Judges does not rest his decision solely on that ground, for he pointed out at page 775 that the facts of that case were different from the facts of the case which he was called upon to decide. It is unfortunate that this mistake should have crept into the judgment of the learned Judge.

The meaning of the expression "not being an area in the occupation of His Majesty or of a State allied with His Majesty" is by no means clear and is difficult to construe. In a recent judgment of Viswanatha Sastri, J. in S.A. No. 37 of 1948 of the Pudukottah State, in construing the definition of "enemy territory" in the Defence of India Rules he differed from the interpretation placed upon it by this Court by the learned Chief Justice in *Chem Abbheong* v. *Packiri Mahomed Rowther*[2] and by Chandrasekara Aiyar, J. in *Tenappa Chettiar* v. *Indian Bank, Ltd.*[3], and *Manasser Film Co.* v. *Gemini Picture Circuit*[4]. All the three decisions of course related to the interpretation of section 83 of the Code of Civil Procedure and the interpretation of the Defence of India Rules did not directly arise for decision. Viswanatha Sastri, J. sitting as a Special Judge of the Pudukottah Court, of course was not bound by the decisions of this Court and was at liberty to place an interpretation of his own unfettered by any precedent.

The definition of "enemy territory" in the rules relates to three different areas, (1) an area which is under the sovereignty of a State at war with His Majesty, (2) an area which is administered by a State at war with His Majesty, (such as the mandated territories) and (3) any area for the time being in the occupation of a State at war with His Majesty. The words "for the time being" are significant and are important in deciding the nature of occupation at the material point of time. The last expression "not being an area in the occupation of His Majesty or of a State allied with His Majesty" takes out of the definition an area in the occupation of His Majesty or even an area in the occupation of a State allied with His Majesty. The application of this part of the definition in the first two cases above instanced presents no difficulty. In the first case even if the State at war with His Majesty is the undisputed sovereign of an area at the time if such an area at the material time, is however occupied by His Majesty or by a State allied with His Majesty it is no longer an enemy territory though the Sovereign of that State is at war with His Majesty. The reason is undoubtedly that His Majesty is in effective occupation of a territory belonging to a Sovereign who is at war with himself. The same remarks would apply also to an area in respect of which the State at war is not the sovereign, but was under its administration and control. The difficulty is to apply this part of the definition to the third case where the area is "for the time being in the occupation of the State at war with His Majesty." It is pertinent to ask how can an area be in the occupation of a State at war and at the same time be in the occupation of His Majesty or of a State allied with His Majesty. The expression "for the time being" undoubtedly indicates that the occupation

1. (1943) A.C. 203.
2. (1946) 1 M.L.J. 222 : I.L.R. (1946) Mad. 768.
3. (1943) 2 M.L.J. 201.
4. (1944) 1 M.L.J. 58 : I.L.R. 1944 Mad. 124.

concerned is the present occupation though it may in the context include also territory previously in the occupation of His Majesty or of a State allied with His Majesty. In other words it would have been better if the definition contained in the last part of the words which was after the expression "not being an area." With that amendment the last part would read as follows: "not being an area which was in the occupation of His Majesty or of a State allied with His Majesty." This part undoubtedly qualifies the words "any area" in the beginning of the definition and it is intended to apply to the three classes of cases contemplated by the definition and not merely to the first two classes. In *Chem Abbhoong* v. *Packiri Mahomed Rowther*[1], Leach, C.J. put upon the clause a similar interpretation and the mistake into which the learned Chief Justice fell about the supposed difference in language between the English and Indian definitions of enemy territory does not vitiate or in any way affect the construction put by him on the definition. At page 773, the learne Chief Justice says:

> "The question then is, what is the meaning to be attached to the words "not being an area in the occupation of His Majesty or of a State allied with His Majesty to be found in the Indian Rule? In our judgment they can only be read as meaning "not being an area which was in the occupation of His Majesty or of a State allied with His Majesty." The words "not being an area" must have reference to the words "any area" with which the rule opens. Under the rule there are three categories of enemy territory, namely, (i) territory which is under the sovereignty of a State at war with His Majesty, (ii) territory which is being administered by a State at war with His Majesty, and (iii) territory which for the time being is in the occupation of a State at war with His Majesty. If the words 'not being an area in the occupation of His Majesty' are not to be read in the way we read them, the provision with regard to the territory occupied by the enemy would be meaningless because an area cannot be in the occupation of both at the same time."

He, therefore, held that Penang in the Federated Malay States was not an enemy territory reversing the decision of Byers, J., to the contrary reported in *Packiri Mahomed Rowther* v. *Chow Ah Choong*[2].

We are not in this case concerned with the criticisms of Viswanatha Sastri, J., levelled by him against the decisions of this Court in interpreting section 83 of the Code of Civil Procedure and we think it is unnecessary therefore to deal with that aspect of the judgment of the learned Judge. The learned Judge however in the judgment in the second appeal of Pudukottah points out the anomaly of describing territories like Burma and Federated Malay States under the sovereignty of His Majesty as territories in the occupation of His Majesty so as to exclude them from the definition of "enemy territory." No doubt, these territories were endoubtedly under the sovereignty of His Majesty and were not merely territories occupied by His Majesty. But the object of the definition is to exclude from the definition by adopting the comprehensive test previous to occupation by His Majesty as the sole and guiding factor even in respect of territories held by His Majesty as sovereign even though they happen to be in the occupation of the enemy for the time being.

During war under the English common law the essential assumption and basic test to determine the national character of the territory and to decide whether it is enemy territory or not is occupation, and effective occupation, as laid down in the decisions already refered to. It does not matter even if the sovereignty is held by one State if that State at the material time was not in effective occupation of the territory. Even territories in respect of which His Majesty is undoubtedly the sovereign may pass into the occupation of the enemy State, but the object of the definition is to exclude from it States over which His Majesty has undoubted sovereignty or were under His Majesty's administration though they are occupied by the enemy. If previously they were in the occupation of His Majesty (whether held as Sovereign or administered by His Majesty) they should not be treated as enemy territory. The object seems to be not to cut off trade relations in such a case as His Majesty may have possibly intended to recover back in a short time possession

1. (1946) 1 M.L.J. 222 : I.L.R. (1946) Mad. 768.
2. (1944) 2 M.L.J. 293.

of those territories from the enemy who occupied it or, perhaps it was thought it was inequitable for the residence in that territory to be under disability to have commercial intercourse with residents in a territory which was all along a friendly or neutral State. It was perhaps thought that trading in such circumstances need not be prohibited. The learned Judge in our view did not attach sufficient importance to the expression "for the time being" in the definition which can only be contrasted with a previous occupation of His Majesty. There is no necessity to have deliberately introduced the expression "for the time being" in the Indian definition which was not present in the English Act. The interpretation adopted by the learned Judge would apply only to the first two classes of cases and would not apply to the third thereby omitting to give full significance to the intention of the Legislature in introducing the clause qualifying expression "any area" occurring in the opening part of the definition. The accepted canon of interpretation of all Statutes, is, as far as possible the construction which gives effect to all the parts of a clause must be adopted and a restricted construction which makes a part of it otiose shall not be adopted unless it becomes impossible to reconcile all the parts of a clause. In our view, therefore, it is difficult to accept the narrow interpretation placed by the learned Judge upon the clause, and, with great respect we differ from his view. In our opinion the interpretation placed by Leach, C.J., and Lakshmana Rao, J., in *Chem Abbhsong* v. *Packiri Mohomed Rowther*[1] is correct.

Applying this interpretation of the definition to the present case Burma is not an enemy territory as it was in the previous occupation of His Majesty.

We now turn to the definition of "enemy" in rule 97, of the Defence of India Rules. Under clause (*b*) "any individual resident in enemy territory" and under clause (*f*) "as respects any business carried on in enemy territory, any individual or body of persons (whether incorporated or not) carrying on that business" are enemies. By reason of residence in Burma the plaintiff's agent P.W. 2 and the defendants' agent would be enemies. As the plaintiff and the defendants are carrying on business in Burma in respect of that business the plaintiff and the defendants are also enemies. They may not have been within the purview of the prohibition in rule 98 as there is no proof that they carried on any commercial, financial or other intercourse or dealings with or for the benefit of an enemy. Under sub-clause (2) of rule 98:

> "any reference in this rule to an enemy shall be construed as including a reference to a person acting on behalf of an enemy."

Therefore, the agent of the plaintiff is an enemy for the purpose of this rule 98. The receipt of payment of the money by an enemy, that is the plaintiff's agent, residing in Burma was not by a subject who is not an enemy but by an enemy either resident or carrying on business in an enemy territory. None of the disabilities therefore contemplated by rule 98 would apply as the transaction was between enemies *inter se* and not between a British Indian subject on the one hand and an enemy on the other. It follows therefore that even if Burma is treated as an enemy territory within the meaning of the Defence of India Rules the payment in Burma by the debtor to the creditor is not hit at by any of the rules made under the Defence of India Act.

We have already found that in view of the subsequent legislation the payment in Japanese currency is valid.

It follows that the decision of the learned Judge in the Court below decreeing the plaintiff's suit is erroneous and must be reversed. The appeal is accordingly allowed and the decree of the lower Court is set aside and the plaintiff's suit is dismissed with costs throughout.

K.S. *Appeal allowed.*

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1. (1946) 1 M.L.J. 222: I.L.R. (1946) Mad. 768.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—M. PATANJALI SASTRI, *Chief Justice*, MEHRCHAND MAHAJAN, B. K. MUKHERJEA, S. R. DAS AND N. CHANDRASEKHARA AIYAR, JJ.

Naranjan Singh Nathawan and others .. *Petitioners**

v.

The State of Punjab (I) .. *Respondent.*

Preventive Detention Act (IV of 1950), section 3 (1)—*Fresh detention order issued as earlier one was defective on formal grounds—Detention if can be challenged.*

Where an earlier order of detention is defective purely on formal grounds there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, and if at any time before a Court directs the release of a detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner. As in *habeas corpus* proceedings the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of proceedings, it cannot be held that in the absence of proof of bad faith the detaining authority cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf.

Petitions under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus*.

Raghbir Singh, Senior Advocate, *amicus curiae* for Petitioners in Petitions Nos. 513, 566, 568, 570, 595, 596, 609, 616, 617, 623, 625 and 631 of 1951.

A. S. R. Chari, Advocate, *amicus curiae*, in Petition No. 591 of 1951.

Shiv Charan Singh, Advocate, *amicus curiae*, in Petition No. 632 of 1951.

S. M. Sikri, Advocate-General, Punjab (*Jindra Lal*, Advocate, with him) for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is a petition under Article 32 of the Constitution submitted through the Superintendent, Central Jail, Ambala, for the issue of a writ of *habeas corpus* for the release of the petitioner from custody.

On 5th July, 1950, the petitioner was arrested and detained under an order of the District Magistrate of Amritsar in exercise of the powers conferred on him under section 3 of the Preventive Detention Act, 1950, and the grounds of his detention were served on him as required by section 7 of the Act on 10th July, 1950. The Act having been amended by the Preventive Detention (Amendment) Act, 1951, with effect from 22nd February, 1951, a fresh order No. 7853—ADSB, dated 17th May, 1951, was issued in the following terms :

"Whereas the Governor of Punjab is satisfied with respect to the person known as Naranjan Singh Nathawan, son of Lehna Singh of village Chak Sikandar, P. S. Ramdas, Amritsar District, that with a view to preventing him from acting in a manner prejudicial to the security of the State, it is necessary to make the following order:

Now, therefore, in exercise of the powers conferred by sub-section (1) of section 3 and section 4 of the Preventive Detention Act 1950, as amended by the Preventive Detention (Amendment), Act 1951, the Governor of Punjab hereby directs that the said Naranjan Singh Nathawan be committed to the custody of the Inspector-General of Prisons, Punjab, and detained in any jail of the State till 31st March. 1952, subject to such conditions as to maintenance, discipline and punishment for breaches of discipline as have been specified by a general order or as contained in the Punjab Detenu Rules, 1950."

This order was served on the petitioner on 23rd May, 1951, but no grounds in support of this order were served on him.

The petitioner thereupon presented this petition for his release contending that the aforesaid order was illegal inasmuch as (1) the grounds of detention com-

* Petition Nos. 513, 566, 568, 570-591, 595, 596, 601, 616, 617, 623, 625, 631 and 632 of 1951. ... 25th January 1952.

municated to him on 10th July, 1950, were "quite vague, false and imaginary" and (2), he was not furnished with the grounds on which the order, dated 17th May, 1951, was based. The petition was heard *ex parte* on 12th November, 1951, when this Court issued a rule *nisi* calling upon the respondent to show cause why the petitioner should not be released, and it was posted for final hearing on 23rd November, 1951. Meanwhile, the State Government issued an order on 18th November, 1951, revoking the order of detention, dated 17th May, 1951, and on the same date the District Magistrate, Amritsar, issued yet another order for the detention of the petitioner under sections 3 and 4 of the amended Act; this last order along with the grounds on which it was based was served on the petitioner on 19th November, 1951.

Thereupon the petitioner submitted a supplemental petition to this Court on 28th November, 1951, challenging the validity of the last order on the ground that

"it was only a device to defeat the *habeas corpus* petition of the petitioner in which a rule had already been issued"

and he put forward an additional ground of attack on the legality of the earlier order, dated 17th May, 1951, namely, that it fixed the term of detention till 31st March, 1952, before obtaining the opinion of the Advisory Board as required by section 11 of the amended Act. This ground was evidently based on the view expressed by this Court that the specification of the period of detention in the initial order of detention under section 3 of the amended Act before obtaining the opinion of the Advisory Board rendered the order illegal.

In the return to the rule showing cause filed on behalf of the respondent, the Under-Secretary (Home) to the Government explained the circumstances which led to the issue of the fresh order of detention, dated 18th November, 1951. After stating that the petitioner's case was referred to and considered by the Advisory Board constituted under section 8 of the amended Act and that the Board reported on 30th May, 1951, that there was sufficient cause for the detention of the petitioner the affidavit proceeded as follows :

"That the Government was advised that the orders made under section 11 of the Preventive Detention Act, 1950, as amended by the Preventive Detention (Amendment) Act, 1951, but carried out in the form of orders under section 3 of the said Act, should be followed by grounds of detention and, as this had not been done in most cases, the detentions were likely to be called in question. The Government was further advised there were other technical defects which might render the detention of various detenus untenable. In view of this, the Government decided that the cases of all detenus should be reviewed by the District Magistrates concerned. Accordingly, the Punjab Government instructed the District Magistrates to review the cases and apply their minds afresh and emphasised that there must exist rational grounds with the detaining authority to justify the detention of a person and they were asked to report clearly in each case if the District Magistrate concerned wanted the detenus to be detained. The Punjab Government also reviewed some cases. Accordingly all cases including the case of the petitioner were reviewed and in this case the District Magistrate was again satisfied that it was necessary that the detenu be detained with a view to prevent him from acting in a manner prejudicial to the security of the State and the maintenance of public order." And it concluded by stating "that the petitioner is detained now under the orders of the District Magistrate, Amritsar."

The original and supplementary petitions came on in due course for hearing before Fazl Ali and Vivian Bose, JJ., on 17th December, 1951, when reliance was placed on behalf of the petitioner on certain observations in an unreported decision of this Court in Petition No. 334 of 1951—*Naranjan Singh* v. *The State of Punjab*, and it was claimed that in view of those observations and of the provisions of Part III of the Constitution, the decision in *Basanta Chandra Ghose* v. *King-Emperor*[1], on which the respondent relied, was no longer good law. The learned Judges thought that the matter should be considered by a Constitution bench and the case was accordingly posted before us.

It will be seen from the affidavit filed on behalf of the respondent that the case of the petitioner, along with this representation against the detention order

1. (1945) F.L.J. 401 : 1945 F.C.R. 81 : (1945) 1 M.L.J. 365.

of 17th May, 1951, was placed before the Advisory Board for its consideration, and the Board reported on 30th May, 1951, that in its opinion there was sufficient cause for the detention of the petitioner. It is said that, on the basis of that report, the Government decided that the petitioner should be detained till 31st March, 1952, but while a properly framed order under section 11 should " confirm " the detention order and " continue " the detention for a specified period, the order of 17th May, 1951, was issued under a misapprehension in the form of an initial order under section 3 of the amended Act, on the same grounds as before without any fresh communication thereof to the petitioner. To avoid arguments based on possible defects of a technical and formal character, the said order was revoked under section 13 and on a review of the case by the District Magistrate, a fresh order of detention was issued under section 3 on 18th November, 1951, and this was followed by a formal communication of the same grounds as before as there could be no fresh grounds, the petitioner having throughout been under detention.

It is contended by the Advocate-General of the Punjab that the decision reported in *Basanta Chandra Ghose* v. *King-Emperor*[1] is clear authority, in support of the validity of the aforesaid order. On essentially similar facts the Court laid down two propositions both of which have application here. (1) Where an earlier order of detention is defective merely on formal grounds, there is nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds is not examinable by the Courts, and (2) if at any time before the Court directs the release of the detenu, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage, there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the later valid order the Court can direct the release of the petitioner. The learned Judges point out that the analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings has no application to proceedings in the nature of *habeas corpus* where the Court is concerned solely with the question whether the applicant is being lawfully detained or not.

The petitioner's learned counsel conceded that he could not challenge the correctness of the second proposition, but took exception to the first as being no longer tenable after the Indian Constitution came into force. It was urged that Article 22 lays down the procedure to be followed in cases of preventive detention and the said procedure must be strictly observed as the only prospect of release by a Court must be on the basis of technical or formal defects, a long line of decisions having held that the scope of judicial review in matters of preventive detention is practically limited to an enquiry as to whether there has been strict compliance with the requirements of the law. This is undoubtedly true and this Court had occasion in the recent case of *Makhan Singh Tarsikka* v. *The State of Punjab*[2] to observe :

> " it cannot too often be emphasised that before a person is deprived of his personal liberty the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected."

This proposition, however, applied with equal force to cases of preventive detention before the commencement of the Constitution, and it is difficult to see what difference the Constitution makes in regard to the position. Indeed, the position is now made more clear by the express provisions of section 13 of the Act which provides that a detention order may *at any time* be revoked or modified and that such revocation shall not bar the making of a fresh detention order under section 3 against the same person. Once it is conceded that in *habeas corpus* proceedings, the Court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the date of the institution of the proceeding, it is difficult to hold in the absence of proof of bad faith, that the detaining authority

1. (1945) 8 F.L.J. 40 : 1945 F.C.R. 81 : (1945) 1 M.L.J. 365.

2. Petition No. 308 of 1951. (Since reported in 1951 S.C.J. 835).

cannot supersede an earlier order of detention challenged as illegal and make a fresh order wherever possible which is free from defects and duly complies with the requirements of the law in that behalf.

As regards the observations in *Naranjan Singh's case*, we do not understand them as laying down any general proposition to the effect that no fresh order of detention could be made when once a petition challenging the validity of an earlier order has been filed in Court. The learned Judges appear to have inferred from the facts of that case that the later order was not made *bona fide* on being satisfied that the petitioner's detention was still necessary but it was "obviously to defeat the present petition." The question of bad faith, if raised, would certainly have to be decided with reference to the circumstances of each case, but the observations in one case cannot be regarded as a precedent in dealing with other cases.

We accordingly remit the case for further hearing. This order will govern the other petitions where the same question was raised.

Agent for Respondent : *P. A. Mehta.*

G.R./V.S. ——— *Cases remitted for further hearing.*

[THE SUPREME COURT OF INDIA.]

(Criminal Appellate Jurisdiction.)

PRESENT :—M. PATANJALI SASTRI, *Chief Justice*, MEHRCHAND MAHAJAN, B. K. MUKHERJEA, S. R. DAS AND N. CHANDRASEKHARA AIYAR, JJ.

Bathina Ramakrishna Reddy .. *Appellant**

v.

The State of Madras .. *Respondent.*

Contempt of Courts Act (XII of 1926), section 2 (3)—Scope and effect—Contempt of subordinate Court constituting an offence under section 499, Penal Code—Jurisdiction of the High Court to take cognizance of the contempt, if barred.

Sub-section (3) of section 2 of the Contempt of Courts Act excludes the jurisdiction of the High Court only in cases where the acts alleged to constitute contempt of a subordinate Court are punishable as contempt under specific provisions of the Penal Code but not where these acts merely amount to offences of other descriptions for which punishment has been provided for in the Penal Code.

It cannot be said that libel on a Judge is punishable as contempt under the Penal Code, for it is not every libel on a Judge that would amount to contempt of Court. It is only when the act of defaming a Judge is calculated to obstruct or interfere with the due course of justice or proper administration of law that it would amount to contempt of Court.

Where the defamation of a Judge of a subordinate Court amounts to contempt of Court proceedings can certainly be taken under section 2 of the Contempt of Courts Act, quite apart from the fact that other remedy may be open to the aggrieved officer under section 499 of the Penal Code.

On appeal by Special Leave from the Judgment and Order dated the 10th April, 1950 of the High Court of Judicature at Madras (Rajamannar, C.J. and Balakrishna Ayyar, J.) in Contempt Application No. 10 of 1949.

S. P. Sinha, Senior Advocate (*S. S. Prakasam*, Advocate with him) for Appellant.

R. Ganapathy Iyer for Respondent.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal has come up before us on special leave granted by this Court on 23rd May, 1950, and it is directed against a judgment of a Division Bench of the Madras High Court dated 10th April, 1950, by which the learned Judges found the appellant guilty of contempt of Court and sentenced him to serve simple imprisonment for three months.

The appellant is the publisher and managing editor of a Telugu weekly known as "Praja Rajyam" which is edited and published at Nellore in the State of Madras. In the issue of the said paper dated 10th February, 1949, an article appeared under

* Cr. Appeal No. 13 of 1951. 14th February, 1952.

the caption "Is the Sub-Magistrate, Kovvur, corrupt?" The purport of the article was that Surya Narayan Murthi, the stationary Sub-Magistrate of Kovvur, was known to the people of the locality to be a bribe-taker and to be in the habit of harassing litigants in various ways. He was said to have a broker, through whom negotiations in connection with these corrupt practices were carried on. Several specific instances were cited of cases tried by that officer, where it was rumoured that he had either taken bribes or had put the parties to undue harassment, because they were obdurate enough to refuse the demands of his broker. The article, which is a short one, concludes with the following paragraph :

> "There are party factions in many villages in Kovvur Taluk. Taking advantage of those parties many wealthy persons make attempt to get the oppsite party punished either by giving bribes or making recommendations. To appoint Magistrates who run after parties for a Taluk like this.... is to betray the public. It is tantamount to failure of justice. Will the Collector enquire into the matter and allay the public of their fears?"

The attention of the State Government being drawn to this article, an application was filed by the Advocate-General of Madras before the High Court on 14th November, 1949 under section 2 of the Contempt of Courts Act (Act XII of 1926) praying that suitable action might be taken against the appellant as well as three other persons, of whom two were respectively the editor and sub-editor of the paper, while the third was the owner of the press where the paper was printed.

On receiving notice, the appellant appeared before the High Court and filed an affidavit taking sole responsibility for the article objected to and asserting that the article was published because of his anxiety to uphold the highest traditions of the judiciary in the land and to create popular confidence in Courts, the duty of which was to dispense justice without fear or favour and without any discrimination of caste, creed or community. It was said that before the article was published, numerous complaints had reached him from various quarters imputing corruption and disreputable conduct to this Magistrate and the only desire of the appellant was to draw the attention of the higher authorities to the state of public opinion in the matter and to invite an enquiry into the truth or otherwise of the allegations which were not asserted as facts but were based only on hearsay.

The High Court after hearing the parties came to the conclusion that the publication in question did amount to contempt of Court, as it was calculated to lower the prestige and dignity of Courts and bring into disrepute the administration of justice. As the appellant was not prepared to substantiate the allegations which he made and which he admitted to be based on hearsay and did not think it proper even to express any regret for what he had done, the Court sentenced him to simple imprisonment for three months.

The other three respondents, through their counsel, tendered unqualified apology to the Court and the learned Judges considered that no further action against them was necessary.

The propriety of the decision of the High Court so far as it relates to the appellant has been challenged before us in this appeal and Mr. Sinha, who appeared in support of the same, raised before us a two-fold contention : his first and main contention is that as the contempt in this case was said to have been committed in respect of a Court subordinate to the High Court and the allegations made in the article in question constitute an offence under section 499 of the Indian Penal Code, the jurisdiction of the High Court to take cognizance of such a case is expressly barred under section 2 (3) of the Contempt of Courts Act. The other contention advanced by the learned counsel relates to the merits of the case and it is urged that in publishing the article objected to, the appellant acted in perfect good faith and as the article amounted to nothing else but a demand for enquiry into the conduct of a particular person who was believed to be guilty of corrupt practices in the discharge of his judicial duties, there was no contempt of Court either intended or committed by the appellant.

So far as the first point is concerned, the determination of the question raised by the appellant would depend upon the proper interpretation to be put upon section 2 (3) of the Contempt of Courts Act which runs as follows :

"No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

According to Mr. Sinha, what the sub-section means is that if the Act by which a party is alleged to have committed contempt of a subordinate Court constitutes offence of any description whatsoever punishable under the Indian Penal Code, the High Court is precluded from taking cognisance of it. It is said that in the present case the allegations made in the article in question amount to an offence of defamation as defined by section 499 of the Indian Penal Code and consequently the jurisdiction of the High Court is barred. Reliance is placed in support of this proposition upon the decision of the Nagpur High Court in *Kisan Krishna Ji* v. *Nagpur Conference of Society of St. Vincent de Paul*[1]. This contention, though somewhat plausible at first sight, does not appear to us to be sound. In our opinion, the sub-section referred to above excludes the jurisdiction of High Court only in cases where the acts alleged to constitute contempt of a subordinate Court are punishable as contempt under specific provisions of the Indian Penal Code but not where these acts merely amount to offences of other description for which punishment has been provided for in the Indian Penal Code. This would be clear from the language of the sub-section which uses the words "where such contempt is an offence" and does not say "where the act alleged to constitute such contempt is an offence." It is argued that if such was the intention of the Legislature, it could have expressly said that the High Court's jurisdiction will be ousted only when the contempt is punishable as such under the Indian Penal Code. It seems to us that the reason for not using such language in the sub-section may be that the expression "contempt of Court" has not been used as description of any offence in the Indian Penal Code, though certain acts which would be punishable as contempt of Court in England, are made offences under it.

It may be pointed out in this connection that although the powers of the High Courts in India established under the Letters Patent to exercise jurisdiction as Superior Courts of Record in punishing contempt of their authority or processes have never been doubted, it was a controversial point prior to the passing of the Contempt of Courts Act, 1926 as to whether the High Court could, like the Court of King's Bench in England, punish contempt of Courts subordinate to it in exercise of its inherent jurisdiction. The doubt has been removed by Act XII of 1926 which expressly declares the right of the High Court to protect subordinate Courts against contempt but subject to this restriction, that cases of contempt which have already been provided for in the Indian Penal Code should not be taken cognizance of by the High Court. This seems to be the principle underlying section 2 (3) of the Contempt of Courts Act. What these cases are, need not be exhaustively determined for purposes of the present case, but some light is undoubtedly thrown upon this matter by the provision of section 480 of the Criminal Procedure Code, which empowers any civil, criminal or revenue Court to punish summarily a person who is found guilty of committing any offence under sections 175, 178, 179, 180 or section 228 of the Indian Penal Code in the view or presence of the Court. We are not prepared to say, as has been said by the Patna High Court in *Jnanendra Prosad* v. *Gopal*[2], that the only section of the Indian Penal Code which deals with contempt committed against a Court of justice or judicial officer is section 228. Offences under sections 175, 178, 179 and 180 may also, as section 480 of the Criminal Procedure Code shows, amount to contempt of Court if the "public servant" referred to in these sections happens to be a judicial officer in a particular case. It is well known that the aim of the contempt proceeding is "to deter men from offering any indignities to a Court of justice" and an essential feature of the proceeding is the exercise of a summary power by the Court itself in regard to the

1. A.I.R. 1943 Nag. 334. 2. (1932) I.L.R. 12 Pat. 172.

delinquent. In the cases mentioned in section 480 of the Indian Penal Code, the Court has been expressly given summary powers to punish a person who is guilty of offending its dignity in the manner indicated in the section. The Court is competent also under section 482 of the Criminal Procedure Code to forward any case of this description to a Magistrate having jurisdiction to try it, if it considers that the offender deserves a higher punishment than what can be inflicted under section 480. Again the Court is entitled under section 484 to discharge the offender on his submitting an apology, although it has already adjudged him to punishment under section 480 or forward his case for trial under section 482. The mode of purging contempt by tendering apology is a further characteristic of a contempt proceeding. It seems, therefore, that there are offences which are punishable as contempt under the Indian Penal Code and as subordinate Courts can sufficiently vindicate their dignity under the provisions of criminal law in such cases the Legislature deemed it proper to exclude them from the jurisdiction of the High Court under section 2 (3) of the Contempt of Courts Act; but it would not be correct to say that the High Court's jurisdiction is excluded even in cases where the act complained of, which is alleged to constitute contempt, is otherwise, an offence under the Indian Penal Code.

This view has been taken and, in our opinion quite rightly, in a number of decisions by the Calcutta[1], Patna,[2], Allahabad[3] and Lahore[4] High Courts. The only authority which Mr. Sinha could cite in support of his contention is the decision of the Nagpur High Court in *Kisan Krishna Ji* v. *Nagpur Conference of Society of St. Vincent de Paul*[5]. The authority is undoubtedly in his favour as it proceeds upon the assumption that the idea underlying the provision of section 2 (3) of the Contempt of Courts Act is that if a person can be punished by some other tribunal, then the High Court should not entertain any proceeding for contempt. It is to be noticed that the learned Judge, who decided this case, himself took the opposite view in the case of *Subordinate Judge, First Class, Hoshangabad* v. *Jawaharlal*[6] and definitely held that the prohibition contained in section 2 (3) of the Contempt of Courts Act refers to offences punishable as contempt of Court by the Indian Penal Code and not to offences punishable otherwise than as contempt. This decision was neither noticed nor dissented from in the subsequent case, and it is quite possible that the attention of the learned Judge was not drawn to this earlier pronouncement of his, in which case the matter would certainly have been more fully discussed. We think further that the decision of the Calcutta High Court in *V. M. Basan* v. *A. H. Skone*[7] which was the basis of the decision of the learned Judge in the subsequent case does not really support the view taken in it. In the Calcutta case what happened was, that a clerk of the Attorney, who appeared for the respondent decree-holder, went to serve a notice under Order 21, Rule 37 (1) of the Civil Procedure Code upon the appellant judgment-debtor. The judgment-debtor refused to take the notice and abused and assaulted the Attorney's clerk. Upon that, contempt proceedings were started against him and Mr. Justice C.C. Ghosh, sitting on the Original Side of the High Court of Calcutta, held the appellant guilty of contempt and fined him Rs. 300. On appeal, this judgment was affirmed by the appellate Bench and there was a general observation made by Chief Justice Sanderson at the close of his judgment that it is not desirable to invoke the special inherent jurisdiction of the High Court by way of proceeding for contempt if ordinary proceedings in a Magistrate's Court are sufficient to meet the requirements of a case. This was not a case under section 2 (3) of the Contempt of Courts Act at all and no question either arose or was decided as to whether if an act is otherwise punishable as an offence under the Indian Penal Code the jurisdiction of the High Court under

1. *Narayan Chandra* v. *Panchu Pramanic*, A.I.R. 1935 Cal. 684; *Naresh Kumar* v. *Umaroo-mal*, A.I.R. 1951 Cal. 489.
2. *Kaulashia* v. *Emperor*, (1932) I.L.R. 12 Pat. 1.
3. *State* v. *Brahma Prakash*, A.I.R. 1950 All. 556; *Emperor* v. *Jagannath*, A.I.R. 1938 All. 358.
4. *Bennet Coleman* v. *G. S. Monga*, I.L.R. (1937) Lah. 34.
5. A.I.R. 1943 Nag. 334.
6. A.I.R. 1940 Nag. 407.
7. (1925) I.L.R. 53 Cal. 401.

that section would be ousted. Undoubtedly the High Court had jurisdiction in that case and whether such jurisdiction, which is certainly of a special character and is exercised summarily, should be called into aid in the circumstances of a particular case would depend upon the discretion of the Court. This has, however, no bearing on the point that has arisen for consideration before us. We would hold, therefore, that the right view was taken by the learned Judge of the Nagpur High Court in the earlier case and not in the later one.

It is next urged by Mr. Sinha that even assuming that this view is correct, the language of section 499 of the Indian Penal Code is wide enough to cover a case of contempt of Court. What is said is, that if a libel is published against a Judge in respect of his judicial functions that also is defamation, within the meaning of section 499 of the Indian Penal Code and as such libel constitutes a contempt of Court, it may be said with perfect propriety that libel on a Judge is punishable as contempt under the Indian Penal Code. We do not think that this contention can be accepted as sound. A libellous reflection upon the conduct of a Judge in respect of his judicial duties may certainly come under section 499 of the Indian Penal Code and it may be open to the Judge to take steps against the libeller in the ordinary way for vindication of his character and personal dignity as a Judge ; but such libel may or may not amount to contempt of Court. As the Privy Council observed in *Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court*[1] :

> "although contempt may include defamation, yet an offence of contempt is something more than mere defamation and is of a different character."

When the act of defaming a Judge is calculated to obstruct or interfere with the due course of justice or proper administration of law, it would certainly amount to contempt. The offence of contempt is really a wrong done to the public by weakening the authority and influence of courts of law which exist for their good. As was said by Willmot, C.J.[2] :

> "attacks upon the Judges excite in the minds of the people a general dissatisfaction with all judicial determinations.... and whenever man's allegiance to the laws is so fundamentally shaken it is the most fatal and dangerous obstruction of justice and in my opinion calls out for a more rapid and immediate redress than any other obstruction whatsoever, not for the sake of the Judges as private individuals but because they are the channels by which the King's justice is conveyed to the people."

What is made punishable in the Indian Penal Code is the offence of defamation as defamation and not as contempt of Court. If the defamation of a subordinate Court amounts to contempt of Court, proceedings can certainly be taken under section 2 of the Contempt of Courts Act, quite apart from the fact that other remedy may be open to the aggrieved officer under section 499 of the Indian Penal Code. But a libel attacking the integrity of a Judge may not in the circumstances of a particular case amount to a contempt at all, although it may be the subject-matter of a libel proceeding. This is clear from the observations of the Judicial Committee in the case of *The Matter of a Special Reference from the Bahama Islands*[3]. The first contention of Mr. Sinha therefore, fails.

The second point raised by the learned counsel does not appear to us to have any real substance. The article in question is a scurrilous attack on the integrity and honesty of a judicial officer. Specific instances have been given where the officer is alleged to have taken bribes or behaved with impropriety to the litigants who did not satisfy his dishonest demands. If the allegations were true, obviously it would be to the benefit of the public to bring these matters into light. But if they were false, they cannot but undermine the confidence of the public in the administration of justice and bring judiciary into disrepute. The appellant, though he took sole responsibility regarding the publication of the article, was not in a position to substantiate by evidence any of the allegations made therein. He admitted that the statement was based on hearsay. Rumours may have reached him from various

1. (1883) L.R. 10 I.A. 171 : I.L.R. 10 Cal. 109 at 131 (P.C.).
2. Willmot's Opinions, page 256 ; *Rex* v. *Davies*, 30 at p. 40-41.
3. (1893) A.C. 138.

sources, but before he published the article it was incumbent upon him as a reasonable man to attempt to verify the informations he received and ascertain, as far as he could, whether the facts were true or mere concocted lies. He does not appear to have made any endeavour in this direction. As the appellant did not act with reasonable care and caution, he cannot be said to have acted *bona fide* even if good faith can be held to be a defence at all in a proceeding for contempt. What is more, he did not express any regret for what he had done either in the High Court or before us and his behaviour does not show the least trace of contrition. In these circumstances, we think that the appeal cannot succeed and must be dismissed.

Agent for Appellant : *S. Subramanian.*

Agent for Respondent : *P. A. Mehta.*

G.R./V. S. ——— *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—S. FAZL ALI AND VIVIAN BOSE, JJ.

The Ruby General Insurance Co., Limited .. *Appellant* *

v.

Shri Pearey Lal Kumar and another .. *Respondents.*

Arbitration Act (*X of* 1940), *section* 33—*Petition under by one party where both parties rely upon the arbitration clause in an insurance policy—Maintainability—Amendment of application under section* 33 *in final appeal—Permissibility.*

Where one party relying on the arbitration clause in a policy of insurance says that there has been a breach of its terms and the other party, also relying on that clause, says that there has been no breach but on the other hand the requirements of that clause have been fulfilled, the point in dispute between the parties is one for the decision of which the former is compelled to invoke to his aid one of the terms of the insurance agreement and so the difference between the parties is a difference "arising out of the policy" within the meaning of the arbitration clause and the arbitrator has jurisdiction to decide it. In such a case a petition under section 33 of the Arbitration Act by one of the parties would not be maintainable.

It would be an unusual step to allow the petition under section 33 to be amended at the hearing of special appeal against its dismissal.

On appeal by special leave from the Judgment dated the 10th April, 1951, of the High Court of Judicature for the State of Punjab at Simla (Kapur, J.) in Civil Revision No. 286 of 1950 arising out of Order, dated the 24th March, 1950, of the Court of Subordinate Judge, First Class, Delhi, in Application under section 33 of Indian Arbitration Act (X of 1940).

Rattan Lal Chawla, Senior Advocate (*K. N. Aggarwal*, Advocate, with him) for Appellant.

Som Nath Chopra, Advocate, for Respondent No. 1.

Respondent No. 2 in person.

The Judgment of the Court was delivered by

Fazl Ali, J.—This is an appeal by special leave against the judgment of the Punjab High Court upholding the decision of a subordinate judge of Delhi relating to a petition filed by the appellant-company under section 33 of the Indian Arbitration Act against the respondents.

The material facts are these. On the 22nd April, 1947, the appellant-company insured a car belonging to the first respondent and issued a policy which fully sets out the terms and conditions of the agreement relating to the insurance. The first respondent left his car in a garage at Lahore and came away to India on the 31st July, 1947. Subsequently, he learned about the loss of his car, and sent a legal notice dated the 18th March, 1948, through his advocate, Mr. A. R. Kapur to the Head Office of the company at Calcutta, claiming a sum of Rs. 7,000

* C. A. No. 163 of 1951. 25th February, 1952.

for the loss of the car. On the 10th April, 1948, Mr. Kapur received a letter from the Branch Manager of the company's office at Amritsar asking for information regarding certain matters stated in the letter. This information appears to have been supplied on the 30th April, 1948. On the 26th May, 1948, the company's Branch Manager at Amritsar wrote to the first respondent repudiating the liability of the company for the loss of the car on the ground that the loss was "due to communal riots which were going on in the whole of Punjab" and was not covered by the agreement of insurance. A similar letter was written again by the Branch Manager on the 3rd July, 1948, to the first respondent, and another letter was written by one Mr. Rattan Lal Chawla representing himself to be counsel for the company, to Mr. A. R. Kapur, on the 1st August, 1948. On the 21st November, 1949, the first respondent wrote a letter to the Branch Secretary of the company's office at Calcutta, stating that his claim was valid and nominating Mr. T. C. Chopra, Assistant Manager, Lakshmi Insurance Company, Ltd., Delhi, as arbitrator on his behalf and requesting the company to appoint another person as arbitrator on its behalf. Thereafter, the company presented an application on the 29th December, 1949, in the Court of the Senior Sub-Judge, Delhi, under section 33 of the Indian Arbitration Act, against the first respondent and Mr. T. C. Chopra, the arbitrator, who is the second respondent in this appeal, praying for—

(1) a declaration to the effect that the reference to arbitration and the appointment of respondent No. 2 as sole arbitrator was illegal;

(2) a declaration to the effect that if the respondent No. 2 made any award it would not be binding on the company; and

(3) an injunction restraining the respondents Nos. 1 and 2 from taking any proceeding in the matter and the respondent No. 2 from making any award.

Upon this petition, notice was issued to the respondents, and an injunction was issued directing them not to file any award till the date of the next hearing, which was fixed for 31st January, 1950. On the 4th February, 1950, the first respondent wrote to the second respondent (the arbitrator) that since no arbitrator had been appointed by the company and since the company had refused to appoint any arbitrator, he (Mr. Chopra) was to act as the sole arbitrator. On the 6th February, 1950, Mr. Chopra wrote to inform the Insurance Company that he had been appointed sole arbitrator and asked the company to send the statement of its case and to produce all the evidence on the 14th February, 1950. On the 10th February, 1950, the insurance company filed a petition before the subordinate judge, Delhi, praying that the respondents be stopped from proceeding further in the matter, so that its application under section 33 may not become infructuous. On the 11th February, the subordinate judge issued notice to the respondents fixing the 17th February as the date of hearing and passed the following order:

"Moreover (till) the decision of this application the arbitrator should not give or pronounce his award but should continue the proceedings."

On the 14th February, 1950, the second respondent pronounced his award after making a note to the following effect:—

"Mr. G. R. Chopra, the counsel of the defendants, sent a telephonic message at 12 A.M. requesting extension till 1 P.M. I agreed and accordingly I waited for him and the plaintiff with his counsel also waited upto 1 P.M. Nobody turned up on behalf of the defendants. I commenced the proceedings and took the statement of the plaintiff and the documents that he had produced."

He made a further note at the end of the award to this effect:—

"As after the giving of the award a notice was served upon me not to give the award, I have not sent any formal letter to the parties informing them of the award and its costs."

On the 24th March, 1950, the subordinate judge passed an order on the company's application under section 33, dismissing it and holding that the terms of clause 7 of the agreement

"were comprehensive enough to include the points of disputes between the parties now and as such are triable by the arbitrator and not by the Court."

The subordinate judge concluded his order by observing :

> "I, therefore, hold that the reference to the arbitration of the differences is perfectly valid and the points raised by the parties to this application with regard to the abandonment of claim and its becoming irrecoverable are to be decided by the arbitrator."

The judgment of the subordinate judge was upheld in revision by the Punjab High Court, and the company has now preferred an appeal to this Court by special leave.

The points that were urged on behalf of the appellant in this appeal are these :—

(1) that the arbitration clause had ceased to be operative and the question as to the existence and validity of the arbitration agreement was triable by the Court under section 33 of the Arbitration Act and not by the arbitrator ; and

(2) that the award was invalid and not binding on the appellant, because it was pronounced in spite of the order of the Court dated the 11th February, 1950, directing the arbitrator not to pronounce his award.

Clause 7 of the policy of insurance runs as follows :—

> "All differences arising out of this policy shall be referred to the decision of an arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator, to the decision of two arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the arbitrators do not agree on an umpire appointed in writing by the arbitrators before entering upon the reference. The umpire shall sit with the arbitrators and preside at their meeting and the making of an award shall be a condition precedent to any right of action against the company. If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained, then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

It will be noticed that this clause provides among other things that if the company disclaimed liability to the insured for any claim under the policy and such claim was not within twelve calendar months from the date of such disclaimer referred to arbitration, then the claim should be deemed to have been abandoned, and was not recoverable. The case of the company is that it disclaimed liability for the loss of the car on three successive occasions, namely, on the 26th May, 1948, the 3rd July, 1948 and the 1st August, 1948. The first respondent however did not take any action in regard to the appointment of an arbitrator until the 21st November, 1949, *i.e.*, until more than 12 months after even the last disclaimer by the company. For this reason, the claim put forward by the first respondent must be deemed to have been abandoned, and he cannot recover anything from the company. On the other hand, the case of the first respondent, which is set out in his affidavit dated the 17th February, 1950, is that there was never any valid disclaimer by the company of its liability. The position that he took up was that the Branch Manager of the company had no authority to disclaim the liability, and it could have been disclaimed only by a resolution of the company. Now these being the respective contentions of the parties, the question is whether the point in dispute fell to be decided by the arbitrator or by the Court under section 33 of the Arbitration Act. Section 33 is to the following effect :—

> "Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits :
>
> Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit."

The question to be decided is whether the point on which the parties are in dispute is a difference "arising out of the policy" in terms of clause 7 of the policy. The test for determining such a question has been laid down in a series of cases and is a simple one. The test is whether recourse to the contract by which the parties are bound is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction. In the present case, both

the parties admit the contract and state that they are bound by it. Indeed, the appellant-company, in order to make good its contention, is obliged to rely and does rely on that part of clause 7 of the policy which states that if the company should disclaim liability and the claim be not referred to arbitration within 12 months of such disclaimer, the claim shall be deemed to have been abandoned. Evidently, the company cannot succeed without calling in aid this clause and relying on it. Again, the first respondent does not say that he is not bound by the clause but states that the matter was referred to arbitration before any valid disclaimer was made. The position therefore is that one party relying upon the arbitration clause says that there has been a breach of its terms and the other party, also relying on that clause, says that there has been no breach, but on the other hand, the requirements of that clause have been fulfilled. Thus, the point in dispute between the parties is one for the decision of which the appellant is compelled to invoke to his aid one of the terms of the insurance agreement. It is thus clear that the difference between the parties is a difference arising out of the policy and the arbitrator had jurisdiction to decide it, the parties having made him the sole judge of all differences arising out of the policy.

A large number of cases were cited before us on behalf of the parties, but it is unnecessary to refer to them, since the question which arises in this appeal is a simple one and is covered by the statement of law which is to be found in the decision of this Court in *A. M. Mair & Co.* v. *Gordhandass Sagarmull*[1], and in a series of English authorities, some of which only may be referred to. In *Heyman* v. *Darwins, Ltd.*[2], the law on the subject has been very clearly stated in the following passage :—

"An arbitration clause is a written submission, agreed to by the parties to the contract, and like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.

If, however, the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of', or 'with regard to,' or 'under the contract', and an arbitration clause which uses these, or similar expressions, should be construed accordingly."

In *Macaura* v. *Northern Assurance Co.*[3], the appellant had insured a large quantity of timber against fire and the greater part of the timber having been destroyed by fire, he sued the Insurance Company to recover the loss but the action was stayed and the matter was referred to arbitration in pursuance of the conditions contained in the policy. The arbitrator held that the claimant had no insurable interest in the goods insured and disallowed the claim. One of the points raised in the case was that the arbitrator had no jurisdiction to decide the matter, but that contention was rejected by Lord Sumner in these words :—

"The defendants do not repudiate the policy or dispute its validity as a contract; on the contrary they rely on it and say that according to its terms, express and implied, they are relieved from liability; see *Stebbing's* case[4], *Woodall* v. *Pearl Assurance Co.*[5] . . . . . It is a fallacy to say that they assert the policy to be null and void."

In *Stebbing* v. *Liverpool and London and Globe Insurance Company Limited*[4], to which reference was made by Lord Sumner, the policy of Insurance contained a clause referring to the decision of an arbitrator "all difference arising out of this policy". It also contained a recital that the assured had made a proposal and declaration as the basis of the contract, and a clause to the effect that compliance with the conditions indorsed upon the policy should be a condition precedent to any liability on the part of the insurers. One of the conditions provided that

1. (1951) S.C.J. 1 : 1950 S.C.R. 792
2. (1941) 1 All E.R. 337, 343.
3. (1925) A.C. 619.
4. (1917) 2 K.B. 433.
5. (1919) 1 K.B. 593.

if any false declaration should be made or used in support of a claim all benefit under the policy should be forfeited. In answer to a claim by the assured, the insurers alleged that statements in the proposal and declaration were false. When the matter came before the arbitrator, the assured objected that this was not a difference in the arbitration and that the arbitrator had no power to determine whether the answers were true or not, or to determine any matters which called in question the validity of the policy. In holding that the arbitrator had jurisdiction to decide the matter, Viscount Reading, C.J., observed as follows :—

"If the company were seeking to avoid the contract in the true sense they would have to rely upon some matter outside the contract, such as a misrepresentation of some material fact inducing the contract of which the force and effect are not declared by the contract itself. In that case the materiality of the fact and its effect in inducing the contract would have to be tried. In the present case the company are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements in question are material and that they induced the contract. If they succeed in escaping liability, that is by reason of one of the clauses in the policy. In resisting the claim they are not avoiding the policy but relying on its terms. In my opinion, therefore, the question whether or not the statement is true is a question arising out of the policy."

The main contention put forward on behalf of the appellant is that the points in dispute fall outside the jurisdiction of the arbitrator, firstly because the existence of the arbitration agreement is challenged, and secondly because the sole object of the application under section 33 of the Arbitration Act is to have the effect of the arbitration agreement determined. In our opinion, neither of these objections is sound. How can it be held that the existence of the arbitration agreement is challenged, when both parties admit that the clause in the policy which contains that agreement binds them. It is neither party's case that there is no arbitration agreement in the policy. On the other hand, both parties admit that such agreement exists, and each of them relies on it to support its case. It is true that the appellant contends that the arbitration agreement has ceased to be applicable, but that contention cannot be sustained without having recourse to the arbitration agreement. It is said that the agreement no longer subsists, but that is very different from saying that the agreement never existed or was void *ab initio* and therefore is to be treated as non-existent.

Again, no question of determining the effect of the arbitration agreement arises, because there is no dispute between the parties as to what it means. The language of the arbitration clause is quite clear, and both parties construe it in the same way. The real question between them is whether the first respondent has or has not complied with the conditions of the agreement. But this question does not turn on the effect of the agreement. This is the view which has substantially been taken by the High Court, and in our opinion it is correct.

The second point urged before us is that the award is invalid, since it was made in spite of the court's injunction directing the arbitrator not to pronounce any award. This point however does not, in our opinion, fall within the scope of this appeal. The application under section 33 of the Arbitration Act, which is the subject of this appeal, was filed before the award was pronounced. In that application, there is no reference to the award ; nor is there any reference to the circumstances which are now stated to invalidate the award and which happened after the application was filed. The learned counsel for the appellant made an application before us praying for the amendment of the petition under section 33 by introducing certain additional facts and adding a prayer for declaring the award to be invalid, but it was rejected by us. It should be stated that as early as the 24th March, 1950, the subordinate judge in dismissing the appellant's petition under section 33, made the following observations :—

"During the pendency of the arbitration proceedings the arbitrator pronounced the award ..... The award has now been filed in the Court of S. Mohinder Singh, sub-Judge, 1st Class, Delhi. Any objection against the award can be filed there. In this application in which there is no prayer for setting aside the award, which exists, I do not think it proper to decide the question of the validity of the award."

In our opinioon, the subordinate judge correctly indicated the course which it was open to the appellant in law to adopt for the purpose of questioning the validity of the award, but not having taken that course and not having made any application in the courts below for amending the petition under section 33, the company cannot ask this court to go into the validity of the award by widening the scope of the original petition. This court is always in favour of shortening litigation, but it would be a very unusual step to allow the petition under section 33 to be amended now and to decide a question involving investigation of facts without having the benefit of the judgments of the courts below.

In the result, the appeal fails and is dismissed with costs.

Agent for Appellant : *Ganpat Rai.*

Agent for Respondent No. 1 : *S. D. Sekhri.*

G.R./V.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—MEHRCHAND MAHAJAN, B. K. MUKHERJEA AND VIVIAN BOSE, JJ.

Mummareddi Nagi Reddi & others .. *Appellants**

v.

Pitti Durairaja Naidu & others .. *Respondents.*

Hindu Law—Widow—Surrender—Basic principle of doctrine of—Release by widow in favour of next heir and stranger—If a surrender—Mesne profits—Right to—Reversioner's suit questioning widow's alienations—Date from which right accrues.

The basic principle upon which the doctrine of surrender rests is that it is the complete self-effacement by the widow or the withdrawal of her life-estate which opens the estate of the deceased husband to his next heirs at that date. It follows that no surrender and consequent acceleration of estate can possibly be made in favour of anybody except the next heir of the husband. It is true that no acceptance or act of consent on the part of the reversioner is necessary in order that the estate might vest in him; vesting takes place under operation of law. But it is not possible for the widow to say that she is withdrawing herself from her husband's estate in order that it might vest in somebody other than the next heir of the husband. In favour of a stranger there can be an act of transfer but not one of renunciation. The position is not materially altered if the surrender is made in favour of the next heir with whom a stranger is associated and the widow purports to relinquish the estate in order that it might vest in both of them. So far as the next heir is concerned, there cannot be in such a case a surrender of the totality of interest which the widow had, for she actually directs that a portion of it should be held or enjoyed by somebody else other than the husband's heir. As regards the stranger, there can be no question of renunciation; the transaction at the most may be evidence of an intention to confer a bounty on him, though such intention is not clothed in proper legal form. A transfer made by a widow of her entire estate in favour of the nearest reversioner and an outsider jointly (in this case to the daughter and her husband) would not operate as a surrender of the whole estate to the immediate reversioner and a transfer of half share in it to the stranger.

As in a reversioner's suit for recovery of possession of property alienated by a widow it is not necessary that the transfer should be set aside before any decree for possession is made, a decree passed in such a suit must be on the basis that the possession of the transferee was unlawful ever since the widow died. It follows that it is quite proper in such a suit to allow the reversioner mesne profits against the alienee from the date of the widow's death. There is no rule of law that no mesne profits can be allowed in a case where the alienation cannot be described as absolutely void.

On appeal against the judgment and decree dated the 12th January, 1948, of the High Court of Judicature at Madras (Gentle, C.J. and Satyanarayana Rao, J.) in Appeal No. 167 of 1945 arising out of Decree dated the 17th August, 1942, of the Subordinate Judge at Nellore in O.S. No. 3 of 1940.

K. Rajah Aiyar, Senior Advocate (*R. Ganapahti Aiyar*, Advocate, with him) for Appellants.

B. Somayya, Senior Advocate (*M. Krishna Rao*, Advocate, with him) for Respondents.

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*Civil Appeal No. 51 of 1950. 8th May, 1951.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal is directed against an appellate judgment of a Division Bench of the Madras High Court dated the 12th January, 1948, reversing in part, a decision of the Subordinate Judge of Nellore passed in O. S. No. 3 of 1940.

To appreciate the material facts of the case and the controversy that now centres between the parties, it would be convenient to refer to a short genealogy which is given below :—

Udatha Narayanappa
= Chanchamma (d. 1933)
|
Venkata Narasamma (d. 1926)
= Pitti Rangayya (d. 1914)
|
Venkatadri—Rajakantamma
|

Duraiaraja	Rajavathi	Balakrishna	Krishnababulu
Pltf. 1	Pltf. 2	Pltf. 3	Pltf. 4

The properties in dispute which are described in schedule A to the plaint admittedly belonged to one Narayanappa who was the father of the paternal grandmother of the plaintiffs. Narayanappa died intestate sometime before 1884 leaving him surviving his wife Chanchamma and a daughter named Venkata Narasamma. Narasamma was married to one Pitti Rangayya and they had a son named Venkatadri, who was the father of the plaintiffs. Chanchamma died in March, 1933, and the plaintiffs aver that they being the heritable *bandhus* of Narayanappa as the daughter's son's sons of the latter and there being no nearer heir in existence, they became entitled to all the properties left by Narayanappa on the death of his widow. It appears that on 22nd February, 1894, Chanchamma executed, what has been described as a deed of release, in favour of her daughter Narasamma and her son-in-law Pitti Rangayya, under which the entire estate of Narayanappa came into the possession of the latter. After the execution of this document, the daughter and son-in-law of Chanchamma began to deal with the properties left by Narayanappa as their own and entered into various transactions on that footing. Pitti Rangayya died in 1914 and Narasamma followed him in 1926. There are six items of property comprised in schedule A to the plaint. Of these items 4 and 5, were sold by Venkata Narasamma along with her son, the father of the plaintiffs, on 9th July, 1922, to the 5th defendant and the father of defendants 6 to 9 for a sum of Rs. 6,500. Again, on 26th October, 1929, when both Narasamma and the plaintiff's father were dead, item 1 of schedule A was sold by the mother of the plaintiffs as their guardian to the 1st defendant for a consideration of Rs. 33,000. Defendants 2 and 3 are the undivided sons of the 1st defendant. There are other transfers in favour of other defendants in the suit but they are not the subject-matter of the appeal before us.

The plaintiffs' allegations in substance are that these alienations are not binding on them as the so-called deed of release executed by the widow could not and did not operate as a deed of surrender and any transfer effected on the strength of this deed by Venkata Narasamma or her son, Venkatadri, or even on behalf of the plaintiffs by their mother as guardian, could not be operative after the death of the widow. As these transfers were made during the lifetime of Chanchamma and without any legal necessity, the plaintiffs as actual reversioners were not bound by them and they are entitled to recover possession of the properties by evicting the transferees. It was for the recovery of possession of these properties that the present suit was brought and there was a claim for mesne profits as well from the date of the widow's death to the date of delivery of possession.

The defence of the defendants who are interested in the properties mentioned above, were really of a three-fold character. It was contended in the

first place that the plaintiffs were not the next reversionary heirs of Narayanappa and consequently were not entitled to succeed to the estate of the latter on the death of the widow. The second contention was that the deed of release operated as a surrender of the widow's estate in favour of the daughter who was the next reversioner and although by such a surrender the daughter could get only a limited estate which she would have been entitled to on the death of the widow, yet as the daughter died in 1926, the present suit which was instituted more than 12 years after the date of death, was barred by limitation. The third plea was that in any event, these alienations could not stand as they were not justified by any legal necessity.

The learned Subordinate Judge who heard the suit decided it adversely to the plaintiffs. It was held first of all that though the plaintiffs were the heritable *bandhus* of Narayanappa, the evidence adduced by them, fell short of establishing that there were no agnatic relations or nearer heir in existence. As regards the document of release (Exhibit P-6) executed by the widow in favour of her daughter and son-in-law, the Subordinate Judge came to the conclusion that the deed operated as a surrender of the widow's estate and as the daughter died in 1926, the plaintiffs' suit was barred by limitation. On the question of legal necessity, the finding recorded by the Subordinate Judge was that the sale-deed (Exhibit D-1) executed in favour of the 1st defendant was supported by legal necessity in the extent of Rs. 5,061 and odd annas and that the other document under which defendants 5 to 9 claimed title was not binding on the estate at all. In the result, the plaintiffs' suit was dismissed in its entirety.

Against this decision, the plaintiffs took an appeal to the High Court of Madras and the appeal was heard by a Division Bench consisting of Gentle, C.J. and Satyanarayana Rao, J. The learned Judges allowed the appeal in regard to the items of property mentioned above and reversed the decision of the trial Judge to that extent. It was held that the plaintiffs were the nearest reversionary heirs of Narayanappa and that the deed of release did not operate as a surrender of the widow's estate. The plaintiffs were given a decree for possession in respect of item 1 of the schedule properties as against defendants 2 and 3 on condition of their depositing into Court the sum of Rs. 5,061, and odd annas, that being the amount of debt legally binding on the estate which was discharged out of the sale proceeds of the transfer, and there was a further direction to pay interest upon this amount at the rate of six per cent. per annum from certain specified dates up to the date of making the deposit. It may be noted here that the first defendant died after the trial Court's decree and his interest passed by survivorship to defendants 2 and 3, who are his undivided sons. As against defendants 5 to 9, there was an unconditional decree for recovery of possession in respect of items 4 and 5 of schedule A. The plaintiffs were further given a decree for mesne profits, both past and future, commencing from the date of the widow's death down to the date of delivery of possession, and the amount of mesne profits was directed to be ascertained in a separate proceeding under Order 20, rule 12 of the Code of Civil Procedure. It is against this decision that the present appeal has been preferred by defendants 2, 3 and 5 to 9.

Mr. Rajah Aiyar appearing for the appellants did not seriously challenge the finding of the High Court as to the plaintiffs being the nearest reversioners at the time of Ghanchamma's death. He has assailed the propriety of the High Court's decision substantially on two points. His first contention is that the deed of release (Exhibit P-6) executed by Ghanchamma had the effect of a surrender of the widow's estate in favour of her daughter and son-in-law and the daughter having died in 1926, the plaintiffs' suit was barred by limitation. The second ground urged is that the High Court should not have given the plaintiffs a decree for mesne profits from the date of the widow's death. Mesne profits could at best have been allowed from the date of the institution of the suit and so far as defendants 2 and 3 are concerned against whom a conditional decree was given,

meme profits could be allowed only from the time when the condition was fulfilled by the plaintiffs, depositing the specified amount in Court.

The first point taken by the learned counsel for the appellants raises the question as to the legal effect of the document (Exhibit P-6), upon which the defendants mainly base their contention. The document is more than 50 years old and the language of it is not very clear or definite. It begins and ends by saying that it is a deed of release. It says that as the executant is a woman unable to look after her worldly affairs and as the persons in whose favour the document is executed are the son-in-law and daughter of the executant, she has put the latter in possession of all her properties, movable and immovable. Then comes a description of the properties and after that the provisions run as follows :—

> "Therefore you shall yourself pay the quit rent, etc., payable herefor every year to the Government and enjoy the same permanently from your son to grandson and so on hereditarily. For my lifetime you shall pay for our maintenance expenses Rs. 360 per year every year, before the month of Palguna of the respective years."

The remaining clauses of the deed enjoin upon the recipients thereof the duty of realising all debts due to the executant by other people and also of paying all just debts due by her. It is stated finally that the lands are under an *izara* lease executed by the widow in favour of one Narasimha Naidu which is due to expire by the end of 1346 Fasli and it would be for the daughter and son-in-law to consider what they would do with regard to the lease.

There are no words of transfer used in the deed, though the widow purports to endow her son-in-law and daughter with hereditary rights of enjoyments in the property. The document is described as a release and is stamped as such. Apparently it comprises all the properties which the widow had, and in a sense the document indicates an intention on the part of the lady to give up all connection with business affairs. *Prima facie* these facts lend support to the story of surrender. It is not and cannot be disputed that there can be a surrender even when the next reversioner is a female heir herself who takes a limited interest in the property, though such surrender cannot give her a larger interest than she would get as an heir under the law of inheritance. The whole difficulty in this case, however, is created by the fact that the widow purports to exercise her right of relinquishment of her husband's estate in favour of two persons, one of whom is a next heir but the other, though related to her as son-in-law, is a complete stranger so far as rights of inheritance are concerned, and there can be no doubt that she intended that her husband's estate should go to the son-in-law jointly with her own daughter.

The doctrine of surrender or relinquishment by the widow of her interest in the husband's estate which has the effect of accelerating the inheritance in favour of the next heir of her husband is now a well-settled doctrine of Hindu Law which has been established by a long series of judicial decisions. Though the judicial pronouncements cannot be said to be altogether uniform or consistent, yet there can be no doubt as regards the basic principle upon which the doctrine rests, namely that it is the self-effacement by the widow or the withdrawal of her life estate which opens the estate of the deceased husband, to his next heirs at that date. "It must be remembered", thus observed the Judicial Committee in *Vytla Sitanna* v. *Marivada*[1] :

> "that the basis of the doctrine is the effacement of the widow's estate and not the *ex facie* transfer by which such effacement is brought about. The result merely is that the next heir of the husband steps into the succession in the widow's place."

This effacement may be effected by any process and it is not necessary that any particular form should be employed. All that is required is that there should be a *bona fide* and total renunciation of the widow's right to hold the property and the surrender should not be a mere device to divide the estate with the reversioners. (Vide *Rangaswami Gounden* v. *Nachiappa Gounden*[2].) It would be clear from the

1. (1934) 67 M.L.J. 20 : L.R. 61 I.A. 200 at 207 : I.L.R. 57 Mad. 749 (P.C.).

2. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).

principle underlying the doctrine of surrender that no surrender and consequent acceleration of estate can possibly be made in favour of anybody except the next heir of the husband. It is true that no acceptance or act of consent on the part of the reversioner is necessary in order that the estate might vest in him; vesting takes place under operation of law. But it is not possible for the widow to say that she is withdrawing herself from her husband's estate in order that it might vest in somebody other than the next heir of the husband. In favour of a stranger there can be an act of transfer but not one of renunciation. The position is not materially altered if, as has happened in the present case, the surrender is made in favour of the next heir with whom a stranger is associated and the widow purports to relinquish the estate in order that it might vest in both of them. So far as the next heir is concerned, there cannot be in such a case a surrender of the totality of interest which the widow had, for she actually directs that a portion of it should be held or enjoyed by somebody else other than the husband's heir. As regards the stranger, there can be no question of renunciation, the transaction at the most may be evidence of an intention to confer a bounty on him, though such intention is not clothed in proper legal form.

Mr. Rajah Aiyar made a strenuous attempt to induce us to hold that the document is a composite document combining really two separate transactions, one, an act of surrender by the widow of the entire estate in favour of her daughter and the other a transfer of a portion of the interest which thus vested in the daughter in favour of her husband. If the document could be read and interpreted that way, obviously the decision should be in favour of the appellants; but, in our opinion, there seem to be difficulties and those of an insuperable character in the way of construing the document being interpreted as such. Neither in form nor in substance does the document purport to be a relinquishment of the entire widow's estate in favour of the daughter alone, nor is there any indication that the interest intended to be given to the son-in-law was being received by him by way of transfer from the daughter. The document is not one executed by the widow and her daughter jointly in favour of the son-in-law containing a recital of relinquishment of the estate by the widow in favour of the daughter and transferring a portion of the same to the son-in-law. The daughter does not figure as an executant of the deed nor even as an attesting witness. She is the recipient of the deed along with her husband and it is impossible to spell out of the document either that she received the entire estate on renunciation by her mother or transferred or even consented to transfer a portion of it to her husband.

Mr. Aiyar in support of his contention placed great reliance upon the principle enunciated in the Full Bench decision of the Calcutta High Court in *Nobokishore* v. *Harinath*[1], which was impliedly accepted by the Judicial Committee in *Rangaswami Gounden* v. *Nachiappa Gounden*[2]. It was held by the Calcutta High Court in a number of cases which were reviewed and affirmed in *Nobokishore* v. *Harinath*[1], that a widow is entitled to sell or transfer the entire estate of her husband without any necessity but with the consent of the next reversioner so as to bar the rights of the actual reversioner at the time of her death. This was explained by the Judicial Committee as an extension of the principle of surrender in *Rangaswami Gounden* v. *Nachiappa Gounden*[2]:

> "The surrender, once exercised," observed their Lordships, "in favour of the nearest reversioner or reversioners, the estate became his or theirs, and it was an obvious extension of the doctrine to hold that inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent."

This was decided to be possible by *Nobokishore's case*[1] already cited. The judgment went upon the principle of surrender, and it might do so for the surrender there

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1. (1884) I.L.R. 10 Cal. 1102 (F.B.).
2. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).

was of the *whole estate*; but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity so that it might have been supported on the grounds to be mentioned under the second head above set forth.

It would be quite consistent with established principles of law if the widow relinquishes her interest in the husband's estate and the reversioner in whom the estate vests transfers the estate either in whole or in part to another person. If the transfer is of the entire estate, the two transactions may be combined in one document and the widow and the reversioner might jointly transfer the whole estate to a stranger but the implication in such cases must always be that the alienee derives his title from the reversioner and not the widow. The extension of this doctrine in the class of cases of which *Nobokishore* v. *Harinath*[1], may be taken as the type, seems to be rather far-fetched and somewhat anomalous. In these cases the effect of the immediate reversioner's giving consent to the alienation of the whole estate by the widow to a stranger has been held to import a double fiction; the first is the fiction of a surrender by the widow in favour of the consenting reversioner and the second is the fiction of a transfer by the latter to the alienee, although both fictions are contrary to the actual facts. It is difficult to say in the first place why a surrender should be presumed at all when the widow gives the property directly to the stranger and not to the reversioner. Even if this position is assumed, then also the question arises as to how the consent of a party can take the place of a conveyance which is requisite for the purpose of vesting title in a transferee. A consent merely binds the consenting party or anybody else who derives his title from him. If the actual reversioner at the date of the widow's death is the same person who gave his consent, obviously he can be precluded from challenging the transfer; but if the actual reversioner is a different person, there seems to be no justification for holding that he would be bound by the consent expressed by a person who had nothing but a chance of succession at that time and which chance did not materialize at all. (*See* Observations of Mahajan, J., in *Ali Mohammad* v. *Mst. Mughlani*[2].) Sir Richard Garth, C.J., in his judgment in *Nobokishore* v. *Harinath*[1], expressed considerable doubt as to the propriety of the view which would make a sale by the widow with the consent of her reversioner stand on the same footing as an actual renunciation. But in view of a series of previous decisions of the Court he was constrained to accept that view as correct.

It may be necessary for this Court at some time or other to reconsider the whole law on this subject. It seems probable that the Privy Council did not subject the decision in *Nobokishore's case*[1] to a critical examination from the point of view of the doctrine of surrender, as the transfer in that case was upheld on the ground of legal necessity as well. For the purpose of the present case we will proceed on the assumption that the law laid down in *Nobokishore's case*[1] is correct. But the doctrine should certainly not be extended any further. As was felicitously expressed by Sir Lawrence Jenkins,

> "The road to the decision in *Nobokishore's case*[1] was not without its difficulties but the learned Judges felt it had to be travelled that titles might be quieted. But it is settled that there should be no extension of this Bengal doctrine."

(Per Jenkins, C.J., in *Debi Prosad* v. *Golap Bhagat*[3]).

The present case obviously does not come within the purview of the doctrine laid down in *Nobokishore* v. *Harinath*[1], which presupposes an alienation of the entire property in favour of a stranger to which the immediate reversioner was a consenting party. Here it cannot be said that the entire interest was transferred to the son-in-law of the widow with the consent of her daughter. The interest transferred was a fraction of the interest held by the widow and strictly speaking, there was no consent expressed by the daughter. She was a sort of a

1. (1884) I.L.R. 10 Cal. 1102 (F.B.).
2. A.I.R. 1946 Lah. 180 at 188 (F.B.).
3. (1913) I.L.R. 40 Cal. 721 at 751 (F.B.).

co-assignee with her husband. Mr. Aiyar contends that her consent was implied by her accepting the deed and joining in several subsequent transactions on the basis of the same, and once this consent is established we can import the fiction of surrender in her favour of the entire estate, and if that fiction could be invoked it would be only a logical extension of the principle in *Nobokishore's case*[1] to hold that a part transfer in favour of a stranger could also be validated on the theory of surrender. We are unable to accept this chain of reasoning as sound. As stated above, it would be most improper to extend the doctrine in *Nobokishore's case*[1] which is not itself based on sound legal principles to what Mr. Aiyar calls, its logical consequence. We cannot invoke the fiction of surrender in a case like this when the renunciation, if any, was of a part of the estate; and the attempt to validate a part alienation by the widow in favour of a stranger on the basis of the doctrine of surrender, simply because the reversioner has impliedly assented to it is, in our opinion, absolutely unwarranted.

It remains to notice a few decisions of the Calcutta and Bombay High Courts upon which Mr. Rajah Aiyar relies in support of his contention. The case of *Abhay Padha* v. *Ramkinkar*[2], decided by a Division Bench of the Calcutta High Court seems to be very similar in its facts to the present case, and *prima facie* it is in favour of the appellants. There a Hindu widow executed a '*nadabi patra*' or deed of release in favour of her husband's brother who was the nearest reversioner and three sons of a predeceased brother of her husband. After the death of the widow the husband's brother instituted a suit for recovery of possession of the entire property denying the rights of his nephews under the deed executed by the widow. The suit was dismissed by both the courts below and this decision was affirmed in second appeal by the High Court. The point was definitely raised before the High Court that the transaction could not be upheld on the footing of surrender as it was partly surrender in favour of the next heir and partly an alienation in favour of certain remoter heirs. This point was disposed of by Cumming, J., who delivered the judgment, in the following manner :—

> "I do not think that there is much substance in this contention. It is a question more of form than of substance. If the widow had surrendered the whole estate to the reversioner and the reversioner had at the same moment made a transfer of his estate to his nephews nothing could be said against the transaction, and this is what in effect has been done by the present document."

We do not know what the contents of the document in the case actually were, nor whether the husband's brother joined in the execution of the document. Be that what it may, we cannot for the reasons already discussed accept the view that a transfer made by a widow of her entire estate in favour of the nearest reversioner and an outsider jointly would operate as a surrender of the whole estate to the immediate reversioner and a transfer of a half share in it to the stranger. This, of course, is subject to any rule of estoppel that may on proper materials be urged against the presumptive reversioner. This is precisely the view that has been taken by the Allahabad High Court in *Mt. Jagrani* v. *Gaya*[3], and, in our opinion, this is the correct view to take.

The learned counsel for the appellants has in this connection referred us to two decided authorities of the Bombay High Court. The first is the case of *Yeshwanta* v. *Antu*[4], where the widow together with her daughter who was the immediate heir executed a deed of gift of the entire estate in favour of a stranger who was the husband of a predeceased daughter. It was held that the transaction was valid on the basis of the doctrine of surrender. It is quite clear that this case comes directly within the purview of the principle enunciated in *Nobokishore's*[1] case, and there are two material facts which distinguish it from the case before us. In the first place, the reversioner joined with the widow in making the transfer in favour of a stranger and secondly, the transfer to the stranger was of the entire estate. There can be no difficulty in construing such a transaction as a valid act of surrender.

1. (1884) I.L.R. 10 Cal. 1102 (F.B.).
2. A.I.R. 1926 Cal. 228.
3. A.I.R. 1933 All. 856.
4. (1934) I.L.R. 58 Bom. 521.

Of the other case which is to be found reported in *Bala Dhondi* v. *Baya*[1], the facts are somewhat similar to those in the present case, but the actual decision does not assist the appellants. There a Hindu widow made a gift of the entire estate of her husband in favour of her daughter and her husband jointly, the daughter being the next heir at that time. The lower appellate court held that the gift was a valid surrender, but this decision was reversed by the High Court on appeal and it was held that the transaction was not valid in law inasmuch as it was not a gift in favour of the daughter alone but in favour of her son-in-law as well who was to take jointly with the daughter. It was further held that the daughter being a minor, was not competent to consent to the gift in favour of her husband. It is true that there is no question of minority in the present case, but the decision certainly is no authority on the point which we are called upon to decide. In our opinion the view taken by the High Court in regard to the legal effect of the document (exhibit P-6) is the correct one and the first contention raised by Mr. Rajah Aiyar should therefore fail.

We now come to the other point which relates to the question of mesne profits. Mr. Aiyar's main contention under this head is that as an alienation by the widow is not void but only voidable and the reversioner can avoid it by choosing to institute a suit, the possession of the alienee could not be held to be unlawful before that date and consequently no mesne profits should have been allowed for the period prior to the institution of the suit. The other branch of his contention is that in respect of property No. 1 of the schedule there was only a conditional decree passed against defendants 2 and 3 and so long as the condition is not fulfilled by the plaintiffs depositing the required amount in court, the plaintiffs' right to take possession does not accrue and consequently no mesne profits can be allowed to them. In support of this contention, reliance has been placed upon the decision of the Allahabad High Court in *Banwarilal* v. *Mahesh*[2].

As regards the first branch of the contention, it may be pointed out that prior to the decision of the Judicial Committee in *Bijoya Gopal* v. *Krishna Mahishi*[3] there was some misconception regarding the legal position of an alienee of a property from a Hindu widow *vis-a-vis* the reversioner, upon the death of the widow. It was held in an earlier case by the Judicial Committee that an alienation by the widow was not void but voidable and the reversioner might elect to assent to it and treat it as valid. It did not absolutely come to an end at the death of the widow. On the strength of this decision, it was held by the Calcutta High Court in *Bijoy Gopal* v. *Krishna Mahishi*[3] that it was necessary for a reversioner to have the alienation set aside before he could recover possession of the widow's property and the period of limitation for a suit to set aside such an alienation was that prescribed by Article 91 of the Indian Limitation Act. On appeal to the Privy Council, it was pointed out by their Lordships that this view was based on a misconception and they explained in what sense a transfer by a Hindu widow was not void but voidable. It was said that the alienation by a Hindu widow does not become *ipso facto* void as soon as the widow dies; for, if that were so, it could not have been ratified by the reversioners at all. The alienation though not absolutely void, is *prima facie* voidable at the election of the reversionary heir. He may, if he thinks fit, affirm it or he may at his pleasure treat it as a nullity without the intervention of any Court and he can show his election to do the latter by commencing an action to recover possession of the property. There is in fact nothing for the court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. A reversioner's suit for recovery of possession of the property alienated by a widow, it is well settled, is governed by Article 141 of the Limitation Act, and as it is not necessary that the transfer should be set aside before any decree for possession is made, all that is necessary is that the reversioner

1. (1935) I.L.R. 60 Bom. 211.
2. (1918) L.R. 45 I.A. 284: I.L.R. 41 All. 63 (P.C.).
3. (1907) 17 M.L.J. 154: L.R. 34 I.A. 87: I.L.R. 34 Cal. 329 (P.C.).

should file a suit for possession within 12 years from the death of the widow and a decree passed in such a suit must be on the basis that the possession of the transferee was unlawful ever since the widow died. This being the position, we think that it is quite proper to allow the reversioner mesne profits against the alienee from the date of the widow's death. There is no rule of law that no mesne profits can be allowed in a case where the alienation cannot be described as absolutely void. The decisions of the Judicial Committee in *Bhagwat Dayal* v. *Debi Dayal*[1] and *Satgur Prasad* v. *Har Narain Das*[2] may be cited as illustrations where mesne profits were allowed in transactions which were only voidable. We think further that there is a difference between the alienee of a widow and the transferee of joint property from a Mitakshara father. A son of a Mitakshara father is bound to set aside an alienation made by the father within the period laid down in Article 125 of the Indian Limitation Act and it is only on the alienation being set aside that he is entitled to recover possession of the property. The High Court, in our opinion, was perfectly right in holding that the decision in *Banwarilal* v. *Mahesh*[3] which related to a suit instituted by a son against an alienee of the father under the Mitakshara law does not apply to the facts of the present case. It is true that as regards defendants 2 and 3 the decree is a conditional decree and the plaintiff cannot recover possession unless he pays a certain amount of money to the extent of which the widow's estate has been held to be benefited, but the High Court has very properly allowed interest upon this amount to the alienee while making the latter liable for the mesne profits.

The result is that in our opinion, the decision of the High Court cannot be assailed on either of these two points and the appeal therefore fails and is dismissed with costs.

Agent for Appellants : *M. S. K. Aiyangar.*

Agent for Respondents : *M. S. K. Sastri.*

G.R./V.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT :—S. FAZL ALI, B. K. MUKHERJEA AND VIVIAN BOSE, JJ.

Kashmira Singh .. *Appellant**

v.

The State of Madhya Pradesh .. *Respondents.*

Confession—Confession of co-accused—Nature and use of—Principles governing.

The confession of a co-accused is not evidence in the ordinary sense of the term as it does not come within the definition of "evidence" contained in section 3 of the Evidence Act. As regards the question whether and in what manner it can be used in support of other evidence, the proper way to approach is, first, to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, *if it is believed*, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But in cases where the Judge is not prepared to act on the other evidence as it stands even though, if *believed*, it would be sufficient to sustain a conviction, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept. As regards its use in the corroboration of accomplices and approvers, a co-accused who confesses being naturally an accomplice there is the danger of using the testimony of one accomplice to corroborate another. The danger is in no way lessened when the "evidence" is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice provided the Judge has the rule of caution in mind and gives reasons why he thinks it would be safe in a given case to disregard it. It follows, that the testimony of an accomplice can

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1. (1908) L.R. 35 I.A. 48 : I.L.R. 35 Cal. 420 (P.C.).
2. (1932) 62 M.L.J. 451 : L.R. 59 I.A. 147 (P.C.).
3. (1918) L.R. 45 I.A. 284 : I.L.R. 41 All. 63 (P.C.).

*Criminal Appeal No. 53 of 1951.

4th March, 1952.

in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons disclosed.

It is not desirable to call as a witness a Magistrate who has recorded a confession. *Nazir Ahmed* v. *King Emperor*, (1936) 71 M.L.J. 476 : L.R. 63 I.A. 372 (P.C.).

Appeal by Special Leave from the Judgment and Order, dated the 8th June, 1951, of the High Court of Judicature at Nagpur (Hemeon and Rao, JJ.) in Criminal Appeal No. 297 of 1950, arising out of the Judgment and Order dated the 11th September, 1950, of the Court of the Additional Sessions Judge of Bhandara in Sessions Trial No. 25 of 1950.

Bakshi Tek Chand, Senior Advocate (*Gopal Singh* Advocate with him) for Appellant.

S. K. Kapoor, Advocate for Respondent.

The Judgment of the Court was delivered by

Bose, J.—The appellant Kashmira Singh has been convicted of the murder of one Ramesh, a small boy aged five, and has been sentenced to death. He was granted special leave to appeal. Three other persons were tried along with him. They were his brother Gurudayalsingh, his nephew Pritipalsingh (son of Gurudayal), a boy of eleven, and one Gurubachansingh. Gurudayal and Pritipal have been acquitted. Gurubachansingh confessed and was convicted. He was also sentenced to death. He has not appealed here.

The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law.

The prosecution case is this. The deceased Ramesh was the son of P. W. 48 L.P. Tiwari who was the Food Officer at Gondia at the relevant date. The appellant Kashmira Singh was an Assistant Food Procurement Inspector there. On the 1st of July, 1949, Tiwari found the appellant and Harbilas (P.W. 31) getting rice polished at a certain rice mill. At that date the polishing of rice was prohibited by a State law. Tiwari accordingly reported the matter to the Deputy Commissioner of Bhandara. He suspended the appellant and later his services were terminated by an order of the State Government with effect from the 7th of July. The orders were communicated on the 17th of November. This embittered the appellant who on at least two occasions was heard to express a determination to be revenged.

In pursuance of this determination he got into touch with the confessing accused Gurubachansing and enlisted his services for murdering the boy Ramesh.

On the 26th of December, 1949, festivities and religious ceremonies were in progress all day in the Sikh Gurudwara at Gondia. The boy Ramesh was there in the morning and from there was enticed to the house of the appellant's brother Gurudayalsingh and was done to death in a shocking revolting fashion by the appellant, with the active assistance of Gurubachansingh, in the middle of the day at about 12 or 12-30. The body was then tied up in a gunny bag and rolled up in a roll of bedding and allowed to lie in Gurudayal's house till about 7 P.M.

At 7 P.M. the body, wrapped as above, was carried by Gurubachan on his head to a chowkidar's hut near the Sikh Gurudwara. The appellant accompanied him. The map, exhibit P-18-A, shows that the distance along the route indicated was about half a mile to three quarters of a mile. It was left there till about midnight.

Shortly before midnight the appellant and Gurubachan engaged the services of a rickshaw coolie Shambhu *alias* Sannatrao, P.W. 14. They took him to the chowkidar's hut, recovered the bundle of bedding and went in the rickshaw to a well which appears from the map, exhibit P-18-A, to be about half a mile distant. There the body was thrown into the well. That in brief is the prosecution case.

Gurubachan's confession has played an important part in implicating the appellant, and the question at once arises how far and in what way the confession of an accused person can be used against a co-accused? It is evident that it is not evidence in the ordinary sense of the term because, as the Privy Council say in *Bhuboni Sahu* v. *The King*[1].

"It does not indeed come within the definition of 'evidence' contained in section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination."

Their Lordships also point out that it is

"obviously evidence of a very weak type . . . . . It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities."

They stated in addition that such a confession cannot be made the foundation of a conviction and can only be used in "support of other evidence." In view of these remarks it would be pointless to cover the same ground, but we feel it is necessary to expound this further as misapprehension still exists. The question is, in what way can it be used in support of other evidence? Can it be used to fill in missing gaps? Can it be used to corroborate an accomplice or, as in the present case, a witness who, though not an accomplice, is placed in the same category regarding credibility because the Judge refuses to believe him except in so far as he is corroborated?

In our opinion, the matter was put succinctly by Sir Lawrence Jenkins in *Emperor* v. *Lalit Mohan Chuckerbutty*[2] where he said that such a confession can only be used to "lend assurance to other evidence against a co-accused" or, to put it in another way as Reilly, J. did in *In re Periyaswami Moopan*[3]—

"the provision goes no further than this—where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in section 30 may be thrown into the scale as an additional reason for believing that evidence."

Translating these observations into concrete terms they come to this. The proper way to approach a case of this kind is, first, to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, *if it is believed*, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, *if believed*, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

Then, as regards its use in the corroboration of accomplices and approvers. A co-accused who confesses is naturally an accomplice and the danger of using the testimony of one accomplice to corroborate another, has repeatedly been pointed out. The danger is in no way lessened when the "evidence" is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice is regarded by the judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice provided the Judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it. Two of us had occasion to examine this recently in *Rameshwar* v. *The State of Rajasthan*[4]. It follows that the testimony of an accomplice can in law be used to corroborate another though it ought not to be so used save in exceptional circumstances and for reasons diclosed. As the Privy Council observe in *Bhuboni Sahu* v. *The King*[5]—

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1. (1949) 2 M.L.J. 194 : L.R. 76 I.A. 147 155 (P.C.).
2. (1911) I.L.R. 38 Cal. 559 at 588.
3. (1930) 59 M.L.J. 471 : I.L.R. 54 Mad. 75 at 77.
4. Criminal Appeal No. 2 of 1951 : Since reported in 1952 S.C.J. 46 : (1952) 1 M.L.J. 440.
5. (1949) 2 M.L.J. 194 : L.R. 76 I.A. 147 at 157. (P.C.).

"The tendency to include the innocent with the guilty is peculiarly prevalent in India, as Judges have noted on innumerable occasions, and it is very difficult for the court to guard against the danger. . . . . . . The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused."

Turning now to the facts of the present case. The evidence on which the prosecution relies, apart from the confession, is this :—

(1) *Previous association between Gurubachan and the appellant.*

The only evidence about this is that of P.W. 23 Upasrao, a water carrier. He speaks of three meetings and is curiously definite about days of the week and times though he did not know on what day of the week *diwali* fell nor could he give the names of anybody else he met on those occasions. However, for what it is worth, he says he saw them talking (1) three weeks before the murder, (2) on the 24th and (3) on the 25th. They spoke in Punjabi which he does not understand, but on the second occasion he heard them mention the name of Ramesh. Two of these meetings, namely the first and the third, tally with two of the only three meetings described in the confession. It is proved that the witness did not disclose these facts to the police but despite that the Sessions Judge believed him because of the confession. The High Court appear to have disbelieved him, for in paragraph 37 of the judgment the learned Judges point out that he is contradicted by his own statement to the police. There his story was that the three *brothers* met and not Gurubachan, and the appellant. This evidence can therefore be disregarded and consequently the confession cannot be used to prove previous association.

It was argued however that if it is proved that the appellant helped in disposing of the body after the murder, then their previous association can be inferred because one would hardly seek the assistance of a stranger for a task like that. That has some force but the weakness of that in this case lies on the fact that, according to the prosecution case as disclosed in the confession, Gurubachan was a stranger to Gondia. He had come there only six weeks before the murder and did not meet the appellant till three weeks later and then only casually. Their second meeting, equally casual, was on the 21st, that is, five days before the murder, and on that date the appellant is said to have disclosed his intention to this stranger whom he had only met once before. It is true this stranger knew the appellant's brother, but how? The brother was a travelling ticket inspector on the railway and used to allow Gurubachan to travel without a ticket, presumably because he was also a Sikh. If probabilities are to be called in aid, the story disclosed in the confession has distinct weaknesses, particularly as Gurubachan's assistance was wholly unnecessary. If the confession is true, there was a well thought out plot timed with the precision almost of a minor military operation. At a given moment the nephew Pritipal was to decoy the deceased away from his companions and isolate him. Then, after leading him several hundred yards down the road, hand him over to Gurubachan. Gurubachan was to take him down to point No. 6 on the map well over half a mile from the spot where he took over from Pritipal. In the meanwhile the appellant was to walk another half mile at right angles to Gurubachan's course to the point No. 15 to hire a cycle. From there he was to cycle close on a mile to point No. 6 and meet Gurubachan and the boy. As the learned High Court Judges who made a spot inspection, point out, the route would lie through a crowded bazaar locality. From point No. 6 Gurubachan was to hand over the child to the appellant who was to cycle with him close on a mile to his brother Gurudayal's quarters, point No. 16, through this same crowded bazaar. In the meanwhile, Gurubachan was to walk back to his house (No. 17) and pick up a chisel and a piece of wire for the purpose of the murder and rejoin the appellant at Gurudayal's house. As will be seen, the timing would have to be within fairly close tolerances. Then, at the murder itself, what assistance did Gurubachan give? Nothing which a grown man could not easily have accomplished himself on a small helpless victim of five. The appellant could have accomplished all this as easily without the assistance of Gurubachan, and equally Gurubachan, a mere hired assassin, could have done it all himself without the appellant running the risk of drawing pointed attention to himself as having

been last seen in the company of the boy. We hold that previous association of a type which would induce two persons to associate together for the purposes of a murder is not established.

(2) *That the deceased Ramesh was in the Gurudwara about* 9-30 *or* 10 *in the morning of the* 26*th.*

This is not disputed.

(3) *That Kashmira Singh who had gone to the Gurudwara in the morning was absent between* 11 *a.m. and* 12-45 *p.m.*

That the appellant was at the Gurudwara in the morning is not disputed, in fact his case is that he was there the entire day. The evidence to prove that he left it between these hours consists of three persons: P.W. 30 Atmaram, P.W. 35 Tilakchand and P.W. 5 Bisan.

The prosecution story is that the appellant left the Gurudwara about 11 A.M. to go to the shop of P.W. 5 Bisan to hire a cycle. He was first seen by P.W. 35 Tilakchand, a wood-stall-keeper, at point No. 13, just near the Gurudwara. The witness places the time at about 10-30 or 11 A.M. He says he saw him coming from the direction of the railway station and going past his stall. Fifteen minutes later, he went past his stall again in the opposite direction, that is to say, towards the railway station which lies on his way to the cycle shop.

Next comes P.W. 30 Atmaram. He keeps a bookstall on the broad guage platform of the Gondia Railway station. He says he saw the appellant coming from the bridge and going towards the Railway Police station of all places in the world: He came near enough the witness to wish him good day. He places time at about 10-30 or 11. The only comment we would make on this witness is that he says he used to see the appellant at the station almost every day and they used to greet each other. The possibility that the witness is mixing up this day with one of the other days cannot be excluded. It is certainly a matter for comment that a would-be murderer on his way to hire a cycle for the purpose and keep an assignment with his accomplice and victim should go out of his way and either go on to or very near the railway platform to greet a person he knows there and then walk away towards the Police station of all places where the danger of recognition would be strong.

Next there is P.W. 5 Bisan, the man in charge of the cycle shop. He speaks from his register and says the appellant hired a cycle from him on that day at 11-20 A.M. and returned it at 12-45 P.M. The Sessions Judge and the High Court lay great stress on this witness.

But as against this is the evidence of Anupsingh Bedi, D.W. 1, a respectable disinterested witness, who is a resident of Nagpur. He says he saw the appellant at the Gurudwara at 11 and again "about 11-45 A.M." The Sessions Judge thought he was interested because he admits he reported a complaint he had received from Gurudayalsingh to the effect that the appellant was being harassed by the Police and that they threatened to arrest ladies also, to the Inspector-General of Police and the Home Minister. He explained that as head of the Sikh community in that State he felt bound to pass on these complaints to the highest authorities. We are unable to regard this as disclosing interest. There is no suggestion that what he did was improper and we are of opinion he did nothing more than any man of responsibility in his position would have done. The High Court has not criticised him. The learned Judges merely say that he may be mistaken as to the time; nor of course does he suggest that he is giving more than a mere estimate. All he says is that, "It may have been about 11-45 A.M. by this time."

We do not think there is much in all this. Nobody, except P.W. 5 Bisan, pretends to be exact and when one is guessing at the time several days after the event there really is not much discrepancy between 11-20 and 11-45. Even if it was 11-45 there would still have been sufficient time to commit the murder. As two Courts have believed the evidence on this point without calling in aid the confession, we are

not prepared to depart from our usual rule regarding concurrent findings of fact. We will therefore accept the position that the appellant was absent from the Gurudwara long enough to enable him to commit the murder. We will also take into consideration the fact that he made a false statement on this point when he said he was not away at all.

(4) *Disposal of the body.*

The rest of the evidence relates to the disposal of the body and the only direct evidence connecting the appellant with this, apart from the confession, is that of Sannatrao P.W. 14, the rickshaw coolie. He does not bring the appellant into the picture till about midnight. Now this coolie is a very shaky witness. We cannot but note the remarkable series of coincidences which emerge from his testimony. First, he is not a rickshaw coolie at all. He merely happened to hire a rickshaw that night and he told the Police that this was the first time he had ever done that at night after a day's work. Next, he knew the appellant because he happened to be a chowkidar in the Food Office at Gondia at the same time that the appellant was there as a Food Inspector. But at the date of the incident neither was still in service, so by a somewhat strange coincidence the appellant happens to hire, for the first time, this old co-worker in the middle of the night who, in his turn, happened to hire, also for the first time at night, a rickshaw for which he had no licence. Next comes a still stranger coincidence. He is taken to within a few paces of his own house and the body is dumped, in his presence, into a well, a stone's throw from where he lives. Gurubachan tells us that earlier in the day, about 7 P.M., he (Gurubachan) had carried, unaided, the "bedding" on his head for a distance which we know was half to three quarters of a mile, namely from Gurudayal's house to the chowkidar's hut. Despite this, the two are said to have engaged this rickshaw coolie to carry it just half a mile (a shorter distance) to the well and there they threw it in the man's presence; and none of this was disclosed to the police till a month later, namely, the 17th of January, though the witness was present when the body was recovered and though he was questioned on three previous occasions.

We do not doubt that a rickshaw was used because rickshaw tracks were discovered by the well, long before anybody has suggested that a rickshaw had been used. But we find it difficult to resist the inference that this witness was an accomplice so far as the disposal of the body was concerned. Consequently, he is in much the same category so far as credibility is concerned. That brings us at once to the rule that *save in exceptional circumstances* one accomplice cannot be used to corroborate another, nor can he be used to corroborate a person who though not an accomplice is no more reliable than one. We have therefore either to seek corroboration of a kind which will implicate the appellant apart from the confession or find strong reasons for using Gurubachan's confession for that purpose. Of course, against Gurubachan there is no difficulty, but against the appellant the position is not as easy.

We will therefore examine the reliability of Gurubachan's confession against the appellant. Now there are some glaring irregularities regarding this confession and though it was safe for the Sessions Judge and the High Court to act on it as against Gurubachan because he adhered to it throughout the sessions trial despite his pleader's efforts to show the contrary, a very different position emerges when we come to the appellant.

The first point which emerges regarding this is that the confession was not made till the 25th of February, 1950, that is to say, not until two months after the murder.

We do not know when Gurubachan was first interrogated but P.W. 42 Narayandas tells us that when he was taken to the police station house at Gondia for interrogation about the 1st or 3rd of January he saw Gurubachan sitting in the police lock-up. We do not know how long he was kept there like this but it is evident that he was not there voluntarily, at any rate till the 1st or 3rd, because the Station Officer P.W. 44 says that—

"Until Gurubachansingh was arrested he used to be *allowed* to go home."

Also he says that Gurubachan was interrogated several times and was confronted with Pritipal.

However, eventually Gurubachan was allowed to go away and he went to Balaghat. Then, on the 16th of February the Station Officer P.W. 44 went to Balaghat, brought Gurubachan back with him to Gondia and handed him over to the C.I.D. Inspector, Guha. Guha, P.W. 50, tells us that from then till the 20th of February, when he was arrested, he was kept under observation but was allowed to go home at night. He did not confess till the 25th and the Station Officer, P.W. 44 tells us that from the 20th to the 25th he was kept in one of the rooms in Guha's quarters. Then, after the confession on the 25th he was taken back to Guha's custody for a couple of days, then only was he sent to the magisterial lock-up. (*See* Guha's evidence). He was kept in this lock-up till the conclusion of the committal proceedings, that is, till the 30th of June, instead of being sent to jail custody in Bhandara where there is a jail. The other accused, including Pritipal who had by then confessed, were sent to Bhandara.

Now though Gurubachan was kept in the magisterial lock-up the distinction between the magisterial lock-up and police custody in Gondia is only theoretical. In practice, it is no better than police custody. Police constable Lalbahadur, P.W. 55, tells us that—

"The Station House Officer, Gondia, deputes constables for duty in the lock-up. The constables in charge take the prisoners out to the latrine and also arrange for their food. . . . The Head Constable in fact is in charge."

Also, Guha admits that he interrogated Gurubachan in the lock-up twice within the ten days which succeeded the confession. This is in disregard of the Rules and Orders (Criminal) of the Nagpur High Court which enjoin at page 25, paragraph 84, of the 1948 edition that—

"After a prisoner has made a confession before a magistrate he should ordinarily be committed to jail and the magistrate should note on the warrant for the information of the Superintendent of the jail that the prisoner has made a confession."

No explanation has been given why these directions, which were made for good reason, were disregarded in Gurubachan's case. As we have said, the other prisoners were all committed to jail custody in the usual way, so there was no difficulty about observing the rule. All this makes it unsafe to disregard the rule about using accomplice testimony as corroboration against a non-confessing accused. None of the Judges who have handled this case have given any reason why this rule could safely be departed from in this particular case. In the circumstances, we do not feel that the confession *by itself* can be used to corroborate the rickshaw coolie Sannatrao, P.W. 14. But there is other corroboration. It consists of the sari border and this is the next point on which the prosecution relies.

There is one argument about this confession advanced on behalf of the appellant with which we shall have to deal. The prosecution were criticised for not calling the magistrate who recorded the confession as a witness. We wish to endorse the remarks of their Lordships of the Privy Council in *Nazir Ahmad* v. *King-Emperor*[1] regarding the undesirability of such a practice. In our opinion, the magistrate was rightly not called and it would have been improper and undesirable for the prosecution to have acted otherwise.

(5) *Sari borders, Articles F, G, and T.*

Articles F and G are two pieces of a sari border which were used for tying up the mouth of the gunny-bag in which the body was placed. The evidence about that is beyond doubt. Article T is another piece of a sari border which was found in the appellant's house on the 30th of December, 1949. It is true the appellant was not present at the time but his mother was there and it will be seen that it was seized on

1. (1936) 71 M.L.J. 476 : L.R. 63 I.A. 372 : I.L.R. 17 Lah. 629 (P.C.).

he same day that the body was discovered. There is strong proof that Articles F and G are a part of the same border as Article T, and as there is a concurrent finding regarding these facts we are not prepared to take a different view. That therefore affords corroboration of Sannatrao's evidence and the confession can be called in aid to lend assurance to the inference which arises from these facts, namely, that the appellant did help to dispose of the body. The High Court and the Sessions Judge were accordingly entitled to act on this evidence for establishing that particular fact and we are not prepared to disturb their concurrent conclusions. But the matter cannot be carried further because, not only are the sari borders not proved to have had any connection with the crime of murder but the confession shows that they did not. The only conclusion permissible on these facts is that the appellant, at some time which is unknown, subsequent to the murder assisted either actively or passively in tying up the gunny-bag in which the corpse was placed and that he then accompanied Gurubachan in the rickshaw from the chowkidar's hut to the well in the middle of the night.

(6) *Coat, Article X, and Safa, Article Y.*

These were seized on the 20th of January, 1950, from a trunk in the house of the appellant's brother Gurudayalsingh. The appellant's house is not in this neighbourhood. It is some distance away in another part of the town. The coat is a uniform coat of the kind worn by a Travelling Ticket Inspector on the Railways. Gurudayal is a Travelling Ticket Inspector. The appellant is not. Here again the appellant was not present when the seizures were made.

This coat and safa were recovered in the fourth search. The first search was on the 30th of December, 1949. The next on the 10th of January, 1950. The third on the morning of the 20th and the fourth in the afternoon of the 20th. These Articles were not found in the first three searches.

The Chemical Examiner reports that there is one minute bloodstain on the safa and some (the number is not given), also minute, on the coat. The seizure memo. Exhibit P-55, picked out only five. Those stains are not proved to be of human blood.

Now there is next to no evidence to connect either the coat or the safa with the appellant. The High Court has relied on the evidence of Sannatrao (P.W. 14), Gokulprasad the Station Officer (P.W. 44) and Tiwari (P.W. 48). Sannatrao does no more than say that he noticed the appellant wearing a popat coloured safa and a black coat. But he was not able to describe the clothes of the passenger he had carried immediately before the appellant, nor was he able to describe the appellant's coat in detail. That therefore is no identification of this coat with the one of the appellant wore or owns. The Station Officer Gokulprasad said that he had seen the appellant wear this very coat and safa and therefore he identified them as his clothes. In cross-examination he admitted that he had only seen the appellant on three occasions but not to speak to. Consequently, that is not strong evidence of identification. But what in our opinion is almost conclusive against this identification is that Tiwari, P.W. 48, who is clearest on the point and who of course had the best opportunities for observation, gives a distinctive feature of the appellant's coat, namely, that it *had only one button*. That is one of his reasons for knowing what the appellant used to wear. But the seizure memo. Exhibit P-55, shows that the coat, Article X, had *two buttons*. In the circumstances we find it difficult to see how it can be the appellant's coat.

There is another strong point in the appellant's favour which the High Court has not noticed. P.W. 35 the wood-stall-keeper, Tilakchand, who saw him on his way to pick up his victum, is definite that the appellant was *not* wearing a coat at the time. It is difficult to see why he should have donned a coat and got it stained with blood just for murdering a child of five. In our opinion, it would be unsafe to conclude on this evidence that any connection is established between the coat and the safa and the appellant. The furthest point to which this evidence can be pushed is

to indicate that the appellant possessed a coat *similar* to Article X *but which was not Article* X.

We do not ordinarily interfere with a concurrent finding of fact but when the finding omits to notice these two very important points in the accused's favour which, in our opinion, swing the balance the other way, we are unable to let the finding stand. In our opinion the nexus between the appellant and the coat and the safa is not established.

(7) *Motive.*

This is the last piece of evidence on which the prosecution rely. Both courts hold that the motive is established and there is strong evidence to prove it. We accordingly accept the finding that the appellant had a motive for enmity against Tiwari and that he had expressed a determination to be revenged. The only comment we will make is that other persons who were also dismissed from service had similar motives.

What then is the summary of the evidence? In the appellant's favour there are the facts that there is no proof of his having been last seen in the company of the deceased. The only evidence of the boy's movements is that of Krishna (*alias* Billa) P.W. 9, a boy of seven years, and all he says is that Pritipal asked him to bring Ramesh with him to the Gurudwara that morning about 9 A.M. The boys played about and had some tea and then Pritipal took Ramesh away in the direction of the prostitute's house. Pritipal later returned without Ramesh. The Sessions Judge thought this witness had been tutored on at least one point. Pritipal's so-called confession has been rejected because, in the first place, it is not a confession at all, for it is exculpatory, and, in the next, the High Court was not able to trust it. Therefore, the only evidence of the boy's last movements is as above.

The next point in the appellant's favour is that he was seen *without* a coat shortly before the murder and at a time when he was not in the vicinity of his own house. According to the prosecution, the murderer wore the coat, Article X, and the safa, Article Y.

The third point is that the appellant was not seen by anyone in the vicinity of the place of occurrence.

The fourth point is that if the prosecution case is true, then it is remarkable that no one saw the appellant and the boy on a cycle through nearly a mile of what the High Court which made a spot inspection describes as a crowded locality.

The points against the appellant are (1) that he had a motive and that he said he would be revenged, (2) that he was absent from the Gurudwara about the time of the murder long enough to enable him to commit and denied the fact, (3) that some twelve hours after the crime he assisted in removing the body from a place between half to three quarters of a mile distant from the scene of the crime and (4) that at some unknown point of time he assisted in tying up the mouth of the gunny bag in which the body was eventually placed. In our opinion, it would be unsafe to convict of murder on these facts.

A number of rulings were cited, including one of the Privy Council, and it was argued that in those cases persons were convicted of murder on similar facts. We do not intend to examine them because no decision can be a guide on facts. Each case has its own special circumstances and must be decided on its own facts. For example, in most of the cases cited the accused was associated with the disposal of the body very soon after the occurrence and at the scene of the crime. Here, twelve hours had elapsed and the first connection proved with the disposal is at a place over half a mile distant from where the boy is said to have been murdered. Next, the points we have shown in favour of the appellant in this case were not present there.

We allow the appeal on the charges of murder, conspiracy and kidnapping and reverse the findings and sentences on those charges and acquit the appellant

of them. We, however, convict the appellant of an offence under section 201, Indian Penal Code and sentence him to seven years' rigorous imprisonment.

The learned Sessions Judge omitted to record a conviction under section 201, because he was convicting the appellant of murder. He followed a Nagpur decision which holds that in such a case it would be improper to convict in the alternative. We express no opinion about that ; the question does not arise as we have acquitted the appellant of the murder and the cognate charges. The case now falls in line with that of the Privy Council in *Begu* v. *The King-Emperor*[1] and the conviction and sentence are confined to section 201.

Agent for Appellant : *Ganpat Rai.*

Agent for Respondents : *P. A. Mehta.*

G.R./V.S.

Appeal on charges of murder, conspiracy and kidnapping allowed : Appellant convicted of offence under s. 201 of the Penal Code.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

S. M. Raja Goundar and others .. *Petitioners**

v.

Choolai Sabapathy Mudaliar .. *Respondent.*

Practice—Absence of presiding Judge—Fixing of adjourned date by the Chief Ministerial Officer—Legality.

The proper procedure that should be followed by a presiding Judge when he is absent on a particular day is to take up the cases which are posted to that date on the next working day when he attends Court to which date the cases must be deemed to be automatically adjourned and to either take them up on that date or adjourn them to a future date. The failure to do is a mere irregularity and would not amount to failure of justice. But the practice of the chief ministerial officer of a subordinate court fixing the adjourned date under a presumed delegated authority from the presiding officer cannot be said to be illegal as it is a routine duty and not a judicial order.

Case-law discussed.

Petition under section 115 of Act V of 1908, praying the High Court to revise the judgment of the Court of the District Judge, North Arcot, in C.M.A. No. 68 of 1948, dated 22nd March, 1949 (I.A. No. 356 of 1948, in O.S. No. 100 of 1947, District Munsif Court, Vellore).

N. R. Raghavachari and *V. C. Sri Kumar* for Petitioners.

M. Natesan for Respondent.

The Court delivered the following

JUDGMENT.—O.S. No. 100 of 1947 on the file of the Court of the District Munsif of Vellore, stood posted for hearing to the 18th February, 1948 and on that day the presiding officer was on casual leave. The case was, therefore, adjourned to 4th March, 1948, on which date the defendant did not appear. An *ex parte* decree was passed against him as prayed for by the plaintiff. I.A. No. 356 of 1948 was filed by the defendants to set aside the *ex parte* decree on the ground that he was not aware of the date to which the case had been adjourned, that he had been under the impression that the adjourned date was the 5th March, 1948 and on the *bona fide* belief that the case would be heard only on 5th March, 1948, he did not attend Court on 4th March, 1948 or engage his counsel to conduct the same.

Both the lower Courts have disbelieved the plea of the defendant chiefly on the ground that the defendant did not offer himself for examination to prove the allegations contained in his affidavit. The learned District Judge says that the vakil for the defendant in the court of first instance refused to put the defendant

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1. (1925) 48 M.L.J. 643 : L.R. 52 I.A. 191 (P.C.).

*C.R.P. No. 792 of 1949. 8th September, 1950.

into the witness box although requested to do so by the opposite side; and, therefore, what was peculiarly within the knowledge of the defendant was withheld from the knowledge of the Court. For these and other reasons, the application under Order 9, rule 13, Civil Procedure Code, which was rejected by the trial Court shared the same fate at the hands of the Court of appeal.

In revision it is contended before me by the learned counsel for the petitioner that whatever might be the merits of the case, the lower Courts acted without jurisdiction in not setting aside the *ex parte* decree for the reason that the adjournment of the case from 18th February, 1948 to 4th March, 1948 was illegal and *ultra vires* the powers of the officer who ordered it. It is urged that, on the absence of a Judge or presiding officer on a particular day, the chief ministerial officer has no jurisdiction to adjourn the cases posted for that date; and such being the case the adjournment to 4th March, 1948, was entirely outside the powers of the ministerial officer and if that is so, a case wrongly posted to a date by an unauthorised person need not be attended to by the parties to that litigation. For this contention reliance was placed on two decisions of the Lahore High Court, each by a single Judge. In the first of them *Hukum Chand* v. *Mani Shirbat Dass*[1] Hilton, J., expressed the opinion that when a Judge is absent the clerk has no power to fix the adjournment date and failure to appear on a date so fixed does not justify the dismissal for default. The learned Judge relied upon an earlier decision of the same Court reported in *Jowala Sahai Dhera* v. *Maya Das*[2]. The learned Judge was further of opinion that the absence of the party on such an unauthorised adjourned date would not amount to any negligence on his part. The second of the Lahore cases is by Agha Haidar, J., in *Gulam Haidar* v. *Diwan Iqbal Nath*[3], where the learned Judge relying upon the earlier decisions in *Jowala Sahai Dhera* v. *Maya Das*[2], and in *Lalta Prasad* v. *Nand Kishore*[4], held that where the adjourned dates have been fixed by the reader of the Court who has altered the dates signed by the Subordinate Judge, such practice is wholly irregular and should be put an end to. In this case, it does not appear from the facts stated that the adjournment was on account of the absence of the presiding officer for illness or for other reasons. *Ex concessis* it has to be admitted that when there is a presiding officer in a Court and when he adjourns the case to a particular date the clerk or the reader has no right to alter the date at all; and therefore this later case of Lahore has no bearing so far as the facts of our case are concerned.

No doubt the observations of Hilton, J., in *Hukum Chand* v. *Mani Shirbat Dass*[1], are of some help to the contention urged by the learned counsel for the petitioner. What we have to see is whether th practice and procedure obtaining in this State would justify the adoption of the very wide observations made by the learned Judge in that case. Under section 24 of the Madrs Civil Courts Act, ministerial officers of a Court shall perform such duties as may from time to time be imposed upon them by the presiding officer of the Court. When a presiding officer is absent on account of illness or other reason from Court, it is to be presumed that for performing the routine duties which are not judicial on that day the presiding officer has the power to delegate it to the chief ministerial officer. No instructions have been issued by this Court to the Subordinate Courts as to what should be done with regard to cases which stand posted to a particular date when the presiding officer is unavoidably absent on that day. In such state of circumstances it seems to me that the proper procedure which ought to be followed by the Subordinate Courts is that such cases should be deemed to automatically stand adjourned to the next working day and on such next working day when the presiding officer attends Court he should either take up those cases on that day or adjourn them to suitable dates. But the practice now obtaining, as I understand is, that the chief ministerial officer adjourns such cases to certain future dates. It is this practice that has given room for the contention raised by the learned counsel for the petitioner. In my view

1. A.I.R. 1934 Lah. 984.
2. (1927) 33 P.L.R. 804.
3. A.I.R. 1936 Lah. 1000.
4. (1899) I.L.R. 22 All. 66 (F.B.).

there is nothing illegal or improper in the chief ministerial officer adjourning a case which stands posted to a particular date on which the Judge does not attend Court to a later date, if he is authorised to do so by the presiding officer. Mere adjournment of a case which has not been part-heard cannot be said to be a judicial order; and, therefore, even if the adjournment from the 18th February to the 4th March was done by the chief ministerial officer, still it cannot be held that the action was *ultra vires* and that the case cannot be deemed to have been adjourned to 4th March, 1948. Moreover, in this case there is nothing to show—because the petitioner has not offered to give evidence—that on the 18th February he was present in Court. He should have been present in Court or should have taken necessary steps for the conduct of the case on the 18th and since there is no evidence that he was present, it cannot be held that there is any duty cast upon the Court to inform him of the adjourned date when he has not conformed to the imperative duty of being present in Court. In the *Commissioner of Income-tax* v. *Perianna Pillai*[1], Curgenven, J., in delivering the judgment of the Full Bench observed as follows:

> "It is not the practice, much less a rule of procedure, even in the Court of Justice that an adjournment date is so intimated to an absent party. No doubt if a party chooses to apply, in person or by representative, at the Court or office, he can learn what orders have been passed. But he cannot insist upon a telegram or a letter by post, any more than he can insist upon a letter by a special messenger."

If, therefore, the petitioner, by his own negligence in being absent on 18th February, 1948, did not know the adjourned date, he has to thank himself. He cannot turn round and say that the chief ministerial officer had no jurisdiction to adjourn the case to a free day on a subsequent occasion. He should have presented himself on 18th February, 1948 and objected to it or he could have stated that that date would not be suitable to him or matters like that. But in the absence of such protest it cannot be held that the action of the ministerial officer in fixing a date for the hearing is illegal or irregular. The petitioner has to prove that he was not aware of the adjourned date and he has signally failed to do so.

As I have already remarked, the proper procedure that should have been followed by the presiding officer was to have taken up the cases which had stood posted for 18th February, 1948, on the next day when he attended Court and himself either heard them that day or adjourned them to a future date. But the failure to do so is a mere irregularity which would not amount to a failure of justice.

This Revision Petition is therefore dismissed but in the circumstances without costs.

V.P.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

L. Venkataswamy Chetty .. *Petitioner**

v.

V. A. Ganapathia Pillai and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), sections 75 (4) and 78 (2)—Order of adjudication—Appeal by third party against—Starting point of limitation—Applicability of sections 5 and 12 of the Limitation Act (IX of 1908).

In the case of an appeal against an order of adjudication the starting point for counting the 30 days under section 75 (4) of the Provincial Insolvency Act is in the case of parties to the proceeding the date of the order of adjudication and in the case of third parties the date of its notification in the Gazette.

In counting the 30 days, the time taken for obtaining a copy of the order of adjudication must be excluded under section 12 of the Limitation Act. The Court should also consider whether a case has been made out for the applicability of section 5 of the Limitation Act to the case of such an appeal by a third party and not summarily dismiss it when it is filed beyond the 30 days.

Petition under section 75 of the Provincial Insolvency Act, 1920, praying that the High Court will be pleased to revise the decree of the District Court,

1. (1929) 58 M.L.J. 10 at 15 (F.B.).

* C.R.P. No. 1715 of 1949. 11th February, 1952.

Tirunelveli, dated 13th July, 1949 and made in C.M.A. No. 11 of 1949 (I.P. No. 19 of 1948) on the file of the Sub-Court, Tirunelveli).

B. V. Viswanatha Ayyar for Petitioner.

S. Ramachandra Ayyar and *K. R. Rama Ayyar* for Respondents.

The Court delivered the following

JUDGMENT.—This is a Civil Revision Petition filed against the order made by the learned District Judge, Tirunelveli, in C.M.A. No. 11 of 1949.

The facts are : The petitioner before us L. Venkataswami Chetty had dealings with Ganapathi Pillai who has been adjudicated an insolvent and on the foot of the transactions between them he filed a suit in the Court of the District Munsif of Coimbatore. He obtained an order for attachment before judgment and consequently a major portion of the articles mentioned in the inventory filed by Arunagiri Nadar (to whom reference will be made later) on 7th October, 1948, had been attached and removed and came to be in the possession of this Venkataswami Chetty.

In these circumstances Arunagiri Nadar filed a creditor-petition against this Ganapathi Pillai alleging that the latter had borrowed on five promissory notes and by means of a cheque a sum of Rs. 17,000, that the amount due to the said Arunagiri Nadar as on 30th June, 1948, was Rs. 14,625-7-3, that there was a demand in August 1948 and this Ganapathi Pillai stated that he could not pay his creditors, that this Ganapathi Pillai when the creditors sought him made himself unavailable and could not be got at though searched for several times in his house and shop and that in the meanwhile the petitioner herein Venkataswami Chetti had filed a suit against Ganapathi Pillai in the Coimbatore District Munsif's Court and attached before judgment the clothes in Ganapathi Pillai's shop.

Ganapathi Pillai promptly filed a statement that it was true that this Venkataswami Chetti had obtained an order for attachment before judgment and had removed the clothes from his shop and that therefore he proposed to submit to an adjudication in order to safeguard the interests of all his creditors and that he was prepared to put all his assets and accounts in the hands of the Official Receiver except those attached and removed as aforesaid and that therefore he may be adjudged an insolvent as prayed for by Arunagiri Nadar and that all his assets be made to vest forthwith in the Official Receiver.

The psychological moment at which this creditor-petition is filed and the prompt submission to adjudication with the request that the assets in the hands of Venkataswami Chetti should be vested in the Official Receiver bore all the impress of a collusive creditor-petition.

On account of only one other person by name B. T. Subbiah Mudaliar being added as second respondent creditor as per order dated 19th November, 1948 (the creditor-petition itself was dated 24th September, 1948) and that creditor though represented by a vakil not putting forward any contention as can be seen from the order of the learned Subordinate Judge who makes no reference to this creditor in his order at all, Arunagiri Nadar had a walk over and this Ganapathi Pillai was adjudicated an insolvent on 13th December, 1948 and his assets were made to vest in the Official Receiver of Tinnevelly.

On receiving notice from the Official Receiver to make available the assets in his hand this Venkataswami Chetti of Sukravarpet in Coimbatore ran to the District Judge of Tirunelveli and filed C.M.A. No. 11 of 1949 to set aside the order of adjudication on various grounds which do not concern us for the present here.

The learned District Judge dismissed the appeal on the short ground that the order of adjudication was made on 13th December, 1948 and that this Venkatasami Chetti had applied for a copy of the order on 24th January, 1949 and received the copy on 18th February, 1949 and filed the appeal on 21st March, 1949 and that Venkataswami Chetty had not come to Court within 30 days from the date of the

order of the adjudication and also date the of publication in the Gazette on 28th December, 1948. Hence this Civil Revision Petition.

Section 75 (4) of the Provincial Insolvency Act states that any person aggrieved by an order made by a Subordinate Court may appeal to the District Court and the period of limitation for such appeal to the District Court shall be 30 days. Section 78 (2) of the said Act states that the provisions of sections 5 and 12 of the Indian Limitation Act shall apply to appeals and applications under this Act. Combining these two what will be the effect in regard to limitation in this case?

In this case we have to consider three points, namely, what was the starting point of limitation for the 30 days; secondly, whether the time taken for getting copies can be excluded; and thirdly, whether section 5 of the Indian Limitation Act is applicable.

Point 1.—The starting point of limitation in this case can only be the Gazette notification of the adjudication which was on 28th December, 1948 and cannot be the date of adjudication, *viz.*, 13th December, 1948. Section 75 (4) itself is silent in regard to the starting point of limitation. But when we consider that a person can become aggrieved only when the act by reason of which the grievance arises comes to his knowledge, the better and more commonsensical view seems to be that in the case of parties to the proceeding the 30 days would be from the date of the order because they would have known of its pronouncement and in the case of third parties the starting point would be the date of Gazette notification which would fix him with knowledge of the order passed by the Court. The object of the Gazette notification is to notify the entire world of the adjudication of an insolvent which is a judgment *in rem* so that all persons interested and aggrieved may come forward and take steps for establishing their rights or ventilating their grievances. There are observations supporting this view in *Swaminathan* v. *Latchmanan*[1]. Otherwise parties affected by it will have no means of observing the order or acting in conformity with it or of appealing against it or otherwise setting it aside. Therefore the starting point of limitation in this case is the date of Gazette notification, *viz.*, 28th December, 1948.

Point 2.—Section 12 of the Limitation Act has been clearly made applicable to an appeal under section 75 of the Provincial Insolvency Act by the provisions of section 78 and in fact the lower court itself has remarked that the appeal had been presented beyond the period of 30 days even excluding the period allowable for obtaining copy of the order. In this case the application for copy was made on 24th January, 1949 and excluding the time taken for obtaining copies, the appeal filed on 21st February, 1949, was certainly within 30 days of the date of the Gazette notification, dated 28th December, 1948.

Point 3.—But even assuming that the appeal had been filed beyond 30 days the learned District Judge was not justified in summarily dismissing the appeal but should have considered whether a case had been made out for the application of section 5 of the Limitation Act. The point is concluded by authority. In *Mahomed Siddique Yousuf* v. *Official Assignee of Calcutta*[2], their Lordships of the Privy Council have held, approving Ex parte *Learoyd*[3], that in the case of such third parties "this appeal being the sole remedy is one which justice demands that the Courts should carefully protect; and, if an extension of time for appealing is reasonably required such extension should be granted *ex debito justitiæ* to use the words of James, L.J., in Ex parte *Tucker*: In re *Tucker*[4]." Their Lordships further pointed out that though the time for appealing from an adjudication order under the Limitation Act is limited thereunder, a general power of extension of time is given by section 5 of the Act and that such applications should not be rejected as belated but should be granted. The facts of this case are even stronger than the facts covered by the

1. (1929) 59 M.L.J. 585 : I.L.R. 53 Mad. 491.
2. (1948) 2 M.L.J. 160 : L.R. 70 I.A. 93 (P.C.).
3. (1879) 10 Ch. D. 3.
4. (1879) 12 Ch. D. 308.

Privy Council decision and the decision in Ex parte *Tucker*: In re *Tucker*[1] is in point. There it was held that

"a third person who is aggrieved by an adjudication of bankruptcy, by reason of the date of an act of bankruptcy on which the adjudication purports to be founded, is, after the expiration of the time limited for appealing, entitled, *ex debito justitia*, to an extension of the time for appealing, if he applies promptly after he becomes aware of the date of the act of bankruptcy which affects his rights." *See also* Ex parte *Geisel*: In re *Stranger*[2].

The order of the lower Court cannot be sustained as this was a case where first of all applying section 12 of the Limitation Act and taking the starting of limitation as the date of Gazette notification, there is no default on the part of the appellant and his appeal is in time. Assuming that the date of starting point of limitation is the date of the order, applying section 12 of the Limitation Act the lower Court should have *ex debito justitia* applied section 5 of the Limitation Act.

In this connection it is strongly pressed by the learned advocate for the respondent that an application should have been directed to be filed under section 5 of the Limitation Act so that he might have been able to show that no case has been made out for excusing the delay and that the petitioner from the very beginning knew of the adjudication and that no case has been made out for extending *ex debito justitias* the appealing time. This is not a contention without substance. We have no materials before us to decide one way or the other.

The proper course therefore is to set aside the order of the learned District Judge and direct the petitioner to file an application under section 5 of the Limitation Act to come up along with the appeal in regard to which the order of the lower Court is set aside and to direct the learned District Judge to hear both the matters together and dispose of them according to law. Ordered accordingly. The costs of this Civil Revision Petition will abide by and be provided for in the revised order of the lower Court and the separate claims of these persons will be considered.

V.P.S. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BASHEER AHMED SAYEED.

Sivakami Ammal .. *Appellant**

v.

Bangaruswamy Reddi .. *Respondent.*

Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949), section 5 and rule 9—Failure to adjourn petition after framing issues—Ex parte *order—Setting aside—Powers.*

Under rule 9 framed under section 6 of Madras Act VI of 1949 it is the duty of a Judge to adjourn a petition for four months after framing issues. Where therefore a petition is posted for trial without framing issues there is a failure to exercise jurisdiction vested in the Judge.

Section 5 of the Act provides that all the provisions of the Code of Civil Procedure relating to suits apply to petitions under the Act. An application for setting aside an *ex parte* order under Order 9, rule 13 of the Code therefore lies.

Appeal against the orders of the Court of the Subordinate Judge of Salem dated 26th July, 1950 and 14th October, 1950, in O.P. No. 23 of 1950 and in I.A. No. 539 of 1950 in O.P. No. 23 of 1950 respectively.

N. C. Vijayaraghavachari and *N. C. Srinivasan* for Appellant.

K. S. Desikan and *K. Raman* for Respondent.

The Court delivered the following

JUDGMENT.—These two appeals are preferred by the respondent in the petition O.P. No. 23 of 1950, which was filed by the respondent herein under Act VI of 1949

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1. (1879) 12 Ch. D. 308.
2. (1882) 22 Ch. D. 436.

*A.A.O. Nos. 595 and 596 of 1950. 25th February, 1952.

for a declaration that the marriage between him and the appellant should be dissolved.

The petition itself was filed on 11th February, 1950. Counter was filed on 19th June, 1950. The learned Subordinate Judge did not frame any issues but posted the petition for trial to the 26th of July, 1950. Then, on the 26th of July, 1950, the appellant put in an application for adjournment of the trial of the petition on the ground that she was suffering from dysentery and colic pain. An affidavit also was filed in support of that petition together with a medical certificate from a qualified registered medical practitioner. This petition was dismissed by the learned Subordinate Judge with the observation that he did not think that there were any *bona fides* in the petition for adjournment. Thereafter, the learned Subordinate Judge allowed the petition *ex parte* against the appellant. The appellant thereafter preferred a petition under the Code of Civil Procedure for setting aside the *ex parte* decree and for giving an opportunity to the appellant for the trial of the suit and for letting in evidence. This petition again was dismissed by the learned Subordinate Judge on the ground that that petition was not maintainable and that only the right of appeal was to have been availed of. Against the orders in both these petitions, wherein the appellant failed in the lower Court, she has now preferred these appeals.

The first point that is urged by the learned counsel for the appellant, who is the young wife of the respondent, is that under rule 9 framed under Act VI of 1949, it was the duty of the learned Subordinate Judge to have adjourned the petition for four months after framing issues. This is apparently intended to give scope for *locus penitentia* to the parties, so that there need be no necessity for any order of dissolution of marriage, which is a solemn affair between husband and wife. Without compliance with this rule, the learned Subordinate Judge would appear to have posted the petition itself for trial on the 26th of July, 1950, without framing any issues. Thereby he has not given any opportunity to either of the parties to think over the matter and then explore the possibilities of coming together and lead a reconciled and peaceful life as husband and wife. The learned Subordinate Judge must be held to have failed to exercise the jurisdiction that vested in him under rule 9 of the rules framed under the Act.

In the second place, it is argued by the learned counsel for the appellant that the order of the learned Subordinate Judge that no petition under the Civil Procedure Code for setting aside an *ex parte* decree was sustainable is wrong. Section 5 of Act VI of 1949 provides for the provisions of the Civil Procedure Code governing suits being made applicable to all proceedings under Act VI of 1949. Under this provision, it is abundantly clear that the petition to set aside the *ex parte* order, decreeing or dismissing it would be one which is liable to be taken up and considered by the Court. Mr. Desikan for the respondent contends that Order 9, rule 13, Civil Procedure Code is not made directly applicable to petitions under Special Act VI of 1949. The provision is too general and, therefore, his argument is that unless it has been made specifically applicable, the learned Subordinate Judge was not bound to apply Order 9, rule 13. I do not think that this contention could be accepted for the reason that when all the provisions of the Civil Procedure Code applicable to suits and other proceedings are made applicable to petitions under this Special Act, there is no need for any specific provision of the Code being picked up and made directly applicable to petitions made under the Special Act. Therefore, in my view, the learned Subordinate Judge ought to have taken up the application and considered the merits of the same before passing any order. The cryptic order that has been passed by the learned Subordinate Judge that notwithstanding section 5 of the said Act the petition for setting aside the *ex parte* decree was not sustainable is on the face of it wrong and cannot be supported. In the circumstances, I must set aside both the orders of the learned Subordinate Judge and allow these appeals with costs—one set. The petition O.P. No. 23 of 1950 will, therefore, be remanded and it will be heard and disposed of according to merits.

V.P.S. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMY NAYUDU.

Chockalingam Chettiar .. *Appellant**

v.

Sivakolandu Achi .. *Respondent.*

Madras Estates Land Act (I of 1908), sections 125 and 5—Purchaser of holding in execution of a rent decree for costs—Right to hold free of encumbrances.

A purchaser of a holding in execution of a rent decree for costs would not be entitled under section 125 of the Act to hold the property free from the encumbrances which are created before or after the passing of the Act. Section 125 of the Act will have no application to such a purchaser. The arrears in the section mean arrears of rent and the priority that is given to a purchaser under section 125 can only enure to him if he is a purchaser of the holding and the holding is sold for arrears of rent. Such right is given in pursuance of the charge under section 5 of the Act for rent and interest and not for costs.

Appeal against the decree of the Court of the Subordinate Judge, Tanjore, in A. S. No. 106 of 1947 preferred against the decree of the Court of the District Munsiff, Tanjore, in O. S. No. 226 of 1946.

C. A. Mohammad Ibrahim and *T. S. Santhanam* for Appellant.

K. V. Ramachandra Aiyar for Respondent.

The Court made the following

ORDER.—The plaintiff is the appellant and he sued for possession of the suit properties on the ground of his purchase in a revenue Court auction held in execution of decrees in summary suits filed by the landholder for recovery of arrears of rent. There are three items of property involved : (1) R. S. No. 315/1 measuring 33 cents dry land, (2) R. S. No. 286/1 measuring 26 cents nanja and (3) R. S. No. 286/12 measuring 42 cents dry land. Under Ex. P-3 dated 7th August, 1946, in execution of summary suit No. 52 of 1933, the plaintiff was granted a sale certificate in respect of item No. 1, and Ex. P-2 is the sale certificate dated 27th January, 1945, granted as purchaser in the sale held in pursuance of the rent decree in S. S. No. 136 of 1933 in respect of items 2 and 3. The claim to possession is on the basis that the purchaser at an auction in a rent sale is entitled to permanent title and he holds it free from the encumbrances. The defendant claimed to purchase these properties under a private sale Ex. D-3 dated 16th September, 1943, from the owners of the land. The lower appellate Court held that in so far as item 1 is concerned Ex. P-3 showed that the purchase was in a rent sale held in a revenue Court and the decree is for arrears of rent and therefore the sale passed the property to the purchaser free of all encumbrances except those specified in section 125 of the Madras Estates Land Act. The defendants claim as purchasers of item 1 not being subject to any encumbrance of the category of those that are so excepted under section 125. The sale of item 1 in favour of the appellant was upheld and a decree for possession was granted in respect of that item. But as regards the other two items, namely, items 2 and 3, it was held that the rent decree in S. S. No. 136 of 1933 was not for any arrears of rent or interest but was only for costs and the execution petition No. 220 of 1944 on the file of the Deputy Collector, Tanjore, showed that the sale was in pursuance of the decree for costs alone. The lower appellate Court therefore held that no charge was created under the Madras Estates Land Act in respect of costs under section 5 of the Act. The charge under that section being only for rent and interest thereon and not for costs, the lower appellate Court held that the appellant was not entitled to have priority over the defendants' purchase.

Section 125 of the Madras Estates Land Act states :

"When a holding or part of a holding is sold for arrears due in respect thereof, the purchaser shall take, subject to any right or interest which the ryot has created therein with the landholder's permission in writing registered and subject also to any encumbrances created before the passing

* S.A. No. 959 of 1948. 20th March, 1952.

of this Act but not subject to any arrears of rent due in respect of the holding before the date of sale or to interest on such arrears, whether a decree has been obtained or not for such arrears of interest."

In this case the appellant is no doubt the purchaser of the holding. But the question is whether the holding was sold for arrears as specified in the said provision. The arrears would necessarily mean arrears of rent and the priority that is given to a purchaser under section 125 could only enure to him if he is a purchaser of the holding and the said holding is sold for arrears, meaning arrears of rent. The sale in this case is not a sale for arrears of rent but for costs and on a reading of section 125 it could not be held that the appellant would be entitled to seek the benefit of section 125. Apart from that, section 5 provides:

"The rent of ryoti land together with any interest which may be due in respect thereof shall be a first charge upon the holding and upon the produce of the holding of any part thereof, provided that, if gathered, the produce is in the custody or possession of the ryot or deposited on the holding or on a threshing floor or place for treading out grain, or the like, whether in the fields or within the homestead."

The right of the purchaser to hold the property purchased for arrears under section 125 free from the encumbrances except those created before the passing of the Act is given in pursuance of the charge already created under section 5 of the Act for rent and also for interest. If the decree was for interest alone and not even rent, then it may be contended that the appellant would be entitled to the benefit under section 125. But the decree is neither for rent nor for interest and there being no charge—the only charge that is created by the statute being in respect of rent and interest—it cannot be said that a purchaser of a holding in pursuance of a decree which is not either for rent or interest or both would be entitled to contend that he is a charge holder and therefore entitled to hold the property free from the encumbrances except those created by the Act.

Learned counsel for the appellant relied on the provisions of sections 126 and 127. Section 126 which is as follows:

"The portion of the holding brought to sale by the landholder shall be, as nearly as possible, equal in value to the amount of arrears due and costs"

only provides that the extent of the property that is to be brought to sale may also cover for the costs, which however cannot be taken to mean that a charge for costs is also created though it is not included in section 5 of the Act. Similarly section 127 which provides rules for disposal of the sale proceeds says that in disposing of the proceeds of sale, there shall first be paid to the landholder the costs incurred by him in bringing the holding to sale and in the next place, the amount due to him for arrears and interest up to date of payment. The costs of sale incurred by the landholder are not costs of a sale held in pursuance of a decree for sale, but by distraint and other means provided for in the Act, with the help of the Collector. In any event even this provision could not be understood as providing a charge for costs, the same not having been included in section 5 of the Act where the charge is confined to the rent and to any interest accruing due on the rent. I am therefore of opinion that a purchaser of a holding in execution of a rent decree for costs would not be entitled under section 125 of the Madras Estates Land Act to hold the property free from the encumbrances which are created before or after the passing of the Act. Section 125 will have no application to such a purchaser.

There is a memorandum of cross-objections. That arises out of the contention of the respondent that even the purchase by the appellant was benami for the judgment-debtors in O. S. No. 165 of 1944. That was raised as an issue at the trial and the learned District Munsiff went into the question and gave a finding that the purchase by the plaintiff was only benami for Nadimuthu and his brothers and that the purchase could not therefore be upheld and in any event not binding on the defendant. The appellate Court has not gone into the question and was content with disposing of the appeal on the question of law just dealt with. I consider this is a case which ought to be sent to the lower appellate Court for a finding on

the issue which was decided by the trial Court but was not dealt with by the appellate Court. The appeal is remanded for a finding on issue 1. Time for return of the finding one week after the re-opening of this Court.

V.P.S. ——— *Appeal remanded for finding.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK AND MR. JUSTICE SOMASUNDARAM.

Macharla Balaswamy of Guntur .. *Appellant**.

Penal Code (XLV of 1860), Section 86—Scope and applicability of.

The words "state of intoxication" in section 86, Penal Code, can only mean intoxication, which renders a person incapable of knowing the nature of the act in question or that he is doing what is either wrong or contrary to law when he commits it. It would be extremely dangerous to extend the protection under section 86, Indian Penal Code, to persons, who commit serious offences under the influence of liquor in varying stages and differentiate culpability in their favour as opposed to similar offences by perfectly sober persons. The law places insanity and involuntary drunkenness on the same footing by using the same criteria, *viz.* incapability of "knowing the nature of the act or that he is doing what is either wrong or contrary to law". Ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knows what the natural consequences of his act were, he must be presumed to have intended to cause them. Intention in many cases is an inference from knowledge, but there may be cases in which a person by reason of intoxication may under certain circumstances be incapable of knowing the nature of a particular act he commits or that it is either wrong or contrary to law although his state of intoxication may not be such as to render him incapable of knowing the nature of his acts. In such cases, in determining the quality of the offence, evidence may be necessary of a specific state of mind, which must be found as a fact and not assumed. It is to these exceptional cases that section 86 of the Code applies.

Appeal against the order of the Court of Session; Guntur division, in C. C. No. 37 of 1950.

K. S. Jayarama Aiyar for *C. A. Venkatanarasimham* and *A. V. Krishna Rao* for accused.

The Assistant Public Prosecutor (*A. C. Muthanna*) for the State.

The Judgment of the Court was delivered by

Mack, J.—Appellant, a cooly aged 32, has been found guilty under section 302, Indian Penal Code, of the murder of a woman, Bhudevamma by inflicting on her a single stab in the abdomen when she intervened when the appellant was stabbing her brother Venkayya (P. W. 1). He has also been found guilty under section 324, Indian Penal Code, in respect of injuries he inflicted on Venkayya, although charged in that connection of attempting to murder him under section 307, Indian Penal Code. He has been sentenced to transportation for life and to two years rigorous imprisonment respectively.

Appellant and P. W. 1 lived very close to each other in Guntur town. P.W. 1 had a bunk or petty shop by the road side. There is evidence of some previous ill-feeling between them over the purchase of a house, which was ultimately bought by P. W. 1 in competition with the appellant. P.W. 1 says he filed a complaint against the appellant about a year before this offence, which was dismissed.

The prosecution case based on the evidence of P.W. 1 and two eye-witnesses P.Ws. 2 and 3, whom the trial Court believed, was that between 6-30 and 7 P.M. on 19th April, 1950, P.W. 1 was sitting on a bench near his shop. Appellant suddenly came near him with a knife and started stabbing him. When his sister who was sitting at the shop counter came up to intervene, he stabbed her in the stomach. Appellant then ran away. Bhudevamma and P. W. 1 were both taken to the Central Crime Station, where two statements Exs. P-1 and P-2 were recorded from them. In dying declarations, Exs. P-3 and P-8 made before the Stationary Sub-Magistrate, both P. W. 1 and Bhudavamma described the appellant as being fully drunk, though there is no reference to this either in Ex. P-1 or Ex. P-2. In his evidence, P. W. 1 admitted that in the committing Court he said that appellant

* Criminal Appeal No. 41 of 1951. 4th December, 1951.

came staggering in a drunken state. Appellant was arrested at 7 P.M. on 21st April, 1950, two days later by a Head Constable (P. W. 11) who says he was even then in a drunken condition. There can be no doubt that despite the opinion of the assessors, who thought that appellant was not guilty, the learned Sessions Judge has rightly found that appellant it was who stabbed both P.W. 1 and Bhudevamma. Mr. Jayarama Aiyar for the appellant has not seriously challenged this finding and concentrated his argument before us on the plea of intoxication, which he urged in this case would, under section 86, Indian Penal Code reduce the offence from murder to culpable homicide not amounting to murder.

The injuries on P.W. 1 may well have had fatal consequences. He was stabbed twice in the chest and once in the abdomen. One chest wound was $1\frac{1}{4}''$ deep and the abdominal wound is also described as $1\frac{1}{4}''$ deep. As the doctor P.W. 13 has deposed these wounds were on vital parts of the body and if they had penetrated a little further, they may have caused danger to life. Bhudevamma had a penetrating wound, not so deep, *viz.*, $\frac{3}{4}'' \times \frac{1}{4}'' \times \frac{1}{4}''$ on the left side of the chest which unfortunately however punctured the stomach. In consequence of this, she died in the hospital the following night.

As we understand it Mr. Jayarama Aiyar's argument is that appellant was in a state of intoxication and therefore under section 86, Indian Penal Code he is not guilty of murder which requires a particular knowledge or intent and would be liable to be dealt with as if he had only the same knowledge as he would have had if he had not been intoxicated. Section 86 may be set out in extenso :

"In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will."

Sections 85 and 86 crystallize in tabloid form the law relating to intoxication or drunkenness as a defence or plea in mitigation of a criminal offence. Section 85 gives the same protection as section 84 does to a person of unsound mind, who is by reason of intoxication "incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law," provided that the thing which intoxicated him was administered without his knowledge or against his will. A person, who gets into a state of intoxication voluntarily, is presumed to have the same knowledge he would have had if he had not been intoxicated. When the state of intoxication is such as to make him incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, he can only be punished on the basis of knowledge and not of a particular intention. What is the "state of intoxication" referred to in section 86, Indian Penal Code? There are, of course, many varying degrees of drunkenness, which culminate in a state in which the person becomes incapable of knowing the nature of any act. Mr. Jayarama Aiyar's argument would include in the state of intoxication under section 86, Indian Penal Code, intermediate stages, which witnesses may describe as drunk or fully drunk, but which may not have reached the stage of incapability contemplated under section 85. We have no doubt that the words "state of intoxication" in section 86 can only mean intoxication, which renders a person incapable of knowing the nature of the act in question or that he is doing what is either wrong or contrary to law when he commits it. It would be extremely dangerous to extend the protection under section 86, Indian Penal Code, to persons, who commit serious offences under the influence of liquor in varying stages and differentiate culpability in their favour as opposed to similar offences by perfectly sober persons.

Mr. Jayarama Aiyar has referred us to the House of Lords decision, *Director of Public Prosecutions* v. *Beard*[1]. That was a case in which Beard ravished a girl 13 years old and, in furtherance of the act of rape placed his hand upon her mouth and his thumb upon her throat, thereby causing death by suffocation. The sole

1. (1920) A.C. 479.

defence raised was drunkenness. Bailhache, J., directed the Jury that if they were satisfied that the accused was so drunk that he did not know what he was doing or did not know that he was doing wrong, the defence of drunkenness succeeded to the extent of reducing the crime to man-slaughter. Beard was convicted of murder and sentenced to death. The Court of Criminal Appeal substituted a verdict of man-slaughter on the ground that the Judge was wrong in applying to a case of drunkenness the test of insanity and should have directed the Jury in accordance with the rule laid down in *Rex* v. *Meade*[1], where Lord Coleridge, J., summed up to the Jury as follows :

> "Where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of a man who does the act, the law declares this—that if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to man-slaughter."

The House of Lords in appeal restored the conviction of murder passed on Beard. Lord Birkenhead, delivering the judgment of the Court, held that the rule in *Rex* v. *Meade*[1], did not apply and that the summing up by Bailhache, J., did not amount to a misdirection although he was mistaken in applying to a case of drunkenness, the test of insanity.

In their close juxtaposition, section 84 dealing with a person of unsound mind and section 85 dealing with a person incapable of judgment by reason of intoxication against his will used the same criterion, *viz.*, an incapability "of knowing the nature of the act or that he is doing what is either wrong or contrary to law" and place insanity and involuntary drunkenness on the same footing. We are unable to see any real distinction in the view that we have taken of section 86 and the position in English law as laid down in *Rex* v. *Meade*[1], or in *Director of Public Prosecutions* v. *Beard*[2]. The view that we have taken is in accord with our own case law, though the approach is somewhat different. Ayling, J., In re *Mandru Gadaba*[3], held that ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them. Intention, of course, in many cases, is an inference from knowledge. As an intoxicated man is assumed to have the knowledge, he must, in the generality of cases, be assumed to have had the intention. But there may be cases in which a person by reason of intoxication may, under certain circumstances, be incapable of knowing the nature of *a particular act* he commits or that it is either wrong or contrary to law, although his state of intoxication may not be such as to render him incapable of knowing the nature of all his acts. In such cases, in determining the quality of the offence, evidence may be necessary of a specific state of mind, which must be found as a fact and not assumed. It is only in such cases, which are rare, that section 86 can be invoked by a person in some stage of intoxication to mitigate culpability, and to limit it to knowledge without inference of criminal intention, where the offence with which he is charged, such as murder, requires proof of a specific intention. Sections 85 and 86 were enacted in the Indian Penal Code in the year 1860 at a time when English judge-made law in the domain of intoxication had not been settled. It is a tribute to the anticipatory genius of the authors of that Code that we find even 90 years later no real difference between the law as sought to be cyrstallised there and English judicial decisions since then, which have gone up to the House of Lords. Sections 85 and 86 appear to us clear and unambiguous and we need not look beyond these sections, which appear to us to leave no room for doubt as to what the statutory law is and how it should be applied in defences raised on the ground of intoxication.

In this particular case, we are quite satisfied that although the appellant may have been the worse for liquor, he knew perfectly well what he was doing when he came up to P.W. 1 with a knife and set about stabbing him, it would

1. (1909) 1 K.B. 895.
2. (1920) A.C. 479.
3. (1914) I.L.R. 38 Mad. 479.

appear, murderously in his chest. The learned Sessions Judge appears to us to have taken a lenient and charitable view of the attack on P.W. 1, which was really more murderous than that on his sister Bhudevamma, who intervened and received only one stab in her abdomen. A man, who keeps on stabbing persons in vital parts, must clearly be presumed to know the consequences of his acts and it is not open to him to plead that he was so drunk at the time as not to know or intend what he was doing. We have no hesitation in rejecting this defence based on the distinction between knowledge and intention in section 86, Indian Penal Code put forward to reduce the offence to one under section 304, Indian Penal Code. One of the witnesses to the stabbing, P. W. 2, told the investigating officer that he saw the appellant and P.W. 1 fighting before the stabbing. The learned Sessions Judge gave this as one of the reasons for not passing on the appellant the extreme penalty. On the whole, we do not think that the extreme penalty was called for in this case. We confirm the convictions of the appellant and also the sentences passed on him, though we think, as regards the attack on P. W. 1, he should have been more correctly convicted as charged under section 307, Indian Penal Code, instead of under section 324, Indian Penal Code. With these observations, we dismiss the appeal.

Somasundaram, J.—I had the pleasure of perusing the judgment of my learned brother and I entirely agree with him. I would, however, add a few words to it.

When a person voluntarily drinks and he is in a state of intoxication, section 86 says that he shall be dealt with as if he had the same knowledge as he would have had if he had not been so intoxicated. Can he be dealt with as if he had the same intention is the question. A man is presumed to know the natural or the necessary consequences of his act, and intention being an inference of knowledge he is presumed to intend the natural consequences of his act. This is true in a majority of cases but there may be some cases where knowledge alone may not be sufficient and specific intention may have to be proved to fix the person with liability for the crime. Suppose a man in a state of complete intoxication is found in the house of another during night time. From this circumstance alone can it be presumed that he had the intention to commit theft or any of the things mentioned in section 441, Indian Penal Code. I think not. The section, no doubt imputes to him knowledge, the knowledge here being that it is wrong to enter another man's house during the night. But that is not enough for convicting him for criminal trespass. There must be further proof that he had the intention to commit an offence or one of the things mentioned in section 441. The intention in such cases cannot certainly be inferred merely from the fact that he was found inside the house though in a state of intoxication. It is to cases of this kind that section 86 in my opinion will apply and not to cases where the intention is ordinarily inferred from knowledge.

V.P.S. *Appeal dismissed.*

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—M. PATANJALI SASTRI, *Chief Justice*, S. FAZL ALI, MEHRCHAND MAHAJAN, B. K. MUKHERJEA, S. R. DAS AND N. CHANDRASEKHARA AIYAR, JJ.

N. P. Ponnuswami .. *Appellant**

v.

The Returning Officer, Namakkal Constituency, Namakkal, Salem District and four others .. *Respondents*

The Union of India
The State of Madhya Bharat } .. *Interveners.*

Constitution of India (1950), *Articles* 226 *and* 329 (*b*)—*Jurisdiction of the High Court under Article* 226—*If excluded by Article* 329 (*b*) *in regard to order of Returning Officer rejecting nomination paper for election to the State Assembly.*

*Case No. 351 of 1951. 21st January, 1952.

The High Court has no jurisdiction under Article 226 of the Constitution to entertain petitions regarding improper rejection by the Returning Officer of nomination papers of candidates for election either to the House of Parliament or to the State Assembly. The Jurisdiction of the High Court under Article 226 has been excluded in regard to matters provided for in Article 329 which covers all ' electoral matters '.

The scheme of Part XV of the Constitution and the Representation of the People Act, 1951, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any Court. Under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329 (b) was apparently enacted to prescribe the manner in which and the stage at which this ground and other grounds which may be raised under the law to call the election in question, could be urged. It follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court.

Appeal under Article 132 of the Constitution of India from the Judgment and Order dated the 11th December, 1951, of the High Court of Judicature at Madras (Subba Rao and Venkatarama Ayyar, JJ. in Writ Petition No. 746 of 1951).

The following are the Judgments delivered by the High Court :

Subba Rao, J.—These petitions are filed for issuing *writs of certiorari* quashing the orders of the Returning Officers in various Constituencies on the ground of illegal rejection or reception of nomination papers and for issuing *writs of mandamus* directing the Returning Officers to proceed with the further steps in election by excluding the impugned nomination papers or by including the valid ones, as the case may be. The first elections under the Constitution of India on the basis of adult franchise are being held. The magnitude of the experiment is unparalleled millions of voters will be going to poll. The Election Commissioner appointed under the Constitution of India prepared the electoral rolls and also made the necessary arrangements. The President of the Republic by issuing a Notification called upon the Parliament Constituencies to elect members in accordance with the provisions of the Representation of the People Act, Act XLIII of 1951. So, too, the Governor of the State issued another Notification calling upon the Assembly Constituenies to elect members in accordance with the provisions of the said Act. The Election Commission fixed the dates for nominations, for the withdrawal of nominations, for scrutiny and for poll. On or before the due date for nominations, the intending candidates filed their nominations. On the date of scrutiny, objections were taken by some of the candidates to the nominations filed by others. The Returning Officers after scrutiny rejected some nominations and accepted others. The Returning Officers invariably gave reasons for their rejection or acceptance of the nomination papers. The Petitioners, who were aggrieved by the order of the Returning Officers, filed the present applications for the aforesaid reliefs. It is not necessary to give other facts affecting the merits as we are dismissing the petitions accepting the preliminary objection raised by the Returning Officers as regards the maintainability of the applications.

The learned Advocate-General and the other Advocates representing the other Respondents raised the following four points :

(1) Article 329 of the Constitution of India is a bar to the maintainability of the present applications.

(2) The Parliament by enacting the Representation of the People Act, 1951, deprived the High Court of their power to issue *writs of certiorari* in respect of election disputes.

(3) *Writs of Certiorari* will not issue as the order of the Returning Officer is not a judicial act.

(4) *Writs of Certiorari* will not issue as the Petitioners have other remedy by way of election petition.

I shall now quote the relevant Articles of the Constitution of India and the provisions of the Representation of the People Act, 1951.

" *Article* 324 (1) : The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the Offices of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elctions to Parliament and to the Legislatures of States shall be vested in Commission (referred to in this Constitution as the Election Commission)."

" *Article* 326.—The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage ; that is to say, every person who is citizen of India and who is not less than twenty-one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."

"*Article* 327.—Subject to the provisions of this Constitution Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."

"*Article* 328.—Subject to the provisions of this Constitution and in so far as provisions in that behalf is not made by Parliament the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses."

"*Article* 329.—Notwithstanding anything in this Constitution

(*a*) the validity of any law relating to the delimitation of Constituencies or the allotment of seats to such Constituents, made or purporting to be made under Article 327 or Article 328 shall not be called in question in any Court;

(*b*) no election to either House of Parliament or the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

"*Article* 226.—(1) Notwithstanding anything in Article 32, every High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government within those territories directions, orders, or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32."

Act XLIII of 1951 was passed by the Parliament of India to provide for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt and illegal practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections.

"SECTION 80. Election Petitions. No election shall be called in question except by an election petition presented in accordance with the provisions of this Part."

"SECTION 170. No Civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or any other person appointed under this Act in connection with an election."

On the first point raised, the argument of the learned Counsel for the Respondents may be stated thus. A right to vote or stand as a candidate for an election is a political right and not a common law or a natural right and owes its existence to the Constitution and is, therefore, subject to the limitation imposed by the Constitution. It received a separate treatment in the Constitution and the subject of election was taken out of the purview of the ordinary courts. Article 324 of the Constitution lays down that the superintendence, direction and control of the election shall be vested in an Election Commission. Article 327 authorises Parliament to make law in respect to Elections. Article 329 prescribes that notwithstanding anything in the Constitution, no election can be called in question except by an election petition. The word "election petition" occurring in that article included all the matters mentioned in Article 324, that is every process of election beginning with the writ and ending with the declaration of the result. So, the provision of Article 329 precludes the High Court from calling in question the validity of nominations, which form part of an election.

The reply of the learned Counsel appearing for the Petitioners may be summarised. The Constitution conferred upon all the High Courts, in the interests of the public and the country, an extraordinary power to keep the tribunals within bounds. Unless Article 329 of the Constitution has expressly curtailed that power, the High Court's power to issue writs will remain. The word "election" though susceptible of a wider connotation, in the context it was used in a very restricted and narrower sense to mean "return at the poll". Reliance was placed for this restricted meaning on the provisions of sections 31, 32, 100 and 170 of the Representation of the People Act and Articles 324, 329 (B) and 100 (2) of the Constitution of India. It was pointed out that Article 329 was not originally contained in the Draft Constitution, but was brought in after the Draft Constitution was placed before the Constituent Assembly in the form of Article 291 (A) and that in the renumbering at the final stages of the constitution-making, it was given the number 329. Article 291 (A) as originally drafted consisted of three clauses and the last clause which read, "provision may be made by or under any law made by the appropriate Legislature for the finality of proceedings relating to or in connection with any such election at any stage of such election" was dropped. It was said that the finality clause though intended to be introduced in the Constitution was ultimately dropped and that fact clearly indicates that the Constituent Assembly did not oust the jurisdiction of Civil Courts.

The question, therefore, mainly turns upon the true interpretation to be given to the provisions of Article 329 of the Constitution of India. The Article starts with the following words: "Notwithstanding anything in this Constitution". This is a saving clause usually adopted by statutes

to give an unrestricted scope to a particular provision free from the limitations imposed by the other provisions of the Act. The words are wide, and it is not possible to contend that the powers given to the High Court under Article 226 are not controlled by that clause. For, the provisions of Article 226 will certainly come within the meaning of the words "anything in this Constitution". Learned Advocate-General argued that if Article 329 is not in accordance with the Constitution, an election can be set aside only under Article 226 of the Constitution of India and Article 329 is, therefore, expressly designed to exclude the operation of that Article. But it is pointed out by the other side that apart from Article 227, under Article 105 of the Indian Constitution relating to privilege of the Houses of Parliament and of the members and of committee thereof, and Article 194 dealing with similar matters concerning the State Legislature, the Parliament or the Legislature may make any legislation with regard to election disputes, and that therefore the opening words of Article 329 are enacted to obviate the exercise of that power. Support is sought to be derived for this argument on the state of law in England and America, where election disputes, though judicial in nature, are settled by the Legislature. Be it as it may, even if we accept this argument, the case of the petitioners is not advanced as the opening words of Article 329 excl. de in that case not only the powers of the High Court under Article 226, but also of the power of the Parliament to make law in respect of the privileges of members pertaining to election disputes. Article 329 (a) operates as a complete bar against questioning the validity of any law relating to the delimitation of Constituencies made or purporting to be made under Article 327 or Article 328 in any Court, whereas Article 329 (b) prescribes that no election can be called in question except in the manner as may be provided for by or under any law made by the appropriate Legislature. A fair reading of Article 329 therefore leads me to the conclusion that an election can be questioned only in the manner provided therein and not otherwise notwithstanding the provisions of the Article 226. It is therefore necessary to ascertain the scope and connotation of the word "election", for if a particular proceeding is not one covered by the provisions of Article 329 (a) and also not a part of election, Article 329 will not preclude the High Court from exercising the power under Article 226 in respect of that proceeding.

Therefore the learned Counsel for the Respondents argued that the word "election" is very wide and comprehensive so as to include the entire process starting from the writ and ending with the declaration of the result; whereas the Counsel for the Petitioners sought to restrict its scope only to the declaration of the result. In Wharton's Law Lexicon, page 312, the first meaning given to the word "election" is "the act of selecting one or more from a greater number for an office". In Stroude's Judicial Dictionary—Volume II, page 609, it is stated as follows: "In the Local Government Act of 1894, election includes both the nomination and the poll. The question is, which meaning should be given to the word "election" in Article 329 (b). In *Henrietta Muir Edwards* v. *Attorney-General of Canada*[1] two guides are laid down at page 127 for ascertaining the meaning of a particular word in a particular Act of Parliament. They are (1) the external evidence derived from extraneous circumstances such as previous legislation and decided cases, and (2) internal evidence derived from the Act itself. The authors of the Indian Constitution largely indented upon the Constitutions of other countries, particularly that of America and also the constitutional practice obtaining in England. The meaning attributed to the word "election" in England in various statutes will be a useful guide. 35 and 36, Queen Victoria, 1872, Chapter 33 relates to an Act to amend the law relating to procedure at Parliamentary and Mnuicipal elections. Section 13 of the Act reads: "No election shall be delcared invalid by reason of a non-compliance with the rules contained in the First Schedule to this Act or any mistake in the use of the forms in the Second Schedule to this Act, if it appears to the tribunal having cognizance of the question, that the election was conducted in accordance with the principles laid down in the body of this Act and that such non-compliance or mistake did not affect the result of the election." Schedule I prescribes the rules for Parliamentary Elections and for the issue of a notice by the Returning Officer fixing the date of the election and the place where the election is to be held. On the date of the election, candidates shall be nominated and if the election is contested the election is adjourned giving public notice of the day on which the poll will be taken. Then the poll will be taken in the manner prescribed by those rules. A perusal of the rules clearly indicate that nomination and poll though distinct are component parts of election. Rogers on "Law and Practice of Elections," Volume III, deals with the following different stages of election. Chapter II deals with the proceedings previous to election, the preparation of electoral rolls, supply of nomination papers, appointment of Returning Officers and arrangement for elections. Chapter III deals with proceedings at election such as the nomination of the candidates, withdrawal of nominations, declaration of the election, if candidates are less than the number required for the vacancies, and the taking of the poll if the election is contested. Chapter IV contains the procedure followed in proceedings after the election such as counting of votes, declaration of election, custody of ballot papers and claims against candidates, etc. The treatment of the subject by Rogers, an authority on Elections, also indicate that nomination is part of an election. The Rules framed under the Madras District Municipalities Act and Local Boards Act, which were practically copied from the English Rules, also point out the same result. The Representation of the People Act, 1951, which embodied the legislative practice obtaining in this country and in England in respect of elections, also indicate that nomination is treated as part of the election. Under that Act, an election has been defined to mean "an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State other than the State of Jammu and Kashmir and includes a primary election." Part II prescribes the qualifications and disqualifications for membership. Part III provides for the notification of General Elections. Part IV contains the administrative machinery for the conduct of elections. Part V deals with the conduct of elections. Rule 30 of the Act directs the appropriate

1. (1930) A.C. 124.

authority to fix the date for nominations. Rules 32 and 33 provides for the nomination of candidates and the particulars to be contained in the nomination paper. Rule 35 fixes the day for the scrutiny of the nomination and under Rule 36, nominations are scrutinized, and the Returning Officer decides on objections raised. Under Rule 37 the candidate is allowed to withdraw. Rule 38 deals with the publication of nominations. Chapter II of Part V prescribes rules for the appointment of agents, their revocation, and their disqualifications. Chapter III provides for uncontested elections. Chapter IV deals with the poll. Chapter V deals with counting of votes and Chapter VII with the publication of the election results. Part VI relates to disputes regarding election, and section 80 specifically states that no election shall be called in question except by an election petition presented in accordance with the provisions of this part. Under section 100 (c) if the result of the election has been materially affected by the improper acceptance or rejection of a nomination the Tribunal is enabled to set aside an election on the ground that the nomination was improperly accepted or rejected. It can only be so because the nomination is part of the election. A perusal of the various chapters of this Act also support the contention of the learned Counsel for the Respondents that nomination is treated as part of an election.

The case-law on the subject also point out to the same direction. In *Marford* v. *Linsky*[1], the facts were a candidate was, at the time of his nomination, interested in a contract with the Corporation of the Borough. The Mayor allowed the objection and the Respondent was declared elected. But before the date of the poll, he had assigned his interest in the contract. Wright, J., observed at page 858:

"In the absence of any guide, we think it safest to hold that in cases of elections under the Municipal Corporations Act a person, who at the time of nomination is disqualified for election in the manner in which this petitioner was disqualified, is disqualified also for nomination. The nomination is for this purpose an essential part of the election, and if there are no competitors, it of itself constitutes the election by virtue of the express words of section 56. A different construction might produce much confusion."

In *Srinivasalu Reddy* v. *Kuppuswami Gounder*[2], there was a vacant seat in the Taluk Board of Tindivanam, and three candidates offered themselves for election. The nomination paper of the plaintiff was rejected. The third candidate withdrew. The only remaining candidate was declared elected in accordance with the terms of Rule 7 (1) for the conduct of elections framed under the Act. The plaintiff filed a suit in the District Munsiff's Court against the President and the successful candidate for a declaration that he was a duly nominated candidate, for setting aside the election and for an injunction. Rule 1 of the Rules for the conduct of enquiries and the decision of disputes relating to elections runs as follows: "A. Save as provided in section 57 of the Madras Local Boards Act, 1920, no election held under the Madras Local Boards Act whether of a member or President of a District Board, a Taluk Board, or a Union Board, or a Vice-President of a District Board, or a Taluk Board, shall be called in question except by an election petition presented in accordance with these rules, to the District or Subordinate Judge having jurisdiction by any candidate or elector against the candidate who has been declared by the President of a Local Board to have been duly elected." The question considered was "Whether a proceeding, where only a single candidate was nominated to the seat and so no polling took place, was an 'election.'" Curgenven, J., at page 364, observed "The term is not defined in the Act or in the rules, and doubtless in its ordinary or etymological meaning, it implies some act of choosing on the part of the electorate though indeed we are accustomed to speak of an "uncontested election" where the single candidate is unopposed. The significance of "election" as a selection of one out of two or more was adopted by Phillips, J., and my learned brother in *Krishnaswami* v. *Ghulam Muhammed Ghouse*[3], but with great respect I am led by a consideration of the manner in which the word is used in the Act and Rules to attach to it a somewhat wider and more artificial meaning." The learned Judge proceeds to state at page 365, "I think, therefore, that the term 'election' may be taken to embrace the whole procedure whereby an 'elected member is returned whether or not it be found necessary to take a poll." Madhavan Nair, J., who took a different view in an earlier decision expressed his concurrence with the view of Curgenven, J., as follows: "I think, speaking for myself, that Phillips, J. and I interpreted the term 'election' in its etymological sense. The term as used in the Act seems to cover the whole procedure whereby an 'elected member' is returned, whether or not it be found necessary to take a poll." In *Selvaranga Raju* v. *Doraiswami Mudaliar*[4], a Full Bench of this Court had to consider whether a disqualification under section 49 of the Madras District Municipalities Act, 1929, can be made a ground for a petition before an "Election Court impugning the election under Rules I and II (c) of the rules for the decision of disputes as to the validity of elections held under the Act." Anantakrishna Ayyar, J., in dealing with that question observed at page 743 "I think that in the Madras District Municipalities Act also 'election' should be taken to include both the nomination and the poll. Though a restricted view of the meaning of the word 'election' was taken in some cases, I think that the view that 'election' includes both nomination and the poll was the view adopted by a larger number of learned Judges in this Court as seen from the cases cited in the Judgment of Pakenham Walsh, J., and *Mangala Goundar* v. *Ayyathorai Mudaliar*[5]." Pakenham Walsh, J., in his referring Judgment says at page 735, "In *Srinivasalu Reddy* v. *Kuppuswami Gounder*[2]." Curgenven, J., held "that the term 'election' may be taken to embrace the whole procedure whereby an 'elected member' is returned, whether or not it be found

1. (1899) Q.B. 852.
2. (1927) 27 L.W. 362.
3. (1926) 51 M.L.J. 193: I.L.R. 50 Mad. 86.
4. (1929) 57 M.L.J. 241: I.L.R. 52 Mad. 732 (F.B.).
5. (1927) 55 M.L.J. 632.

necessary to take a poll." He followed the view taken by Jackson, J., in *Srinivasachariar* v. *Venkatarama Iyer*[1], and by Wallace, J., in *Sarvothama Rao* v. *Chairman Municipal Council Saidapet*[2]. Madhavan Nair, J., agreeing with Curgenven, J., adopted this broader meaning of the term "election" as against the more restricted one which he had taken in *Krishnaswami* v. *Ghulam Muhammad Ghouse*[3] with Phillips, J. It will, therefore, be seen from the aforesaid statutes and the case-law on the subject that the word "election" has always been used and interpreted to mean the entire process comprehending not only the actual poll but also the stage of nomination.

Now, let me turn to the internal evidence afforded by the provisions of the Constitution of India itself. The Constituent Assembly was providing for elections based upon adult franchise. Part XV of the Constitution provides a complete machinery for conducting election. Under Article 324 "The superintendence, direction and control of the preparation of the electoral roll for, and the conduct of all elections to Parliament and to the Legislature of every State and of elections to the Office of President and Vice-President held under this Constitution, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission." The entire administrative control of the conduct of the elections including the appointment of the tribunals is vested in the Commission. The word "elections" in Article 324 is used admittedly in a wider sense so as to take in the stage of nominations also. The word "elections" used in Articles 326 and 327 and 328 is also used in a comprehensive sense. There is no reason why the word "election" in Article 329 (B) should be construed in its narrow sense. The provisions of Article 329 also indicate that the framers of the Constitution were making a distinction between pre-election and election process. In the case of pre-election process, that is those relating to the delimitation of Constituencies, the allotment of seats to Constituencies, were all treated purely to be of an administrative character and therefore kept outside the Courts' jurisdiction. As regards the elections-process that is the process commencing from the issue of a writ to the declaration of the result, they treated it as an election, which can only be questioned by the procedure prescribed therein that is in an election petition. If Articles 329 (*a*) and 329 (*b*) do not exhaust the administrative procedure set up by the Constitution and also the election process, an intention would have to be attributed to the framers of the Constitution that for the acts done between the delimitation of constituencies allotment of seats to such constituencies and the taking of the poll, suits in ordinary Courts could be filed. Such an intention obviously cannot be attributed to the framers of the Constitution unless the words used are clear.

Learned Counsel for the Petitioners relied upon the Debates of the Constituent Assembly in support of his argument that, though the Constituent Assembly intended to give finality to the election proceedings, they designedly omitted the clause at the time of the final framing of the Constitution. The intended clause read: "Provision may be made by or under any law made by the appropriate Legislature for the finality of proceedings relating to or in connection with any such election at any stage of such election." This clause was clause (*c*) of Article 291-A on the Draft Constitution corresponding to Article 329. Apart from the fact that it may not be permissible to go into the Debates of the Constituent Assembly to ascertain the intention of the framers, it is not possible to predicate with any certainty that the omission of the said clause was intended to save the powers of the High Court under Article 226. It may well have been omitted for the reason that the framers did not intend to give a finality to the election petition.

Learned Counsel for the Petitioners then relied upon the provisions of Article 101 (1) and 102 (1) of the Constitution, whereunder a person is disqualified for being a member of either House of the Parliament and emphasised upon the word "chosen" in the said sections; and contended that the word indicates that the word "election" is used in a narrow sense. Those sections certainly will not afford any guide for the interpretation of the word "election" in Article 329. The learned Counsel cannot obviously argue that a person disqualified can be nominated, but cannot be declared elected. Nor does the provision of Act XLIII of 1951 relied upon would solve the problem. Section 31 of the Act contains the words "shall give public notice of intended election." In the next section 32, regarding nomination, the words "candidate for election" appeared. If the word "election" in section 31 is used in a narrower sense, the word "election" in section 32 is used in a wider sense. Far from helping the learned Counsel's argument, these provisions indicate beyond any reasonable doubt that the Parliament used the word "election" also in a comprehensive sense including the stage of nomination.

It is then contended that the disputes mentioned in Article 324 are wider than the disputes under Article 329 and, therefore, in regard to disputes excluded from Article 329 the power of the High Court is intact. Article 324 does not deal with any dispute in regard to elections. It only vests the administrative control in a Commission, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to Legislatures of States. It is said "doubts and disputes arising out of or in connection with elections" are wider than the words "no election shall be called in question except by an election petition." As I have already said, Article 324 only authorises the Commission to appoint an election tribunal. The words relied upon are only descriptive of the tribunal to be appointed. It does not in any way affect the interpretation of the words in Article 329 (*b*).

The learned Counsel for the various Petitioners put before us various anomalies that will arise if the construction put forward on behalf of the Respondents is accepted. Wallace, J., in *Sarvothama*

1. (1924) 47 M.L.J. 672.
2. (1923) 45 M.L.J. 23 : I.L.R. 47 Mad. 585.
3. (1926) 51 M.L.J. 193 : I.L.R. 50 Mad. 86.

Rao v. *Chairman, Municipal Council, Saidapet*[1] has brought out the various complications that may arise in a situation similar to that presented to us in the following passage: "The election has yet to be held and I am quite clear that any post-election petition is wholly inadequate to afford the relief which the petitioner seeks, namely, that this election, now published, be stayed, until it can be held with himself as a candidate. It is no consolation to tell him that he can stand for some other election. It is no remedy to tell him that he must let the election go on and then have it set aside by petition and have a fresh election ordered. The fresh election may be under altogether different conditions and may bring forward an array of fresh candidates. The petitioner can only have his proper relief if the proposed election without him is stayed until his rejected nomination is restored." Schwave, C.J., said much to the same effect at page 591: "I do not think the law is such the plaintiff must wait until the election is held and then bring an election petition, which is bound to succeed, nor indeed would that remedy give him all that he is entitled to because after the election petition had succeeded, there would have to be fresh nominations and there might be other candidates in the field that he would not now have to meet, to say nothing of the trouble and expense that he would necessarily be put to." The learned Judges in that case have put forward with force all the difficulties and complications that will arise. To that, another anomaly also may be added. If only one person filed his nomination paper, and that is rejected, what is his remedy? It is said that he can wait till another election is held and then file an application for setting aside that election. This suggestion obviously cannot meet the situation as the petitioner is not questioning the new election and any of its irregularities but the rejection of his nomination paper in an intended election. It may be argued reasonably that as no election is held, the High Court may be moved in an appropriate case by a *Writ of Mandamus*. On the other hand, even if the argument of the petitioners be accepted, there would be other difficulties. In an election of this magnitude, complications and obstruction at every stage may introduce confusion and chaos. If Article 392 of the Constitution stood alone, and the Parliament did not enact section 170 of Act XLIII of 1951, it would be open for aggrieved persons to file suits for declaration and injunction at every stage in the process of election. In the circumstances, whichever view is accepted, it is not possible to avoid difficulties. Perhaps though they are obvious difficulties affecting individuals, in the general interests of the public and in the smooth working of the Election Machinery, it is better to have the election questioned after the results are declared, rather than at every stage of the proceedings. Be that as it may, a fair reading of the provisions of Article 329 in the context of general elections leads me to hold that the word "election" is used in a comprehensive sense, I therefore hold that the word "election" in Article 329 means the process starting from the writ and ending with the declaration of the result. In this view, the election can only be called in question by way of an election petition and not by a *Writ of Certiorari*.

Even so the learned counsel for the petitioners contended that as the word "election" is used in a comprehensive sense, nominations which are part of an election, cannot be questioned otherwise than by an election petition, and therefore the Returning Officer in hearing the objections and deciding thereon is acting without jurisdiction. In other words, they contended that the Returning Officer had no power, but simply to receive the nomination papers and allow all the candidates to contest the election. This argument is certainly ingenious, but in my view is not sound as we hold that nomination is part of the election. The entire process is one. Under section 36 (3) of Act XLIII of 1951, the Returning Officer is given the power to decide all objections which may be made to any nomination and also may, on his own motion, reject any nomination paper after a summary enquiry, if any. This is only a part of the machinery provided for election, and election can only be set aside after the declaration in the manner provided by the Act. The grounds for declaring an election void, provided for in section 100 clearly indicate that an election can be set aside, if the result of the election has been materially affected by the improper acceptance or rejection of the nomination paper. Dispute in respect of this part of the election can be raised in the election petition and as the election petition is the only remedy for calling in question an election, I am of the view that different parts of the election cannot be questioned otherwise than in an election petition.

It is then contended that the petitioner's right to stand for an election is a distinct right and that when that right is denied, he has a separate cause of action. But the right complained of is created by the Constitution itself, and if the Constitution provided a special remedy, the person aggrieved will have to pursue that remedy. The leading case on the subject on this aspect of the case is *Bhaishankar* v. *The Municipal Corporation of Bombay*[2]. The learned Judges pointed out: "Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive." To the same effect Justice Wallace observed in *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet*[1], that "the petitioner's chief contention is that the suits are maintainable under section 42 of the Specific Relief Act, as being suits by persons entitled to a legal character for the declaration of their title. That the general right of being nominated to stand as a candidate for a municipal election is a legal character cannot, I think, admit of doubt, but before it follows that section 42 will give a right of suit, we have to note that this legal character is itself the creation of a specific statute, the District Municipalities Act V of 1920, and that it is settled-law that where a statute itself sets up a proper tribunal for trying cases of the infringement of the right to such a legal character and that tribunal has functioned judicially, the Civil Court will have no jurisdiction." Here I have already held that nomination is part of the election and that the election can only be set aside in the manner provided by Article 391 of the Constitution of India. As the election cannot be questioned other than by filing an election petition, the right to be nominated, which is a component part of that election, can only be questioned in the

1. (1923) 45 M.L.J. 23 : I.L.R. 47 Mad. 585. 2. (1907) I.L.R. 31 Bom. 604.

manner provided by the Constitution. In this view, Article 226 cannot be invoked for protecting the right of the petitioner to be nominated.

The learned counsel for the respondents then contended that the power of the High Court to issue writs and other directions in regard to election disputes was taken away by the Parliament by enacting Act XLIII of 1951. His argument may be stated thus: There is a real distinction between power and jurisdiction and that power is only a mode of enforcing jurisdiction and is, therefore, incidental and ancillary to jurisdiction. Article 225 preserved to the High Court its pre-existing jurisdiction, subject to the provisions of the Constitution and to the provisions of the appropriate Legislature made by virtue of the powers conferred on that Legislature by the Constitution. That existing jurisdiction also included the power to issue writs except in the case of revenue matters. That restriction is removed, by Article 225, Article 226 is only an extension of the power which the High Courts formerly had. As the jurisdiction of the High Court is subject to any law made by the appropriate Legislature and as the Parliament enacted Act XLIII of 1951 removing the jurisdiction in respect of election disputes, the power to issue writs in respect of that subject-matter no longer exists.

To appreciate his contentions, it is necessary to read the relevant provisions of the Constitution of India. "Article 225. Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of and the law administered in any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution: Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."

"Article 226. (1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs in the nature of *Habeas Corpus Mandamus*, prohibition, *quo warranto* and *Certiorari*, or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32."

"Article 227. (1) Every High Court shall have superintendence over all Courts and tribunals throughout the territories in relation to which it exercise jurisdiction.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any Court or tribunal constituted by or under any law relating to the Armed Forces."

"Article 245. (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

"Article 246. (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List')."

Seventh Schedule. List I, Union List Item "72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; The Election Commission."

"95. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction."

Uninfluenced by the historical development of law, let us first test the argument of the learned counsel in the light of the express provisions of the Constitution. Article 225 preserves to the High Court, what I may for convenience call, ordinary jurisdiction which it was exercising before the Constitution. The jurisdiction so preserved may be pecuniary, territorial, or in respect of a subject-matter. It may be Civil or Criminal, Original or Appellate. It may relate to matrimonial, admiralty, insolvency or similar jurisdictions. The proviso to Article 225 removes the restriction on the High Court's jurisdiction in respect of revenue matters. On the other hand, Article 226 confers on every High Court an extensive power to issue writs or other directions in respect of Courts throughout the territories in relation to which it exercise jurisdiction for enforcing fundamental rights and for any other purpose. The only limitation is that the power is limited only to the territories over which the High Court had jurisdiction, that is, it can exercise that power within its territorial jurisdiction. It is deliberately intended to keep tribunals within their bounds and to reach injustice wherever it is found. Before the Constitution, the High Courts of Calcutta, Bombay and Madras were issuing prerogative writs subject to the limitations created by statutes. The other High Courts had no such power. Even the said three High Courts were not able to reach the tribunals beyond the original jurisdiction of the High Court. They were not authorised to enforce fundamental rights. The content of the power now conferred under Article 226 is different and more extensive than the limited power exercised

before. This extraordinary jurisdiction, which, I may, for convenience, call power to issue constitutional writs is not dealt with by Article 225. It cannot be treated as part of the jurisdiction of the law administered in any existing High Court, for if so held, it may mean that in the case of Courts, which had no power to issue a writ previously, fresh power had been given and in the case of Courts which had some power previously, it was an extension of that power. It is, therefore, a new power conferred on the High Courts to be exercised subject to the territorial jurisdiction. It is not a power which is an appenage only to the subject-matter dealt with under Article 225. That the High Court has territorial jurisdiction over the entire State within which it is situated, is also clear from the provisions of Article 227. It says that every High Court shall have superintendence over all Courts and Tribunals throughout the territories in relation to which it exercised jurisdiction. The only Tribunals which are excluded from its superintendence are Courts or Tribunals constituted by or under any law relating to Armed Forces.

Article 225 is subject to the provisions of the Constitution and therefore subject to the provisions of Articles 226 and 227. The construction suggested by the learned counsel for the respondents would make Article 226 subject to Article 225 which the framers of the Constitution did not purport to do. The total quantum of power of the Parliament to enact laws is dealt with in Article 245 and distribution in Article 246. Article 245 clearly says that the power of the Parliament to make any laws for the whole or any part of the territory of India is subject to the provisions of the Constitution, and is, therefore, subject to the provisions of Articles 226 and 227. The Parliament cannot, therefore, make a law in derogation of the provisions of Article 226. Nor does the argument of the learned counsel relying upon the distinction between power and jurisdiction carry his case further. It is true there is a real distinction between power and jurisdiction. It is also true that the framers of the Constitution made that distinction in many articles of the Constitution. But that does not affect the express power conferred on the High Court to issue writs within its territorial jurisdiction for the purposes mentioned therein. Article 226 does not limit that power or make it an appenage to the subject-matter over which it has jurisdiction.

Now I shall proceed to consider the argument of the learned counsel based upon the historical retrospect of the earlier legislation. Before the Constitution, the jurisdiction of the High Court to issue prerogative writs was derived from the Supreme Court. The Supreme Court derived its power under 21 Geo. III, c. 70. It was subject to the following two limitations.

(1) "That the Governor-General and Council of Bengal shall not be subject jointly or severally to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever counselled, ordered or done by them, in their public capacity only, and acting as Governor-General and Council."

(2) "And . . . . the said Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue, or concerning any act or acts ordered or done in the collection thereof according to the usage and practice of the country, or the Regulations of the Governor-General-in-Council." These limitations were again mentioned in 39 and 40 Geo., c. 79 and in the Letters Patent which were issued in pursuance thereof constituting the Supreme Court at Madras. The present High Court was constituted under the Indian High Courts Act, 1861 (24 and 25 Vic., c. 104). Section 9 of that Act conferred on the High Court every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts. Section 9, therefore, preserved in tact the power of the abolished Courts, which included right to issue *writ of certiorari* subject to existing limitations. Section 106 of the Government of India Act conferred on the High Courts all the powers vested in them by Letters Patent and subject to the provisions of any such Letters Patent, all such jurisdictions, powers and authority as are vested in those Courts respectively at the commencement of the Act.

Section 9 of the Indian High Courts Act, 1861 (24 and 25 Vic., c. 104) reads:

"Each of the High Courts to be established under the Act shall have and exercise all such civil, criminal, admiralty, and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the Presidency-towns as may be prescribed thereby; and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts."

The Letters Patent, which they issued, contained the further clause "And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the Legislative powers of the Governor-General-in-Council, exercised at meetings for the purpose of making laws and regulations and also of the Governor-General in cases of emergency under the provisions of an Act of the Twenty-fourth and Twenty-fifth years of Our Reign, chapter sixty-seven, and may be in all respects amended and altered thereby." It is clear from the aforesaid provisions that the High Court was given the same jurisdiction and authority which the Supreme Court possessed but subject to the Legislative power of the Governor-General-in-Council.

Bearing the aforesaid provisions in view, I shall now proceed to consider the cases relied upon by the learned counsel for the respondents. In *Richard Spooner and Bomanjee Nowrojee* v. *Juddoo*[1], one Hurkissondass Hurgovundass failed to pay the annual quit rent. The office of the Collector took away a globe and a lamp from the premises. Hurkissondass Hurgovundass brought an action of trespass in the Supreme Court of Bombay. Their Lordships relying upon the clause in the Letters Patent "that such Court should not have or exercise any jurisdiction in any manner concerning the revenue under the management of the Governor and Council respectively, either within or beyond the limits of the town, fort or factory, or concerning any act done according to the usage and practice of the country, and the Regulations of the Governor-and-Council, Bombay aforesaid," dismissed the suit. In that case, no question of the exercise of the prerogative *writ of certiorari* arose. The suit was dismissed because of the express provision ousting the jurisdiction of the Court in respect of revenue matters. The Judgment of Venkataramana Rao, J., in *Thyagaraja Chettiar* v. *Collector of Madura*[2] relates to the power of the High Court to issue a *Writ of Certiorari* to quash the proceedings for arresting the petitioner taken out by the Collector for realising the arrears of income-tax. That writ was dismissed on the ground the "original jurisdiction" of the High Court in section 106 (2) of the Government of India Act includes also the power to issue a writ and the High Court did not possess that jurisdiction in respect of revenue matters. But there is no provision in the Government of India Act conferring an unlimited power to issue a writ within the territorial jurisdiction of the High Court. The Full Bench decision in *District Magistrate, Trivandrum* v. *Mammen Mappillai*[3], also will not advance the respondent's case. There the question was, whether the High Court had power to issue a writ of *habeas corpus* as known to the English Common Law or whether the powers conferred in that respect were covered by section 491 of the Code of Criminal Procedure. Their Lordships held that they had no power as the Indian High Courts Act of 1861, which constituted the High Courts, expressly authorised Legislature, if it thought fit, to take away the powers which the High Court obtained as successor of the Supreme Court and that the Legislature expressly took away that power. But under the Constitution, Article 226 is not made subject to the Legislative changes in respect of the High Courts' Jurisdiction over the subject-matter. It is, therefore, clear that the power confined to the territorial jurisdiction of the High Court cannot be taken away by the Parliament by enacting laws, removing a particular subject-matter from the jurisdiction of the High Court. So long as the territorial jurisdiction subsists, its unlimited power lasts.

The next question is, whether the Parliament had, as a matter of fact, taken away the power to issue writs in respect of election disputes by enacting Act XLIII of 1951. The relevant provisions of the said Act run as follows:

"SECTION 80. Election petitions. No election petition shall be called in question except by an election petition presented in accordance with the provisions of this Part.

"SECTION 170. No Civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election."

It will be seen from the aforesaid provisions that the Parliament did not purport to take away expressly the power of the High Court to issue a *Writ of Certiorari*. In Halsbury's Laws of England, Volume 9, page 861, the following passage occurs: "It is enacted by various statutes that proceedings under them shall not be removed by the *Writ of Certiorari*. *Certiorari* is said to be 'taken away' by such statutes. *Certiorari* can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be "finally determined" in the inferior Court nor by a proviso that 'no other Court shall intermeddle' with regard to certain matters as to which jurisdiction is conferred on the inferior Court." In the latest case in England on the subject *Rex* v. *Northumberland Compensation Appeal Tribunal*[4], Lord Goddard, C.J., gave an exhaustive treatment to the scope of a *Writ of Certiorari*. At page 716, the learned Lord says: "Many statutes took away *certiorari* in respect of the matters with which those statutes dealt, but that *certiorari* was taken away never debarred the Court from granting *certiorari* if a question of jurisdiction arose." In *Rex* v. *Moreley*[5], a preacher was convicted by the Justice of the Peace under the Conventicle Act, Act 22 of Car. 2, c. 1. A clause in the sixth section of the Act reads that no other Court whatsoever shall intermeddle with any cause or causes of Appeal upon this Act but they shall be finally determined in the Quarter-Sessions only. It was argued that by the said clause, the power of the High Court to issue a *Writ of Certiorari* was taken away. The Court held that a *writ of Certiorari* ought to issue. It was observed: "a *certiorari* does not go to try the merits of the question but to see whether the limited jurisdiction have exceeded their bounds. The jurisdiction of this Court is not taken away unless there be express words to take it away. This is a point settled."

Mockett and Lakshmana Rao, JJ., in *Moorthy* v. *Eli Vedapalli*[6], considered the circumstances under which a *Writ of Certiorari* can be taken away by statutes. Mockett, J., observed at page 174: "It is, I think, axiomatic that *certiorari* can only be taken away by express negative words (*vide* Halsbury's Laws of England, Vol. IX, page 861, paragraph 1455). So long ago as 1760, it was held in *Rex*

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1. (1850) 4 M.I.A. 353.
2. (1935) 70 M.L.J. 343: I.L.R. 59 Mad. 702.
3. (1939) 2 M.L.J. 135: I.L.R. (1939) Mad. 708 (F.B.).
4. (1951) 1 K.B. 711.
5. (1760) 97 E.R. 696.
6. I.L.R. (1938) Mad. 162 at p. 174.

r. *Morley*[1] that the jurisdiction of this Court is not taken away, unless there be express words to take it away; this is a point settled." The learned Judge also cited the following passage in Ex parte *Bradlaugh*[2] with approval. "It is well established that the provision taking away the *certiorari* does not apply where there was absence of jurisdiction The consequence of holding otherwise would be that a metropolitan Magistrate could make any order he pleases without question". The Judicial Committee laid down the law in the *Colonial Bank of Australasia* v. *Willan*[3] as follows:

"There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench Division will grant a *certiorari*, but some of these authorities establish, and none are inconsistent with, the proposition that in any such case the Court will not quash or remove, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it". Act XLIII of 1951 did not expressly take away the power of the High Court to issue a *Writ of Certiorari* and, therefore, the Act did not and could not affect the power of the High Court to issue a Writ.

The next argument advanced by the counsel for the respondents was that the act of the Returning Officer in rejecting or accepting a nomination paper is not a judicial act but only an administrative one and therefore a *Writ of Certiorari* will not issue. It was also contended that a *Writ of Mandamus* would not lie as the Returning Officer discharged his duty by giving his decision, as he was bound to do so, under section 36 of Act XLIII of 1951. It has been held that "whenever a body of persons having legal authority to determine questions of the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writ (Halsbury's Laws of England, Volume 9, page 855)". In the instant case, the provisions of section 36 clearly indicate that the Returning Officer is performing the judicial act. Under section 36, on the date fixed for the scrutiny of nominations under section 36, the candidates, their election agents, one proposer, and one seconder of each candidate and one other person duly authorised in writing by each candidate may attend at such time and place as the Returning Officer may appoint and the Returning Officer may give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in section 33. If a candidate or his agent raises objection as regards the validity of any nomination paper, the Returning Officer shall decide all those objections. He is also authorised to hold the summary enquiry in deciding the questions raised. Under section 36 (6), the Returning Officer shall endorse on each nommation his decision accepting or rejecting the same and if the nomination paper is rejected shall record in writing a brief statement of his reasons for such rejection. It will be seen from the aforesaid provisions that if a dispute is raised by a candidate or his agent, the Returning Officer is bound to decide that dispute and give his reasons for his decision. He is also authorised to make an enquiry for that purpose. The order certainly affects the rights of the parties. He is authorised to exercise his jurisdiction by following the judicial process. He is also bound to give his reasons. It is true that the Returning Officer may also *suo motu* decide the validity of a nomination paper and there may be cases where the defect is so obvious that he may not make a summary enquiry. But these considerations cannot, in my view, make the act non-judicial, if it is otherwise one. I am definitely of opinion that the order of the Returning Officer is a judicial act and is liable to be quashed, if a writ is otherwise maintainable.

It is then said that there is another remedy for rectifying the wrong order of the Returning Officer and therefore following the well-recognized rule, this Court shall not issue the writ. Under section 80 of Act XLIII of 1951, no election shall be called in question except by an election petition presented in accordance with the provisions of the Act. Under section 100, the Tribunal which disposes of the election petition is authorised to set aside the election on the ground that the result of the election has been materially affected by the improper acceptance or rejection of nomination. If a person's nomination is illegally rejected and an election takes place, in his absence, it is obvious that the result of the election is materially affected. For it is impossible to predicate that the result would be the same if the rejected candidate was also allowed to compete. In a case where there is an illegal reception, the aggrieved party will have his remedy, if he establishes that the reception affected the result of the election. If he does not, the illegal acceptance does not in any way affect his right. Further the order of the Tribunal may also be subject to the jurisdiction of the High Court under Article 226 of the Constitution of India. For, in that case, it cannot be posited that an election is called in question otherwise than by an election petition. The High Court then will only be quashing the order of a Tribunal made in an election petition on permissible grounds. Though I realise there will be anomalies and complications, I cannot say that the petitioners have no effective remedy. The remedy, though delayed, is complete and exhaustive.

To conclude: A combined reading of Articles 226 and 391 of the Constitution of India indicates that the power of the High Court to issue a writ before the election petition is disposed of, is taken away. But this does not preclude the High Court from issuing a *Writ of Certiorari* on permissible grounds quashing the order of the Tribunal made in the election petition. Further a *Writ of Certiorari* will not issue at this stage as the petitioners have another effective remedy by way of an election petition. The Parliament has no power to take away the jurisdiction of the High Court to issue a writ under Article 226 of the Constitution in respect of a subject-matter so long as the territorial jurisdiction of the High Court, where a Tribunal is situated, lasts. The Parliament has not expressly taken away such power by enacting section 170 of Act XLIII of 1951. Even if the provisions of the section are construed to negative the power of the High Court to issue a writ, it cannot affect the High Court's

1. (1760) 97 E.R. 696.
2. (1878) 3 Q.B.D. 509.
3. (1874) L.R. 5 P.C. 417.

power to issue a writ when the Tribunal acts without jurisdiction or exceeds the limits of its jurisdiction. For the aforesaid reasons, I dismiss the petitions with costs. Advocate's fee in each application, Rs. 100.

Venkatarama Ayyar, J.—These are petitions presented under Article 226 of the Constitution of India calling in question the orders of the Returning Officer passed under section 36 of the Representation of the People Act, Act No. XLIII of 1951 either rejecting or accepting the nomination papers of candidates for election to the State Assembly or to the House of the People. A preliminary objection has been taken that in view of Article 329 (*b*) of the Constitution and section 170 of Act XLIII of 1951 these applications are not maintainable. On this question we had the benefit of full and erudite arguments by the learned counsel on either side. On a careful consideration of all the matters placed before us I have come to the conclusion that the preliminary objection should prevail.

I shall first deal with Article 329 (*b*) of the Constitution which runs as follows :—

"Notwithstanding anything contained in this Constitution—

(*b*) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

The contention of the learned Advocate-General and the counsel who argued in support of the same position is that this article overrides everything else in the Constitution and that, therefore, Article 226 is subject to the limitations prescribed in Article 329. On this aspect of the matter, Mr. K. V. Venkatasubramania Iyer, the learned counsel appearing for some of the petitioners contended that the power of the Courts to issue writs under Article 226 could be taken away only by "express negative words" and not by implication and that the words "Notwithstanding anything in the Constitution" do not amount to an express negation of the powers conferred by Article 226 and that it is possible to give full effect to those words by confining their operation to Article 105 (3) of the Constitution which is in these terms :—

"In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees, at the commencement of this Constitution."

In England one of the privileges of the members of the House of Commons was that a dispute relating to their qualifications or the validity of their elections should be determined by the House itself and until 1868 such disputes were determined either by the House or by a Committee of the House. In 1868 the Parliamentary Elections Act assigned this jurisdiction to one of the superior Courts at common law and that is now exercised by the King's Bench Division of the High Court, whose decision takes the form of a report to the House. (*Vide* "The Law and Custom of the Constitution" by Anson, 5th edition, page 176.) Similarly Article 1, section 5 of the American Constitution provides that "Each House shall be the judge of the Elections, Returns and Qualifications of its own members." It is argued that enquiry into the validity of disputed elections would be one of the privileges mentioned by Article 105 and but for Article 329 the only body that could have determined such disputes would be the House itself and that there would have been no jurisdiction in any Tribunal to deal with them.

It may be taken that the powers, privileges and immunities conferred by Article 105 are controlled by Article 329 so far as election disputes are concerned but it does not follow from this that Article 226 also is not controlled by Article 329 (*b*). The words "Notwithstanding anything contained in the Constitution" occurring in Article 329 are wide and unrestricted in their operation and Article 226 cannot be excluded from their purview without cutting down the plain and natural meaning of those words. It is contended that it should be so cut down so as to save Article 226 because of the principle that the power to issue prerogative writs by Superior Courts could be taken away only by express enactments but this principle applies only when the question is whether a right to move the Courts for a prerogative writ existing at the date of a statute has been taken away by it; and that would be a relevant consideration in deciding how far the jurisdiction to issue writs under Article 226 has been taken away by section 170 of Act XLIII of 1951. This principle, however, can have no application when the restrictive provision occurs in the very enactment by which power to issue writs is granted. The Constitution of India which confers the power to issue writs under Article 226 has also the power to prescribe the limits within which power could be exercised. Therefore, the only question for consideration is, has the Constitution imposed any limit on the powers conferred by Article 226? The answer must be in the affirmative and it must be held that those powers have been taken away with reference to cases falling within the purview of Article 329 (*b*).

Then the question is what is the true scope of Article 329 (*b*). Under that sub-clause an election can be called in question only by an election petition presented to an authority to be established by the appropriate Legislature. Therefore no election can be called in question by a writ in the High Court. Now the contention of the petitioners is that election means the declaration of the candidate as the successful one on a poll or even return of a candidate when there is no contest that scrutiny of nomination paper is a process preliminary to election and not in itself an election or a part of it and that when the decision of the polling officer is questioned there is no election which is called in question. The respondents contend that election is used in Article 329 (*b*) in a wide sense as comprehending not merely declaration or return of candidates but the entire process of election commencing with the issue of notification for election and culminating in the return of a candidate where there is no contest and in the declaration of the successful candidate where there is polling; that the nomination of candidates is an integral part of an election and the decisions of the Returning Officer are

made in the course of the election and must be set aside in the manner provided in Article 329 (b). The question is which of these two rival interpretations is to be accepted as the correct one? That is the crucial question for determination in this case. Counsel appearing for the respondents cited a number of authorities and authoritative opinions in support of the extended connotation of the word "election". In England an election is generally understood as commencing with the issue of the writ and for some purposes it is considered as beginning even earlier; that is with reference to election expenses and Corrupt and Illegal Practices Prevention Act. In Halsbury's Laws of England, Vol. 12, page 237, paragraph 493, the law is stated in these terms:

"Although the first formal step in every election is the issue of the writ the election is considered for some purposes to begin at earlier date."

In Parker's "Powers, Duties and Liabilities of an Election Agent and of a Returning Officer" (5th edition, page 120) it is stated: "An election is a process ending in a single, valid and recognised return of a duly qualified candidate." Dealing with the question of election expenses the law is stated in these terms: "The question is one to be determined by the facts of each particular case; but until the law is more settled the safest course is to consider that the election has commenced as soon as any definite step is taken in respect of the candidature, or preparation for, or towards the conduct or management of the election of any particular person." The decisions cited in the English and Empire Digest, Vol. 20 at page 48 are generally to the same effect. This question has been considered in several cases which have come before this Court. In *Srinivasalu Reddy* v. *Kuppuswami Goundar*[1] the facts were that the nomination of a candidate was rejected and the other candidate was declared elected without contest. The rejected candidate filed an action to set aside the election. It was held that Rule 1 of the Election Rules, which provided that no election shall be called in question except by an election petition presented in accordance with the rules, was a bar to the maintainability of the action. On the question as to whether election within the meaning of the rule included rejection of the nomination paper it was held that it did. The following observations of Curgenven, J., are relevant:—

"The term (election) is not defined in the Act or in the rules and doubtless in its ordinary or etymological meaning it implies some act of choosing on the part of the electorate, though indeed we are accustomed to speak of an 'uncontested election' where the single candidate is unopposed. . . I think, therefore, that the term 'election' may be taken to embrace the whole procedure whereby an 'elected member' is returned whether or not it be found necessary to take a poll. This is the view taken by Jackson, J., in the case cited *Srinivasachariar* v. *Venkatarama Aiyar*[2] and by Wallace, J., in *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet*[3] and I respectfully concur in it."

Madhavan Nair, J., who, sitting with Philips, J., had adopted a narrower meaning of the word "election" in *Krishnaswami* v. *Ghulam Mohammed Ghouse*[4] agreed with Curgenven, J. and observed that "The term as used in the Act seems to cover the whole procedure whereby an 'elected member' is returned whether or not it be found necessary to take a poll."

In *Selvaranga Raju* v. *Doraiswami Mudaliar*[5], where the question was about the validity of an election under the Madras District Municipalities Act, the question incidentally arose as to the precise meaning of the word "election" under that Act and the rules framed thereunder. The following observations of Anantakrishna Ayyar, J., on that point may be quoted:

"The first question is, what exactly is the scope of what is termed 'election' in the District Municipalities Act and the rules framed thereunder. In Wharton's Law Lexicon, page 312, the first meaning given to the word 'election' is 'the act of selecting one or more from a greater number for an office'." In Stroude's Judicial Dictionary, Volume II, page 609, it is stated as follows:

"In the Local Government Act of 1894, election includes both the nomination and the poll (section 75). I think that in the Madras District Municipalities Act, also, 'election' should be taken to include both the nomination and the poll. Though a restricted view of the meaning of the word 'election' was taken in some cases, I think that the view that 'election' includes both nomination and the poll was the view adopted by a larger number of learned Judges in this Court, as seen from the cases cited in the judgment of Pakenham Walsh, J. Notwithstanding the use of the words 'nomination' and 'election' in section 49, clause (2) of the Act, and speaking with all respect, I think that latter is the correct view to take. The rules framed for the conduct of elections of Municipal Councillors assume that nomination of candidates is included in the election."

In *Harford* v. *Linskey*[6], the point for determination was whether a candidate whose nomination was rejected could present a petition for questioning the election. In affirming that right Wright, J., observed as follows: "The nomination is for this purpose an essential part of the election, by virtue of the express words of section 56. A different construction might produce much confusion."

Counsel for the petitioners relied on the decision in *Krishnaswamy* v. *Ghulam Muhammad Ghouse*[4] and the observations occurring in *Lakshmanan Chetty* v. *Kannappar*[7]. The case in *Krishnaswamy* v. *Ghulam Muhammad Ghouse*[4] is undoubtedly an authority for interpreting the word "election" narrowly,

1. (1927) 27 L.W. 362.
2. (1924) 47 M.L.J. 762.
3. (1923) 45 M.L.J. 23: I.L.R. 47 Mad. 585.
4. (1926) 51 M.L.J. 193: I.L.R. 50 Mad. 86.
5. (1929) 57 M.L.J. 241: I.L.R. 52 Mad. 732 (F.B.).
6. (1899) 1 Q.B. 852.
7. (1926) 51 M.L.J. 738: I.L.R. 50 Mad. 121 at p. 126 (F.B.).

but as already mentioned Madhavan Nair, J., who was a member of the Bench came to a different conclusion after hearing fuller arguments on the meaning of the word "election". (Vide *Srinivasalu Reddi* v. *Kuppuswamy Goundar*[1].) In *Lakshmanan Chetty* v. *Kannappar*[2], the question was whether the Chief Judge, Court of Small Causes, Madras, acted as a Court in deciding the election petition. It was held that he was acting as *persona designata* and that his decision was not liable to be challenged in revision. The decision is, therefore, not material to this case. But the following observations at page 126 are relied on as supporting a narrow construction :—

"Section 59 (2) (*b*) of the Act (District Municipalities Act) provides that 'The Governor-in-Council may make rules which may provide for the adjudication by the Court of Small Causes of disputes . . . . . arising out of elections'. In our opinion 'elections' within the meaning of that section means completed elections which have resulted in the creation of a Councillor ; and does not cover disputes before such election ;"

These observations have relation to the terms of the particular section which was under interpretation and cannot be read as laying down a general rule that election excludes the process ending in the declaration.

The result of the authorities then is to establish the position that though the etymological meaning of the word election might be limited to the act of choosing the candidate it has an extended meaning as including the entire process which ends with the choosing. In other words it has become a term of art comprehending in its connotation the entire procedure of election. That, of course, does not mean that in any particular context the word might not be used in a narrow sense. The question is ultimately one to be decided on a construction of the statute.

I shall now examine the relevant provisions of the Constitution with a view to ascertain whether an election in Article 329 (*b*) is used in a narrow or an extended sense. That Article is the last of a series of Articles forming part XV of the Constitution which is headed "Elections". Article 324 provides for the Constitution of an election commission ; and the superintendence, direction and control of the preparation of the electoral rolls for and the conduct of, all elections are vested in this Commission. There is a further provision that the Commission has the power to appoint Tribunals "for the decision of all doubts and disputes arising out of or in connection with elections". The intention as expressed in this article clearly is that the Commission is to assume charge of the "Election" from the time when the electoral rolls are prepared and what is more it is to have the assistance of Tribunals with comprehensive power to decide all questions arising out of and in connection with the "election". It is impossible to contend that "election" in this context is limited to the choosing of candidates. It is of the widest import comprehending all the processes preceding it. Article 327 provides for laws being enacted by Parliament with respect to matters relating to or in connection with "election". It has not been contended that election in this article is limited to choosing of candidates. The law which is contemplated by Article 327 cannot obviously be one merely regulating polls and the counting of votes. It must include the earlier stages from the issue of notification. That indeed is the scope of Act XLIII of 1951. Article 328 is also in the same terms as Article 327. Then we have Article 329 which provides that no election shall be called in question except by an election petition. If the words "election" is used in an extended sense in Articles 324, 327 and 328 there is no reason why it should be used in a different and restricted sense in Article 329. It cannot be that in the same enactment and in the same chapter the same word is used in two different senses. The scheme of Part XV is to treat election as one comprehensive unit; to create one body of Commissioners as a compact machinery for working it and to entrust the judicial functions in relation thereto to special Tribunals. The Constitution does not regard the actual polling and the declaration following thereon as constituting election ; it treats the entire process of election as one continuous and indivisible whole and the nomination of candidates as an integral part of a single process. It would follow from this that election in Article 329 (*b*) includes all the steps commencing with the notification and ending with the declaration or return of candidates and that the nomination of candidates is a part of the process of election ; and that any person aggrieved by a decision of the Returning Officer can question it only by an election petition as prescribed by Article 329 (*b*).

The learned counsel appearing for the several petitioners addressed the following arguments in support of a limited construction of Article 329 (*b*) :

(1) It was argued that the history of the enactment of Article 329 (*b*) in the Constituent Assembly indicated that no finality should be attached to decisions of Returning Officers. In the Draft Constitution there was nothing corresponding to Article 329. Article 291 (A) was then introduced by way of amendment to the Draft. It runs as follows :

"291-A. Notwithstanding anything contained in this Constitution—

(*a*) the validity of any law relating to the delimitation of Constituencies or the allotment of seats to such Constituencies, made or purporting to be made under Article 290 or Article 291 of this Constitution shall not be called in question in any Court ;

(*b*) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature ;

(*c*) provision may be made by or under any law made by the appropriate Legislature for the finality of proceedings relating to or in connection with any such election at any stage of such election."

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1. (1927) 27 L.W. 362. .. at p. 126 (F.B.).
2. (1926) 51 M.L.J. 738 : I.L.R. 50 Mad. 121

When the Constitution Act was finally passed clause (c) came to be omitted. It is suggested that the omission of section 291-A (c) is an indication that there should be no finality in respect of proceedings relating to or in connection with any election as distinct from the election referred to in section 291-A (b) and that, therefore, "election" in Article 329 (b) does not include the earlier stages. It may be a question how far this circumstance can be looked into to ascertain the meaning of the word "election". In any event it is not possible to speculate on the reasons for its inclusion at one stage and its omission at another. It might have been omitted because it might have been considered redundant. We can only take the Act as it has finally emerged out of the Legislative anvil and as already stated the word "election" in Article 329 (b) in its setting in Part XV and in juxtaposition to Articles 324, 327 and 328 is used in an extended sense.

(2) It was contended that Articles 84 and 102 enact that only persons possessing particular qualifications shall be chosen to the Legislature and that if Article 329 (b) is read along with Articles 84 and 102 it would indicate that election is used in the sense of selection and that only the final stage is intended and not the process preceding it. But Part XV is a special chapter dealing with elections. It is a code in itself and its provisions are self-contained. The meaning of the word "Election" in Article 329 (b) must be determined by reference to the provisions in chapter XV and that will prevail notwithstanding anything in Article 84 or Article 102.

(3) It was next contended that if nomination is part of election a dispute as to the validity of nomination is a dispute relating to election and that can be called in question only in accordance with the provisions of Article 329 (b) by the presentation of an election petition to the appropriate Tribunal and that the Returning Officer would have no jurisdiction to decide that matter and it was further argued that section 36 of Act XLIII of 1951 would be *ultra vires* inasmuch as it confers on the Returning Officer a jurisdiction which Article 329 (b) confers on a Tribunal to be appointed in accordance with the Article. The scheme of Act XLIII of 1951 is that it entrusts the power to decide on the validity or otherwise of nomination papers to the Returning Officer and under section 100 (c) it confers on the candidate a right to challenge the election on the ground that the decision of the Returning Officer is erroneous.

On behalf of the Respondents several answers were sought to be given to this contention. One is that under section 36, the Returning Officer has a right *suo motu* to accept or reject the nomination paper; that when objection to the validity of the nomination paper is presented by a rival candidate the Returning Officer has a discretion to hold "such summary enquiry, if any, as he thinks necessary"; that the matter is purely one between the Returning Officer and the candidate and that to such a situation the words "calling in question" will be inappropriate because the elections are called in question not by the Returning Officers but by the candidates. It was added that if rival candidates are heard by the Returning Officer on their objections to the validity of the nominations it was for his own guidance and not as a matter of right and that the case was analogous to exercise of revisional jurisdiction by Courts.

Apart from this, the decision of the Returning Officer is only a stage in the process of election. There is a completed election only when the declaration or return is made and the right of the rejected candidates is to question the election by a petition as provided in Article 329 (b). In that election petition it will be open to him to urge that his nomination has been improperly rejected as provided in section 100 (c), on all grounds including the present, though it may be that if any of the grounds mentioned in section 36 for rejection exists it might be held that, the result of the election has not been affected by rejection of nomination by one authority and not by another. On the hypothesis on which this contention proceeds, that election includes the whole process, there is no jurisdiction in this Court to exercise the powers under Article 226. The remedy of the Petitioner is by an election petition.

(4) Another problem that was mooted was this. If there is only one candidate for election and his nomination is erroneously rejected by the Returning Officer then there will result no election on which alone the rejected candidate has a right to present a petition. In that event the rejected candidate will be without any remedy. It is argued that this result could be avoided by holding that the decision of the Returning Officer is not part of the election, To the difficulty thus presented there has been no satisfactory answer. This is clearly a case of *Casus Omissus*, But it is possible to hold that in such a case the right of the rejected candidate to move this Court for a writ under Article 226 is not taken away because it is only when there is a completed election that the bar under Article 329 (b) applies. In this view there will be no jurisdiction to issue a writ under Article 226 either where there is a completed election or where there is a process of election in progress, but that where the process had become abortive and could not result in a completed election the jurisdiction of the High Court remains unaffected.

(5) Another contention put forward is that when a nomination is rejected and an election takes place the rejected candidate has a right under section 100 (c) to an order setting aside the election only if the result of the election has been materially affected; and as this condition cannot by its very nature be satisfied by him he is in effect without any remedy and that Article 329 (b) should be held to be inapplicable to such cases. As I read the section, the improper rejection of nomination paper must without more be held to have materially affected the result of the election for the reason that the electors had no opportunity of expressing their mind about the rejected candidate.

(6) It is next contended that when there is a wrongful rejection of a nomination and the election is set aside at the instance of the rejected candidate under section 100 (c) the result will be that fresh election will have to be held. Then other candidates might come on the scene and conditions might have changed and it will be a hardship for the rejected candidate to contest that election under

different conditions. That there is hardship in such a case was recognised in *Sarvothama Rao* v. *The Chairman, Municipal Council, Saidapet*[1] *vide* the observations of Schwabe, C.J., at page 592 and of Wallace, J. at page 600.

But it must be remembered that the right to stand for election is a mere creature of the statute and it does not stand on the same footing as a right to liberty of person or right to hold property; that it is in reality a privilege and that it is a matter for the Legislature to determine the extent of that privilege and the conditions under which it could be exercised. The question involved is one of policy which it is for the Legislature to decide and not for the Courts to prescribe.

I have dealt with the various contentions urged by the Counsel for the several Petitioners but it will be seen that they are mostly directed against the propriety or even legality of the provisions of Act XLIII of 1951. In my opinion they are not relevant in considering, whether Article 329 (*b*) bars the present applications. If some of the provisions of Act XLIII of 1951 are unsatisfactory and the arguments of the Petitioners have exposed several rents in that Act that cannot affect the scope and operation of Article 329 (*b*) which must be determined on its own language. It may well happen that Act XLIII of 1951 will be suitably amended in the light of the experience, which will be gained in the present elections and there will be no cause in future for the complaints now made. But it cannot be that if " election " in Article 329 (*b*) has only a limited significance, it will hereafter acquire an extended sense by reason or the amendments to Act XLIII of 1951.

It has been pressed upon us that to allow the decision of the Returning Officer to stand without question until the election has been completed and then to have the entire election set aside on the ground that the rejection of the nomination was erroneous would be to expose the parties to enormous expenses and that a construction which leads to such inconvenient result should be avoided. There is considerable force in this and it may be added that the inconvenience is not merely to the parties concerned but also to the Government and the public who must be put to great expense and trouble by reason of a fresh election. But at the same time there is reason behind the policy underlying Article 329 (*b*) that an election should be permitted to be attacked only when the entire procedure is completed and not piece-meal at all stages. It must be remembered that adult franchise was granted under Article 326 and the future Constituencies must be colossal in their magnitude. To allow the parties to challenge at every turn decisions given in the course of the election would be to hold it up indefinitely. It is not difficult to imagine that if that were permitted the whole of the election machinery would be blocked and administration brought to a standstill. It is for the Legislature to consider whether the two points of view cannot be reconciled by provision being made for decisions given under section 36 of Act XLIII of 1951 being finally and speedily determined by appropriate Tribunal before elections are held.

Before leaving this part of the case I might add that to hold that election under Article 329 (*b*) refers only to the final stage and that the jurisdiction of the Court to issue writs under Article 226 is barred only at that stage, will lead to anomalous results. In that view this Court will have jurisdiction to pronounce upon the validity of the decision of the Returning Officer. After election, this Court loses this jurisdiction over elections and under Article 329 (*b*) the validity of the nomination would be one of the questions to be tried by the Tribunal. Is the Tribunal bound by the opinion of the High Court? Could it have been intended that the decision of this Court should be liable to be reviewed by the Tribunal? Then again there is this curious result that at the earlier stages of the election, the High Court has jurisdiction; that after the stage of election that jurisdiction is lost and is to be exercised by election Tribunals and that after the matter is finally decided by the Tribunals the jurisdiction of this Court will again revive in respect of the decision of the Tribunal. It is inconceivable that the Legislature could have intended that jurisdiction over election matters should be thus split up and subjected to such cumbersome and shifting procedure. I am accordingly of opinion that the present applications are barred under Article 329 (*b*) of the Constitution.

In this view it is not necessary to consider at length the arguments advanced with reference to section 170 of Act XLIII of 1951. I shall, however, briefly indicate my views on the contentions put forward before us. Section 170 runs as follows:

> " No Civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election."

Act No. XLIII of 1951 was passed by the Central Legislature with the object of providing for the conduct of elections to the Legislatures and for decisions of doubts and disputes arising out of or in connection with such elections and other matters. This was in accordance with Article 327 of the Constitution which confers on the Parliament power to enact legislation with reference to elections. Such legislation is under the terms of that article subject to the provisions of the Constitution. Section 170 of Act XLIII of 1951 will, therefore, be valid subject to the provisions of the Constitution. In so far as it purports to take away the jurisdiction of the Civil Courts its validity cannot be impugned. The question is whether it takes away the jurisdiction of the High Court to issue writs under Article 226. It is conceded by the learned Advocate-General that the power of the High Court to issue writs under Article 226 of the Constitution is not affected by this provision.

Mr. M. K. Nambiar contends that Article 225 is the article which confers jurisdiction on Courts; that Article 226 confers power on the Court to issue writs but that it could be exercised only if the

1. (1923) 45 M.L.J. 23 : I.L.R. 47 Mad. 585.

High Court has jurisdiction over the subject-matter and that as under Part XV of the Constitution the entire jurisdiction over elections has been taken away and vested in a special body the High Court has no jurisdiction under Article 226 to issue writs. He relied on the decision in *Thyagaraja Chettiar* v. *Collector of Madura*[1] in which this Court declined to issue a writ with reference to a matter arising out of the Income-Tax Act on the ground that collection of revenue was not a matter within the jurisdiction of this Court. It may be conceded that this Court can issue writ only in respect of matters within its jurisdiction. In Halsbury's Laws of England, Vol. 9 (2nd edition), page 854, the law is thus stated:

"The writ can only be issued in respect of matters which are within the jurisdiction of the High Court of Justice."

Vide also *Dinshaw Shroff* v. *Income-Tax Commissioner*[2]. But the question is in what sense this jurisdiction is to be understood for the purpose of Article 226? That Article runs as follows:

"Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories, directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose."

This Article contains its own definition of jurisdiction for the purpose of that Article. It extends over any person, or authority within the territories in relation to which theCourt exercises the jurisdiction. In view of the fact that writs are issued for quashing orders made in excess of jurisdiction by Tribunals or for directing public authorities to do or forbear from doing what they are enjoined to do or forbear from doing, the requisites of the jurisdiction are satisfied if the Tribunals or authorities are within the territories over which the Court exercises jurisdiction. I am, therefore, of opinion that the jurisdiction of the Court to issue appropriate writs under Article 226 is not taken away by reason of the fact that the subject-matter of elections is removed from the jurisdiction of this Court. The decisions of the election Tribunals will be subject to the jurisdiction of this Court under Article 226.

In the result I agree with my learned brother, that the applications must be dismissed with costs.

We certify that the case involves a substantial question of law as to the interpretation of the Constitution.

On appeal to the Supreme Court.

N. Rajagopala Iyengar, Advocate for Appellant.

R. Ganapathi Iyer, Advocate for the First Respondent.

M. C. Setalvad, Attorney-General for India (*G. N. Joshi*, Advocate, with him) for the Union of India.

K. A. Chitale, Advocate-General, Madhya Bharat (*G. N. Joshi*, Advocate, with him) for the State of Madhya Bharat.

The Judgment of the Court was delivered by

Fazl Ali, J.—This is an appeal from an order of the Madras High Court dismissing the petition of the appellant praying for a writ of *certiorari*.

The appellant was one of the persons who had filed nomination papers for election to the Madras Legislative Assembly from the Namakkal Constituency in Salem district. On the 28th November, 1951, the Returning Officer for that constituency took up for scrutiny the nomination papers filed by the various candidates and on the same day he rejected the appellant's nomination paper on certain grounds which need not be set out as they are not material to the point raised in this appeal. The appellant thereupon moved the High Court under Article 226 of the Constitution praying for a writ of *certiorari* to quash the order of the Returning Officer rejecting his nomination paper and to direct the Returning Officer to include his name in the list of valid nominations to be published. The High Court dismissed the appellant's application on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of the provisions of Article 329 (*b*) of the Constitution. The appellant's contention in this appeal is that the view expressed by the High Court is not correct, that the jurisdiction of the High Court is not affected by Article 329 (*b*) of the Constitution and that he was entitled to a writ of *certiorari* in the circumstances of the case.

Broadly speaking, the arguments on which the judgment of the High Court is assailed are two-fold:

1. (1935) 70 M.L.J. 343: I.L.R. 59 Mad. 702.
2. I.L.R. (1943) Bom. 152: A.I.R. 1943 Bom. 77.

(1) that the conclusion arrived at by the High Court does not follow from the language of Article 329 (*b*) of the Constitution, whether that Article is read by itself or along with the other Articles in Part XV of the Constitution ; and

(2) that the anomalies which will arise if the construction put by the High Court on Article 329 (*b*) is accepted, are so startling that the Courts should lean in favour of the construction put forward on behalf of the appellant.

The first argument which turns on the construction of Article 329 (*b*) requires serious consideration, but I think the second argument can be disposed of briefly at the outset. It should be stated that what the appellant chooses to call anomaly can be more appropriately described as hardship or prejudice and what their nature will be has been stated in forceful language by Wallace, J., in *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet*[1], in these words :

"I am quite clear that any post-election remedy is wholly inadequate to afford the relief which the petitioner seeks, namely, that this election, now published, be stayed, until it can be held with himself as a candidate. It is no consolation to tell him that he can stand for some other election. It is no remedy to tell him that he must let the election go on and then have it set aside by petition and have a fresh election ordered. The fresh election may be under altogether different conditions and may bring forward an array of fresh candidates. The petitioner can only have his proper relief if the proposed election without him is stayed until his rejected nomination is restored, and hence an injunction staying this election was absolutely necessary, unless the relief asked for was to be denied him altogether *in limine*. In most cases of this kind no doubt there will be difficulty for the aggrieved party to get in his suit in time before the threatened wrong is committed ; but when he has succeeded in so doing, the Court cannot stultify itself by allowing the wrong which it is asked to prevent to be actually consummated while it is engaged in trying the suit."

These observations however represent only one side of the picture and the same learned Judge presented the other side of the picture in a subsequent case (*Desi Chettiar* v. *Chinnasami Chettiar*)[2] in the following passage :

"The petitioner is not without his remedy. His remedy lies in an election petition which we understand he has already put in. It is argued for him that that remedy which merely allows him to have set aside an election once held is not as efficacious as the one which would enable him to stop the election altogether ; and certain observations at page 600 of *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet*[1] are quoted. In the first place we do not see how the mere fact that the petitioner cannot get the election stopped and has his remedy only after it is over by an election petition, will in itself confer on him any right to obtain a writ. In the second place, these observations were directed to the consideration of the propriety of an injunction in a civil suit, a matter with which we are not here concerned. And finally it may be observed that these remarks were made some years ago when the practice of individuals coming forward to stop elections in order that their own individual interest may be safeguarded was not so common. It is clear that there is another side of the question to be considered, namely, the inconvenience to the public administration of having elections and the business of Local Boards held up while individuals prosecute their individual grievances. We understand the election for the elective seats in this Union has been held up since 31st May because of this petition, the result being that the electors have been unable since then to have any representation on the Board, and the Board is functioning, if indeed it is functioning, with a mere nominated fraction of its total strength ; and this state of affairs the petitioner proposes to have continued until his own personal grievance is satisfied."

These observations which were made in regard to elections to Local Boards will apply with greater force to elections to Legislatures, because it does not require much argument to show that in a country with a democratic Constitution in which the Legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protracted or obstructed. To this aspect of the matter I shall have to advert later, but it is sufficient for the present purpose to state firstly, that in England the hardship and inconvenience which may be suffered by an individual candidate has not been regarded as of sufficient weight to induce Parliament to make provision for immediate relief and the aggrieved candidate has to wait until after the election to challenge the validity of the rejection of his nomination paper, and secondly, that the question of hardship or inconvenience is after all only a secondary question, because if the construction put by the High Court on Article 329 (*b*) of the Constitution is found to be correct, the fact that such construction will lead to hardship and inconvenience becomes irrelevant.

1. (1924) 45 M.L.J. 23 : I.L.R. 47 Mad. 585 at 600.

2. (1928) 56 M.L.J. 162 : A.I.R. 1928 Mad. 1271 at 1272.

Article 329 is the last Article in Part XV of the Constitution, the heading of which is "Election", and it runs as follows :—

"Notwithstanding anything in this Constitution—

(*a*) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

(*b*) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

In construing this Article, reference was made by both parties in the course of their arguments to the other Articles in the same Part, namely, Articles 324, 325, 326, 327 and 328. Article 324 provides for the Constitution and appointment of an Election Commissioner to superintend, direct and control elections to the Legislatures ; Article 325 prohibits discrimination against electors on the ground of religion, race, caste or sex ; Article 326 provides for adult suffrage ; Article 327 empowers Parliament to pass laws making provision with respect to all matters relating to, or in connection with, elections to the Legislatures, subject to the provisions of the Constitution ; and Article 328 is a complimentary Article giving power to the State Legislature to make provision with respect to all matters relating to, or in connection with, elections to the State Legislature. A notable difference in the language used in Articles 327 and 328 on the one hand, and Article 329 on the other, is that while the first two Articles begin with the words "subject to the provisions of this Constitution", the last Article begins with the words "notwithstanding anything in this Constitution". It was conceded at the bar that the effect of this difference in language is that whereas any law made by Parliament under Article 327, or by the State Legislatures under Article 328, cannot exclude the jurisdiction of the High Court under Article 226 of the Constitution, that jurisdiction is excluded in regard to matters provided for in Article 329.

Now, the main controversy in this appeal centres round the meaning of the words "no election shall be called in question except by an election petition" in Article 329 (*b*), and the point to be decided is whether questioning the action of the Returning Officer in rejecting a nomination paper can be said to be comprehended within the words, "no election shall be called in question". The appellant's case is that questioning something which has happened before a candidate is declared elected is not the same thing as questioning an election, and the arguments advanced on his behalf in support of this construction were these :—

(1) That the word "election" as used in Article 329 (*b*) means what it normally and etymologically means, namely, the result of polling or the final selection of a candidate ;

(2) That the fact that an election petition can be filed only after polling is over or after a candidate is declared elected and what is normally called in question by such petition is the final result, bears out the contention that the word "election" can have no other meaning in Article 329 (*b*) than the result of polling or the final selection of a candidate;

(3) That the words "arising out of or in connection with" which are used in Article 324 (1) and the words "with respect to all matters relating to, or in connection with" which are used in Articles 327 and 328, show that the framers of the Constitution knew that it was necessary to use different language when referring respectively to matters which happen prior to and after the result of polling, and if they had intended to include the rejection of a nomination paper within the ambit of the prohibition contained in Article 329 (*b*) they would have used similar language in that Article ; and

(4) That the action of the Returning Officer in rejecting a nomination paper can be questioned before the High Court under Article 226 of the Constitution for the following reason : Scrutiny of nomination papers and their rejection are provided for in section 36 of the Representation of the People Act, 1951. Parlia-

ment has made this provision in exercise of the powers conferred on it by Article 327 of the Constitution which is "subject to the provisions of the Constitution". Therefore, the action of the Returning Officer is subject to the extraordinary jurisdiction of the High Court under Article 226.

These arguments appear at first sight to be quite impressive, but in my opinion there are weightier and basically more important arguments in support of the view taken by the High Court. As we have seen, the most important question for determination is the meaning to be given to the word "election" in Article 329 (*b*). That word has by long usage in connection with the process of selection of proper representatives in democratic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected. In *Srinivasalu* v. *Kuppuswami*[1], the learned Judges of the Madras High Court after examining the question, expressed the opinion that the term "election" may be taken to embrace the whole procedure whereby an "elected member" is returned, whether or not it be found necessary to take a poll. With this view, my brother, Mahajan, J., expressed his agreement in *Sat Narain* v. *Hanuman Parshad*[2]; and I also find myself in agreement with it. It seems to me that the word "election" has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the Legislature. The use of the expression "conduct of elections" in Article 324 specifically points to the wide meaning, and that meaning can also be read consistently into the other provisions which occur in Part XV including Article 329 (*b*). That the word "election" bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins. The subject is dealt with quite concisely in Halsbury's Laws of England in the following passage[3] under the heading "Commencement of the Election":—

> "Although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminent". Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day afford any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when 'the conduct and management of' an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case."

The discussion in this passage makes it clear that the word "election" can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.

The next important question to be considered is what is meant by the words "no election shall be called in question". A reference to any treatise on elections in England will show that an election proceeding in that country is liable to be assailed on very limited grounds, one of them being the improper rejection of a nomination paper. The law with which we are concerned is not materially different, and we find that in section 100 of the Representation of the People Act, 1951, one of the grounds for declaring an election to be void is the improper rejection of a nomination paper.

The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election

1. A.I.R. 1928 Mad. 253 at 255.
2. A.I.R. 1945 Lah. 85.
3. See page 237 of Halsbury's Laws of England, 2nd edition, Volume 12.

proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of Part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329 (*b*) was apparently enacted to prescribe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329 (*b*) and in setting up a special tribunal. Any other meaning ascribed to the words used in the Article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

I think that a brief examination of the scheme of Part XV of the Constitution and the Representation of the People Act, 1951, will show that the construction I have suggested is the correct one. Broadly speaking, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made ; (2) there should be an executive charged with the duty of securing the due conduct of elections ; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites, Article 324 with the second and Article 329 with the third requisite. The other two Articles in Part XV, *viz*., Articles 325 and 326 deal with two matters of principle to which the Constitution-framers have attached much importance. They are :—(1) prohibition against discrimination in the preparation of, or eligibility for inclusion in, the electoral rolls, on grounds of religion, race, caste, sex or any of them ; and (2) adult suffrage. Part XV of the Constitution is really a code in itself providing the entire ground-work for enacting appropriate laws and setting up suitable machinery for the conduct of elections.

The Representation of the People Act, 1951, which was passed by Parliament under Article 327 of the Constitution, makes detailed provisions in regard to all matters and all stages connected with elections to the various Legislatures in this country. That Act is divided into 11 parts, and it is interesting to see the wide variety of subjects they deal with. Part II deals with "the qualifications and disqualifications for membership," Part III deals with the notification of General Elections, Part IV provides for the administrative machinery for the conduct of elections, and Part V makes provisions for the actual conduct of elections and deals with such matters as presentation of nomination papers, requirements of a valid nomination, scrutiny of nominations, etc., and procedure for polling and counting of votes. Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of election tribunals and the trial of election petitions. Part VII outlines the various corrupt and illegal practices which may affect the elections, and electoral offences. Obviously, the Act is a self-contained enactment so far as elections are concerned, which

means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder. The provisions of the Act which are material to the present discussion are sections 80, 100, 105, and 170, and the provisions of Chapter II of Part IV dealing with the form of election petitions, their contents and the reliefs which may be sought in them. Section 80, which is drafted in almost the same language as Article 329 (*b*), provides that

"no election shall be called in question except by an election petition presented in accordance with the provisions of this Part".

Section 100, as we have already seen, provides for the grounds on which an election may be called in question, one of which is the improper rejection of a nomination paper. Section 105 says that "every order of the Tribunal made under this Act shall be final and conclusive." Section 170, provides that

"no Civil Court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election".

These are the main provisions regarding election matters being judicially dealt with, and it should be noted that there is no provision anywhere to the effect that anything connected with elections can be questioned at an intermediate stage.

It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J., in *Wolverhampton New Water Works Co.* v. *Hawkesford*[1] in the following passage :—

"There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, *viz.*, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it . . . . . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in *Neville* v. *London Express Newspaper Limited*[2] and has been re-affirmed by the Privy Council in *Attorney-General of Trinidad and Tobago* v. *Gordon Grant Co.*,[3] and *Secretary of State* v. *Mask and Co.*,[4]; and it has also been held to be equally applicable to enforcement of rights (see *Hardutrai* v. *Official Assignee of Calcutta*[5].) That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.

It was argued that since the Representation of the People Act was enacted subject to the provisions of the Constitution, it cannot bar the jurisdiction of the High Court to issue writs under Article 226 of the Constitution. This argument, however, is completely shut out by reading the Act along with Article 329 (*b*). It will be noticed that the language used in that Article and in section 80 of the Act is almost identical, with this difference only that the Article is preceded by the words "notwithstanding anything in this Constitution." I think that those words are quite apt to exclude the jurisdiction of the High Court to deal with any matter which may arise while the elections are in progress.

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1. 6 C.B. (N.S.) 336, 356.
2. (1919) A.C. 368.
3. (1935) A.C. 532.
4. (1940) 2 M.L.J. 140 : L.R. 67 I.A. 222 : I.L.R. (1940) Mad. 599 (P.C.).
5. (1948) 52 C.W.N. 343, 349.

It may be stated that section 107 (1) of the Representation of People Act, 1949, (12 & 13, Geo., 6, c. 68) in England is drafted almost in the same language as Article 329 (*b*). That section runs thus :—

"No parliamentary election and no return to Parliament shall be questioned except by a petition complaining of an undue election or undue return (hereinafter referred to as a parliamentary election petition) presented in accordance with this Part of this Act."

It appears that similar language was used in the earlier statutes, and it is noteworthy that it has never been held in England that the improper rejection of a nomination paper can be the subject of a writ of *certiorari* or *mandamus*. On the other hand, it was conceded at the bar that the question of improper rejection of a nomination paper has always been brought up in that country before the appropriate tribunal by means of an election petition after the conclusion of the election. It is true that there is no direct decision holding that the words used in the relevant provisions exclude the jurisdiction of the High Court to issue appropriate prerogative writs at an intermediate stage of the election, but the total absence of any such decision can be accounted for only on the view that the provisions in question have been generally understood to have that effect. Our attention was drawn to rule 13 of the rules appended to the Ballot Act of 1872 and a similar rule in the Parliamentary Elections Rules of 1949, providing that the decision of the Returning Officer disallowing an objection to a nomination paper shall be final, but allowing the same shall be subject to reversal on a petition questioning the election or return. These rules, however, do not affect the main argument. I think it can be legitimately stated that if words similar to those used in Article 329 (*b*) have been consistently treated in England as words apt to exclude the jurisdiction of the Courts including the High Court, the same consequence, must follow from the words used in Article 329 (*b*) of the Constitution. The words "notwithstanding anything in this Constitution" give to that Article the same wide and binding effect as a statute passed by a sovereign Legislature like the English Parliament.

It may be pointed out that Article 329 (*b*) must be read as complementary to clause (*a*) of that Article. Clause (*a*) bars the jurisdiction of the Courts with regard to such law as may be made under Articles 327 and 328 relating to the delimitation of constituencies or the allotment of seats to such constituencies. It was conceded before us that Article 329 (*b*) ousts the jurisdiction of the Courts with regard to matters arising between the commencement of the polling and the final selection. The question which has to be asked is what conceivable reason the Legislature could have had to leave only matters connected with nominations subject to the jurisdiction of the High Court under Article 226 of the Constitution. If Part XV of the Constitution is a Code by itself, *i.e.*, it creates rights and provides for their enforcement by a special tribunal to the exclusion of all Courts including the High Court, there can be no reason for assuming that the Constitution left one small part of the election process to be made the subject-matter of contest before the High Courts and thereby upset the time-schedule of the elections. The more reasonable view seems to be that Article 329 covers all "electoral matters."

The conclusions which I have arrived at may be summed up briefly as follows :

(1) Having regard to the important functions which the Legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time-schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election" ; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought

up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress.

It will be useful at this stage to refer to the decision of the Privy Council in *Theberge* v. *Laudry*[1]. The petitioner in that case having been declared duly elected a member to represent an electoral district in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Supreme Court under the Quebec Controverted Elections Act, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. Thereupon, he applied for special leave to appeal to Her Majesty-in-Council, but it was refused on the ground that the fair construction of the Act of 1875 and the Act of 1872 which preceded it providing among other things that the judgment of the Superior Court "shall not be susceptible of appeal" was that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative. In delivering the judgment of the Privy Council, Lord Cairns observed as follows:—

"These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights; they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular Court . . . . . . for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that Court, that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly of deciding election petitions, and determining the status of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in such a way that should as soon as possible become conclusive; and enable the constitution of the Legislative Assembly to be distinctly and speedily known."

After dealing with certain other matters, the Lord Chancellor proceeded to make the following further observations:—

"Now, the subject-matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and privileges of the electors and of the Legislative Assembly to which they elect members. Those rights and privileges have always in every colony, following the example of the mother-country, been jealously maintained and guarded by the Legislative Assembly. Above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly, in complete independence of the Crown, so far as they properly exist. And it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court which the Legislative Assembly had put in its place, but belonged to the Crown in Council, with the advice of the advisers of the Crown at home, to be determined without reference either to the judgment of the Legislative Assembly, or of that Court which the Legislative Assembly had substituted in its place."

The points which emerge from this decision may be stated as follows:—

(1) The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.

(2) Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the Legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.

It should be mentioned here that the question as to what the powers of the High Court under Articles 226 and 227 and of this Court under Article 136 of the Constitution may be, is one that will have to be decided on a proper occasion.

It is necessary to refer at this stage to an argument advanced before us on behalf of the appellant which was based on the language of Article 71 (1) of the Constitution. That provision runs thus:—

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1. (1876) 2 A.C. 102.

"All doubts and disputes arising out of or in connection with the election of a President or Vice-President shall be inquired into and decided by the Supreme Court whose decision shall be final."

The argument was as follows :—There is a marked contrast between the language used in Article 71 (1) and that of Article 329 (*b*). The difference in the phraseology employed in the two provisions suggests that they could not have been intended to have the same meaning and scope as regards matters to be brought up before the tribunals they respectively deal with. If the framers of the Constitution, who apparently knew how to express themselves, intended to include within the ambit of Article 329 (*b*) all possible disputes connected with elections to Legislatures, including disputes as to nominations, they would have used similar words as are to be found in Article 71 (1). It is true that it is not necessary to use identical language in every provision, but one can conceive of various alternative ways of expression which would convey more clearly and properly what Article 329 (*b*) is said to convey.

It seems to me that once it is admitted that the same idea can be expressed in different ways and the same phraseology need not be employed in every provision, the argument loses much of its force. But, however that may be, I think there is a good explanation as to why Article 329 (*b*) was drafted as it stands.

A reference to the election rules made under the Government of India Acts of 1919 and 1935 will show that the provisions in them on the subject were almost in the same language, as Article 329 (*b*). The corresponding rule made under the Government of India Act, 1919, was rule 31 of the electoral rules, and it runs as follows :—

"No election shall be called in question, except by an election petition presented in accordance with the provisions of this Part."

It should be noted that this rule occurs in Part VII, the heading of which is :

"The final decision of doubts and disputes as to the validity of an election".

These words throw some light on the function which the election tribunal was to perform, and they are the very words which the learned counsel for the appellant argued, ought to have been used to make the meaning clear.

The same scheme was followed in the election rules framed under the Government of India Act, 1935, which are contained in "The Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936," dated the 3rd July, 1936. In that Order, the rule corresponding to rule 31 under the earlier Act, runs thus :—

"No election shall be called in question except by an election petition presented in accordance with the provisions of this Part of the Order."

This rule is to be found in Part III of the Order, the heading of which is

"Decision of doubts and disputes as to validity of an election and disqualification for corrupt practices."

The rules to which I have referred were apparently framed on the pattern of the corresponding provisions of the British Acts of 1868 and 1872, and they must have been intended to cover the same ground as the provisions in England have been understood to cover in that country for so many years. If the language used in Article 329 (*b*) is considered against this historical background, it should not be difficult to see why the framers of the Constitution framed that provision in its present form and chose the language which had been consistently used in certain earlier legislative provisions and which had stood the test of time.

And now a word as to why negative language was used in Article 329 (*b*). It seems to me that there is an important difference between article 71 (1) and Article 329 (*b*). Article 71 (1) had to be in an affirmative form, because it confers special jurisdiction on the Supreme Court, which that Court could not have exercised but for this Article. Article 329 (*b*), on the other hand, was primarily intended to exclude or oust the jurisdiction of all Courts in regard to electoral matters and to lay down the only mode in which an election could be challenged.

The negative form was therefore more appropriate, and, that being so, it is not surprising that it was decided to follow the pre-existing pattern in which also the negative language had been adopted.

Before concluding, I should refer to an argument which was strenuously pressed by the learned counsel for the appellant and which has been reproduced by one of the learned Judges of the High Court in these words :—

> "It was next contended that if nomination is part of election a dispute as to the validity of nomination is a dispute relating to election and that can be called in question only in accordance with provisions of Article 329 (b) by the presentation of an election petition to the appropriate Tribunal and that the Returning Officer would have no jurisdiction to decide that matter, and it was further argued that section 36 of Act XLIII of 1951 would be *ultra vires* inasmuch as it confers on the Returning Officer a jurisdiction which Article 329 (*b*) confers on a Tribunal to be appointed in accordance with the Article."

This argument displays great dialectical ingenuity, but it has no bearing on the result of this appeal and I think it can be very shortly answered. Under section 36 of the Representation of the People Act, 1951, it is the duty of the Returning Officer to scrutinize the nomination papers to ensure that they comply with the requirements of the Act, and decide all objections which may be made to any nomination. It is clear that unless this duty is discharged properly, any number of candidates may stand for election without complying with the provisions of the Act and a great deal of confusion may ensue. In discharging the statutory duty imposed on him, the Returning Officer does not call in question any election. Scrutiny of nomination papers is only a stage, though an important stage, in the election process. It is one of the essential duties to be performed before the election can be completed, and anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election. The fallacy of the argument lies in treating a single step taken in furtherance of an election as equivalent to election. The decision of this appeal however, turns not on the construction of the single word "election," but on the construction of the compendious expression—"no election shall be called in question" in its context and setting, with due regard to the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Evidently, the argument has no bearing on this method of approach to the question posed in this appeal, which appears to me to be the only correct method.

We are informed that besides the Madras High Court, seven other State High Courts have held that they have no jurisdiction under Article 226 of the Constitution to entertain petitions regarding improper rejection of nomination papers. This view is in my opinion correct and must be affirmed. The appeal must therefore fail and is dismissed. In view of the nature and importance of the points raised in this appeal, there should be no order as to costs.

M. Patanjali Sastri, C.J.—I agree.

Mehrchand Mahajan, J.—I agree.

B. K. Mukherjea, J.—I agree.

S. R. Das, J.—I agree.

N. Chandrasekhara Aiyar, J.—I agree.

Agent for Appellant : *S. Subramaniam.*

Agent for 1st Respondent : *P. A. Mehta.*

Agent for Union of India : *P. A. Mehta.*

Agent for State of Madhya Bharat : *P. A. Mehta.*

G.R./V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Public Prosecutor, Madras .. *Petitioner**

v.

George Williams *alias* Victor .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 426, 497 (5) and 561-A—Bail granted to appellant pending his appeal—Appellant committing similar crimes—Effect—Power of Court to cancel the bail.

The provisions of section 497 (5), Criminal Procedure Code, read with section 561-A, Criminal Procedure Code give the High Court ample powers to deal effectively with accused persons released on bail pending appeal who by their continuing to commit the crimes denied in the appeal memorandum, render themselves liable to re-arrest and re-committal to custody. The High Court has power to cancel the bail granted by it in such a case. In such a case the police can, without the permission of any Court, including the Court that granted bail, arrest him and get him remanded to jail, and drive him to apply for bail again, and can then bring to the notice of the Court how the man abused the bail previously granted to him and proved himself unworthy of being granted any more bail.

Petition praying that in the circumstances stated therein the High Court may be pleased to cancel the bail granted by the High Court, dated 16th May, 1951, in Crl. M. P. No. 1076 of 1950 presented to the High Court to enlarge the petitioner therein on bail pending Criminal Appeal No. 387 of 1950 preferred to the High Court against the judgment of the Court of Sessions of Tirunelveli Division, dated 21st February, 1950, and passed in Sessions Case No. 67 of 1949.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) in person.

P. Basi Reddi for Respondent.

The Court made the following

ORDER.—The learned Public Prosecutor has put in this petition under sections 497 (5) and 561-A, Criminal Procedure Code, for cancelling the bail granted by me on 16th May, 1950, to one George Williams *alias* Victor, in Criminal Miscellaneous Petition No. 1076 of 1950 on the file of this Court in Criminal Appeal No. 387 of 1950, on the ground that he has misconducted himself and rendered himself liable to re-arrest and committal to custody by abusing his release on bail by indulging in the same kind of offence during the period of bail. This person had been convicted in Sessions Case No. 67 of 1949, by the learned Sessions Judge of Tirunelveli Division, under section 120-B of the Indian Penal Code read with section 420, Indian Penal Code, for having conspired with twenty-three other accused to cheat members of the public by promising to give them two counterfeit five rupee notes for *one* genuine five-rupee note. Of course the genuine notes were taken and the others not given ! This accused was held to be the prime mover and ring-leader in this huge conspiracy and was sentenced to undergo four years' rigorous imprisonment and also to pay a fine of Rs. 1,500, or, in default, to undergo further rigorous imprisonment for one year. He was granted bail by me, on 16th May, 1950, on his bail application protesting his innocence, on his executing a bond for Rs. 1,000 with two sureties for Rs. 1,000 each. In the present petition, the allegation is that this accused, during the period when he was on bail, went on committing similar offences of cheating people by such promises of giving two counterfeit notes for one genuine note, as those for which he was convicted in Sessions Case No. 67 of 1949 and that he was arrested and remanded to custody on 24th January, 1951, at Shenkottah railway station when he was found with a suit case containing one bundle of 48 genuine five-rupee currency notes, and 15 other bundles of blank white paper cut to the size of five rupees currency notes pasted over either side of the bundle, and 12 other bundles of white paper cut to the size of five-rupee currency notes ; in Sessions Case No. 67 of 1949 the *modus operandi* adopted for cheating was to keep one genuine note on the top and at the bottom of white papers cut to size and asking the dupes to run away with the bundles as the police were arriving and there was no time to count !

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* Crl. M. P. No. 878 of 1951. 26th April, 1951.

The application by the Public Prosecutor is opposed by Mr. Basi Reddi, for the first accused, only on a *legal* ground, he not disputing the facts alleged by the Public Prosecutor. Mr. Basi Reddi's contention is that once this Court has granted bail to an accused in *an appeal* under section 426, Criminal Procedure Code, as was the case when bail was granted to this accused in Criminal Miscellaneous Petition No. 1076 of 1950, it has *no power to cancel that bail, whatever the conduct of the person let on bail may be, subsequent to the granting of bail*, as section 497 (5) of the Criminal Procedure Code will apply only to accused persons who are let on bail by a High Court before conviction and will not apply to persons (who are convicted) granted bail during the pendency of the appeal, and as section 561, Criminal Procedure Code, too will not have any application to bail matters, which are wholly governed by sections 497 (5) and 426, Criminal Procedure Code, as held by the Privy Council. I cannot agree. I am satisfied that the provisions of section 497 (5), Criminal Procedure Code, read with section 561-A, Criminal Procedure Code, saving the inherent power of the High Court to give effect to any order under the Criminal Procedure Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice will give it ample powers to deal effectively with such accused persons released on bail pending appeal who, by their continuing to commit the crimes denied in the appeal memorandum, render themselves liable to re-arrest and re-committal to custody. It is obvious that provisions similar to those in section 497 (5) will attach themselves analogously to section 426, Criminal Procedure Code, bail cases also in order to prevent abuse of process of Court and to secure the ends of justice.

Reliance was placed by Mr. Basi Reddi on the Privy Council decision in *Jairam Das* v. *Emperor*[1], I have looked into that ruling, and I do not think that it will support the argument of Mr. Basi Reddi and take away the power of this Court to cancel the bail of a person released pending appeal and recommit the person to custody when he has rendered himself liable for that by reason of his misconduct during the period of bail. All that the Privy Council held in that case was that:

> "the Code of Criminal Procedure confers no power on a High Court to grant bail in the case of a convicted person and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard."

The Privy Council also held:

> "Chapter XXXIX of the Code of Criminal Procedure, with section 426, is and was intended to contain a complete and exhaustive statement of the powers of a High Court in India to grant bail and excludes the existence of any additional inherent power in a High Court relating to the subject of bail."

It is obvious that these observations have no application to the present question, and it is also significant that their Lordships of the Privy Council referred to section 426 of the Criminal Procedure Code *along with Chapter* XXXIX thereby taking all the provisions relating to bail together, and impliedly allowing the liberty to cancel contained in section 497 (5) to cases of bail under section 426 also. Of course, they say nothing expressly regarding the *cancelling of bail*. They were concerned with High Court's granting bail to a person who had obtained special leave to appeal to the Privy Council and the absence of *any inherent power* in the High Court to grant such bail (now, section 426 (2) (*b*), Criminal Procedure Code, gives the High Court the power to grant bail in such cases). It is clear to me that when the High Court is given powers under section 497 (5) of the Code of Criminal Procedure to cancel bail granted to persons undergoing trial, a similar power must be implied regarding the grant of bail under section 426, Criminal Procedure Code, also. It will be atrocious if the High Court which grants bail to an appellant, pending his appeal, on his application protesting his innocence, is not empowered to cancel his bail, and re-arrest him, and commit him to custody when he is proved to have abused the process of the Court, by getting bail on false pretences, and misbehaves and proves himself unworthy of continuing on bail. Bail, or mainprize, originally meant, as Blackstone and other eminent jurists explain, bailment or

1. (1945) 2 M.L.J. 40 : L.R. 72 I.A. 120.

delivery of a person to his sureties, to be in *their custody* (instead of being sent to a common jail), they being jailors of his own choosing who have dominion and control over him. That is why sureties are called upon to produce him, as his jailors, in Court, and punished when they fail to do so. If the sureties cannot control him and keep him in good conduct during the period of bail, naturally, the Court will intervene when he misconducts himself and re-arrest him and re-commit him to jail. The Court cannot allow him to go about like an aeroplane reported recently in the daily newspapers to have run away from its pilot who had started it, and done havoc wherever it went! No system of judicial administration can function efficiently if such were the law.

I am of opinion that there are five cases where a person granted bail may have the bail cancelled and be re-committed to jail: (1) where the person on bail, during the period of bail, commits the very same offence for which he is being tried or has been convicted, and thereby proves his utter unfitness to be on bail, as in the present case, if the facts alleged by the learned Public Prosecutor (and they are not controverted by Mr. Basi Reddi, for Accused 1) are true; (ii) if he hampers the investigation as will be the case if he, when on bail, forcibly prevents the search of places under his control for the *corpus delicti* or other incriminating things; (iii) if he tampers with the evidence, as by intimidating the P.Ws. interfering with the scene of offence in order to remove traces or proofs of the crime, etc.; (iv) if he runs away to a foreign country, or goes underground, or beyond the control of his sureties; and (v) if he commits acts of violence, in revenge, against the police and the prosecution witnesses and those who have booked him or are trying to book him.

As this case falls under the first category, the bail granted in Criminal Miscellaneous Petition No. 1076 of 1950, to the first accused in Sessions Case No. 67 of 1949 of the Tirunelveli Division, George Williams *alias* Victor (the appellant in Criminal Appeal No. 387 of 1950 on the file of this Court) is cancelled under the inherent powers of this Court under section 561-A, Criminal Procedure Code, similar to the powers under section 497 (5), Criminal Procedure Code, and he is directed to be re-arrested and committed to custody forthwith.

I may add that when such a man commits a similar non-bailable offence, as is alleged here by the learned Public Prosecutor, the police can, without the permission of any Court, including the Court that granted bail, arrest him and get him remanded to jail, and drive him to apply for bail again, and can then bring to the notice of the Court how the man abused the bail previously granted to him and proved himself unworthy of being granted any more bail. To say that a Court granting bail to a convicted person pending his appeal can *never* cancel the bail, as Mr. Basi Reddi does, will lead to ludicrous results. His bail cannot be cancelled even if he absconds or fails to turn up at the hearing. Very few persons who are convicted of grave crimes like this, will be granted bail during the pendency of their appeals if the Court granting bail (including the High Court) were to be precluded from cancelling the bail even if the man who got the bail by protesting his innocence repeats the offences a number of times during the bail period.

K.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMASWAMI.

Narayana Reddiar and others .. *Petitioners**

Penal Code (*XLV of* 1860), *section* 182—*Bribe-giver not sticking to previous statement—Prosecution for—Sustainability.*

Law deals with the bribe-givers and bribe-takers on the same par and treats them as accomplices of each other. Where it is not shown that the previous statements by bribe-givers were false

* Crl. R. Cs. Nos. 1352 to 1355 of 1950. 10th January, 1950.
(Crl. R. P. Nos. 1278 to 1281 of 1950).

or true and when those persons were not bound to incriminate themselves (by sticking to these previous statement) a prosecution against them for tergiversation (namely that they have not stuck to their previous statement) is misconceived.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Chidambaram in C. A. No. 29 of 1950, etc., preferred against the order of the Court of the Second-Class Magistrate, Tattagudi, in C.C. No. 111 of 1950, etc., respectively.

G. Gopalaswami for Petitioners.

The Public Prosecutor (*V. T. Rangaswami Aiyangar*) for the State.

The Court made the following

ORDER.—In the peculiar circumstances of the case the prosecutions under section 182 of the Indian Penal Code ought not to have been launched because the offence for which these persons have been convicted is for the offence of tergiversation, namely that they have not struck to their previous statements notwithstanding that the previous statements might be untrue and secondly sticking to the previous statement would only be to incriminate themselves because the law deals with the bribe-givers and bribe-takers on the same par and treats them as accomplices of each other. Therefore when it has not been shown whether the information given by these persons was false or true and secondly when these accused persons were not bound to incriminate themselves these prosecutions were misconceived. The convictions and sentences cannot be supported and they are set aside. The fine amounts, if collected, would be refunded.

K.S. ——— *Convictions set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

V. M. S. Kandaswamy Nadar .. *Appellant**

v.

The Province of Madras, through the District Collector of Ramnad at Madura and another .. *Respondents.*

Madras Survey and Boundaries Act (VIII of 1923), sections 9, 11, 13 and 14—Survey without notice to party concerned and adverse to him—Such party not bringing suit to set aside the survey within three years—Survey if binding on party not given notice.

Civil Procedure Code (V of 1908), Order XXIII, Rule 1—Defendant asking suit to be dismissed and permission to be given to file fresh suit—Cannot object to permission when such suit is filed.

A party concerend by an adverse survey to whom no notice was given of the survey is not bound to file a suit within three years to set aside the order of the Survey Officer because he had no notice of the survey and the orders on it cannot be said to be correctly passed under section 13 of the Madras Survey and Boundaries Act and binding on that party.

If a defendant requests the Court to dismiss a suit and grant permission to the plaintiff to file a fresh suit when such a fresh suit is filed he cannot turn round and say that the Court which granted the permission should not have done so.

Appeal against the decree of the Court of the Subordinate Judge, Ramanathapuram in A. S. No. 50 of 1947 preferred against the decree of the District Munsiff's Court, Sattur, in O. S. No. 278 of 1945.

T. V. Balakrishnan for Appellant.

The Government Pleader (*P. Satyanarayana Raju*) and *K. Kuttikrishna Menon* for Respondents.

The Court delivered the following

JUDGMENT.—In view of the finding of the lower appellate Court refusing to rely upon the evidence of D. W. 6, that he affixed the notice to survey number 321

*S. A. No. 1114 of 1948. 4th December, 1951.

on the outer door of the shop, the lower appellate Court was justified in coming to the conclusion that the appellant did not have notice of the survey as contemplated in section 9 (ii) of the Madras Survey and Boundaries Act. The question then arises as to whether such a survey without notice to the party concerned, when it is adverse to him, is binding on him, if he has not brought a suit to set aside the survey within three years as contemplated in section 14 of the Act. The expression in section 13 is "when the survey of any land or boundary which has been notified under section 5 has been completed in accordance with the orders passed under sections 9, 10 or 11 etc., etc." The question is, whether there has been a completion of the survey in accordance with the orders passed under section 9, if no notice of the survey has been given to the party concerned. The learned Judge held that the words "in accordance with the orders" cannot be said to be synonymous with "in accordance with the provisions laid down." I am unable to agree. When a Statute says that an order should be passed under section so and so, it contemplates the fulfilment of all the necessary formalities which have to be completed under the section. Here the non-observance of the giving of a notice to the party would make the order passed not one correctly passed under the section. If the officer passes an order without complying with the requisites of the section, it cannot be said that it is an order passed under the section. I am therefore inclined to hold that the appellant is not bound to file a suit within three years to set aside the order of the Survey Officer because he had no notice of the survey.

The next point is whether the learned Judge is right in holding that the decision of the District Judge of Ramnad in Appeal No. 182 of 1944 is not binding on the parties. That appeal arose out of a suit for a similar relief and in the trial Court, the present plaintiff, was given a decree. In the Court of appeal, it was contended before the learned District Judge that the suit should have been dismissed because the requisite notice under section 80 of the Civil Procedure Code had not been given. In the alternative, it was contended that liberty may be given to the plaintiff to file a fresh suit after complying with the provisions of section 80 of the Civil Procedure Code. The relevant portions of the learned District Judge's judgment are as follows:

> "If at all the lower Court felt that the plaintiff was entitled to some indulgence, it ought to have merely given him the liberty to file a fresh suit on the same cause of action after giving notice under section 80, Civil Procedure Code, to the Government.

The learned District Judge accepted the second alternative and held as follows:

> "I also give the plaintiff liberty to file a fresh suit on the same cause of action against both the defendants after giving the necessary notice under section 80, Civil Procedure Code, to Government."

When a party to an appeal has induced the Court to pass an order on a certain representation made to the Court, that party cannot later on be heard to say that the order passed by the Court on his request is illegal. It seems to me that if the learned District Judge of his own accord had dismissed the suit and given the plaintiff liberty to file a fresh suit, then his order would have been illegal under Order XXIII, rule 1, which definitely states that the leave to file a fresh suit can be given only when the suit is allowed to be withdrawn, on account of the fact that the suit is bad for some formal defect. But here, it was at the instance of the respondents that the District Judge on that occasion granted the plaintiff permission to file a fresh suit after dismissing his suit. If a request like that had not been made at the instance of the Government, probably the District Judge would have permitted the plaintiff herein to withdraw the suit with permission to file a fresh suit and in that case nothing could have been said against the propriety of the order made by the District Judge on that occasion. The Government, like any other party, cannot be allowed to approbate and reprobate. I feel constrained

to hold that the Government cannot now be heard to say that the present suit is not sustainable because of the provisions of Order XXIII, rule 1, Civil Procedure Code. In this view, it is unnecessary for me to discuss the decisions relied upon by the learned Subordinate Judge as well as those cited before me by Mr. Srinivasan for the respondents that it is not open to a Court when a suit is dismissed to grant leave to file a fresh suit. That is perfectly sound law against which nothing could be said but none of those decisions go to the extent of saying that if a defendant requests the Court to dismiss a suit and grant permission to the plaintiff to file a fresh suit and when such a fresh suit is filed, he can turn round and say that the Court which granted him permission should not have done so. Both the points on which the learned Subordinate Judge has found against the plaintiff, thus failing and the lower appellate Court having found title in the plaintiff, the plaintiff's suit ought to be decreed.

I therefore set aside the decision of the lower appellate Court and restore that of the District Munsiff with costs throughout. (No leave).

K.S. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—M. PATANJALI SASTRI, *Chief Justice*, MEHRCHAND MAHAJAN, B. K. MUKHERJEA, S. R. DAS AND N. CHANDRASEKHARA AIYAR, JJ.

G. Veerappa Pillai, Proprietor, Sathi Vilas Bus Service, Porayar, Tanjore District, Madras .. *Appellant.**

v.

Messrs. Raman and Raman Limited, Kumbakonam, Tanjore District and three others .. *Respondents.*

Motor Vehicles Act (*IV of* 1939) (*as amended in Madras*), *sections* 42, 43-A, 47 *and* 64-A—*Issue of permits for buses—Powers of—Nature and extent—Jurisdiction of High Court to interfere with grant or refusal of permits by the appropriate transport authorities—Constitution of India*, 1950—*Article* 226—*Scope.*

The Motor Vehicles Act is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation. No one is entitled to a permit as of right even if he satisfies all the prescribed conditions. The grant of a permit is entirely within the discretion of the transport authorities and naturally depends on several circumstances which have to be taken into account. The Regional Transport Authority and the Provincial Transport Authority (called in Madras the Road Traffic Board and the Central Road Traffic Board respectively) are entrusted under section 42 with this power. They may be described as administrative bodies exercising quasi-judicial functions in the matter of grant of permits. The bodies or authorities are constituted by the Provincial Government. The matters which are to be taken into account in granting or refusing a stage carriage permit are specified in section 47. By delegation under rule 134-A the Secretary of the Road Traffic Board may exercise certain powers as regards the grant or refusal of stage carriage permits and under rule 136 there is an appeal to the Board from these orders. Similar powers of delegation are vested in the Secretary to the Central Board and an appeal lies to the Central Board under rule 148 (1). From an original order of the Road Traffic Board there is an appeal to the Central Board and from the original order of the Central Board to the Government, *vide* rules 147 and 148. Section 64-A (introduced by Madras Amendment Act) vests a power of revision in the Provincial Government. Besides this specific provision, there is a general provision in section 43-A that the Provincial Government may issue such orders and directions of a general character as it may consider necessary to the Provincial Transport Authority or a Regional Transport Authority in respect of any matter relating to road transport, and such transport authority shall give effect to all such orders and directions. There is, therefore, the regular hierarchy of administrative bodies established to deal with the regulation of Transport by means of Motor Vehicles. The remedies for the redress of grievances or the correction of errors are found in the statute itself and it is to these remedies that resort must generally be had and resort cannot be had to a writ of *certiorari* to quash such orders.

Such writs as are referred to in Article 226 of the Constitution are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the

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* Civil Appeal No. 159 of 1951. 17th March, 1952.

record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decisions impugned and decide what is the proper view to be taken or the order to be made.

Further a direction (in the order of the High Court quashing the proceedings) to the Regional Transport Authority to grant permits to a particular party is clearly in excess of its powers and jurisdiction.

On appeal by Special Leave from the Judgment and Order, dated the 13th April, 1951, of the High Court of Judicature at Madras (Rajamannar, C.J. and Somasundaram, J.) in C.M.P. No. 12215 of 1950.

M. S. Setalvad, Senior Advocate (*C. R. Pattabhi Raman* and *G. R. Jagadeesa Ayyar*, Advocates, with him) for Appellant.

C. K. Daphtary, Senior Advocate (*M. Natesan*, Advocate with him) for Respondent No. 1.

V. K. T. Chari, Advocate-General, Madras (*R. Ganapathi*, Advocate with him) for Repondent No. 4.

The Judgment of the Court was delivered by

Chandrasekhara Aiyar, J.—This appeal arises as the result of special leave to appeal granted by this Court on the 1st of May, 1951, against an order of the Madras High Court, dated 13th April, 1951, quashing certain proceedings of the Regional Transport Authority, Tanjore, and the Central Traffic Board, Madras, dated 19th January, 1950 and 3rd March, 1950 respectively, and an order of the first respondent (the State of Madras) dated 7th November, 1950, and directing the issue to Messrs. Raman and Raman, Limited, (Petitioners before the High Court) of permits for the five buses in respect of which a joint application had been made originally by them and one T. D. Balasubramania Pillai.

The present appellant, G. Veerappa Pillai, was the fourth respondent in the High Court. The present first respondents (Messrs. Raman and Raman, Limited) were the petitioners before the High Court. Present respondents Nos. 2, 3 and 4 were respectively respondents Nos. 1, 2 and 3 before the High Court.

The dispute is between the appellant and Messrs. Raman and Raman, Limited, who were competing bus proprietors in the Tanjore District; and it is over the issues of five permanent permits for bus Nos. M.D.O. 81, M.D.O. 230, M.D.O. 6, M.D.O. 7 and M.D.O. 759 on the route between Kumbakonam and Karaikal. It has been a long-drawn game with many moves, counter-moves, advances and checkmates, both sides displaying unusual assiduity and skill in their manoeuvres for position. But it is unnecessary to set out in great detail all the steps taken, as they have been narrated in the order of High Court and many of them are of insignificant relevance for disposal of this appeal. I shall state here only what is material.

The 'C' permits for the five buses stood originally in the name of Balasubramania Pillai. The buses were agreed to be purchased from him by Messrs. Raman and Raman Limited. And there was a joint application by the transferor and transferee on 10th March, 1944 for transfer of the ownership and of the 'C' permits in the name of the purchasers. Two days later, Veerappa Pillai, proprietor of the Sri Sathi Vilas Bus Service, who is the appellant before us, applied for temporary permits to ply two of his own vehicles over the same route, stating that the vehicles of the two agencies which held the permits were mostly out of action. It was a fact that out of the five buses sold by Balasubramania Pillai, only two were then running; the other three were under repairs. The permanent permits for the sold buses were suspended by order of the Secretary dated 28th March, 1944. Temporary permits for buses M.D.O. 920, 894, 918, M.S.C. 7632 and 7482 had been issued to Veerappa Pillai during the same month.

Now we come to another chapter in the story. Balasubramania Pillai resiled from the joint application and repudiated it as having been got from him by fraud.

The Secretary, Road Traffic Board, thereupon refused to transfer the ownership on the 19th March, 1944, and this order was confirmed by the Board on 29th May, 1944. Balasubramania Pillai and Veerappa Pillai made a joint application on 10th April, 1944, for transfer of the buses and the original permits in favour of Veerappa Pillai who had on the same date agreed to purchase the vehicles. The Secretary granted this application on the same date. Messrs. Raman and Raman, Limited, took the matter before the Central Road Traffic Board and they made an order on 16th August, 1944, upholding the issue of temporary permits to Veerappa Pillai for his buses M.D.O. 920, 894, 918, M.S.C. 7632 and 7482, but setting aside the transfer of registry of the original buses and the transfer of the permits relating to the same. On an application by Veerappa Pillai to review its order, dated 16th August, 1944, the Central Road Traffic Board allowed on 27th November, 1944, only the transfer of the ownership of the buses but not a transfer of the permits.

Yet another move in the game was this. Veerappa Pillai filed a suit in the Court of the Subordinate Judge, Kumbakonam, on 3rd October, 1944, for recovery of possession of the original five buses from Messrs. Raman and Raman Limited, on the strength of his purchase from Balasubramania Pillai. The Subordinate Judge appointed Veerappa Pillai as Receiver on 17th March, 1945 and the five disputed buses were delivered to him on 26th April, 1945. Two of the buses M.D.O. 6 and 7 were repaired by him and put on the route under his temporary permits. The suit was decreed in his favour on 2nd May, 1946. Later, he repaired the other three buses M.D.O. 759, 230 and 81 and began to run them on the same route under the temporary permits he held. Veerappa Pillai was discharged from Receivership on 18th September, 1946.

On the strength of the Sub-Court decree, Veerappa Pillai again applied for a permanent transfer of the permits, and on 22nd July, 1946, the Central Road Traffic Board transferred the petition to the Regional Transport Authority with an intimation that it saw no objection to the issue of regular permits to Veerappa Pillai for the disputed buses or to their transfer in his name, provided there were valid permits in existence. This view appears to have been modified later and on 2nd September, 1946, the Regional Transport Officer directed the issue of temporary permits to the buses for the period from 3rd September 1946 to 31st October, 1946, subject to the condition that the issue of the permits did not affect the rights of either party in the matter under dispute. Thereupon, the Government was moved by Veerappa Pillai and also by Messrs. Raman and Raman Limited but the Government declined to interfere and the result was an order on 30th June, 1947, by the Regional Transport Authority to the following effect :—

"Since the subject-matter is on appeal before the High Court, the matter will lie over pending the decision of the High Court. The temporary permits are continued as is being done."

A fresh petition by Veerappa Pillai to the Central Road Traffic Board, Madras, was unsuccessful, but a further appeal to the Government of Madras ended in his favour in an order, dated 29th March, 1949. The order is in these terms :—

"Shri Sathi Vilas Bus Service, Porayar, Tanjore district, have been permitted by the Regional Transport Authority, Tanjore, to run their buses, M.D.O. 6, 7, 81, 230 and 759 on the Kumbakonam-Karaikal route on temporary permits from 1944 pending the High Court's decision on the question of permanent ownership of the buses. Government consider it undesirable to keep these buses running on temporary permits for a long and indefinite period. Further Sri Sathi Vilas Bus Service have secured the decision of the Sub-Court, Kumbakonam, in their favour about the permanent ownership of the buses. In the circumstances the Regional Transport Authority, Tanjore, is directed to grant permanent permits for the buses of Sri Sathi Vilas Bus Service, Porayar, referred to above in lieu of the existing temporary permits."

On the basis of this Government order, permanent permits were issued in favour of Veerappa Pillai on 18th April, 1949. Getting to know of this last order Messrs. Raman and Raman Limited, approached the Government of Madras with a petition praying for clarification of the order by making it expressly subject to the decision of the High Court regarding the title to the said five buses and that in the event of the High Court deciding the appeal in favour of Messrs. Raman and Raman Limited :

"the above said five permanent permits will be taken away from Veerappa Pillai and given to them."

The Minister of Transport, who dealt with the matter, stated on the petition "that was my intention also."

The High Court reversed the decree of the Sub-Court on 2nd September, 1949, and came to the conclusion that the title of Messrs. Raman and Raman Limited, to the five buses prevailed over that of Veerappa Pillai. On 19th September, 1949, they applied to the Government for cancellation of the five permits issued to Veerappa Pillai and for grant of the same to them. The Government declined to interfere as the Regional Transport Authority was the competent authority—*vide* order dated 16th November, 1949. In their application to the Regional Transport Authority, dated 28th November, 1949, Messrs. Raman and Raman Limited, asked for withdrawal of the permits. In the meantime, that is on 14th October, 1949, Veerappa Pillai applied for renewal of his permanent permits held for his own buses Nos. M.D.O. 1357, 20, 1366, 1110, 1077, M.D.O. 1368 and M.S.C. 7632, which had been substituted for the disputed buses as they had become unroadworthy and useless. The application for renewal has under Section 58, Sub-clause (2) of the Act to be treated as a fresh application for new permits. This procedure was followed and on 22nd October, 1949, a notification was issued inviting objections against the renewal and giving 30th November, 1949, as the date of hearing. No objections were received and the Secretary renewed the permits for two years from 1st January, 1950. This order was dated 3rd January, 1950. The Regional Transport Authority dealing with the application of Messrs. Raman and Raman Limited, dated 28th November, 1949, resolved on 19th January, 1950, that the permanent permits issued to Veerappa Pillai should be cancelled, that the route should be declared vacant in respect of the five buses and fresh applications should be invited and dealt with on the merits. The order further stated that

"in the meanwhile Sri G. Veerappa Pillai and Raman & Raman will be given temporary permits for running two and three buses respectively on the route. The permanent permits will be cancelled with immediate effect. Raman & Raman should put in the buses as quickly as possible. Till then Sri G. Veerappa Pillai will be given temporary permits so as not to dislocate public traffic."

Both the parties were dissatisfied with this order and preferred appeals to the Central Road Traffic Board, Madras, which dismissed the appeal of Messrs. Raman and Raman Limited, and restored the permanent permits of Veerappa Pillai by order dated the 3rd March, 1950. Messrs. Raman and Raman, Limited, moved the Government, but it declined to interfere by Government Order, dated 7th November, 1950.

Thereupon, Messrs. Raman and Raman Limited, moved the High Court on 4th December, 1950, under Article 226 of the Constitution in Civil Miscellaneous Petition No. 12215 of 1950 for a writ of *certiorari* for quashing the orders and the proceedings of the Regional Transport Authority, the Central Road Traffic Board Madras and the State of Madras, dated 19th January, 1950, 3rd March, 1950 and 7th November, 1950 respectively, and for the issue of a writ of *mandamus* or other such appropriate directions to the first respondent to transfer, issue or grant "the five pucca permits in respect of the route Kumbakonam to Karaikkal to the petitioner herein." (Messrs. Raman and Raman Limited). It is on this petition that the order challenged in this appeal was made by the High Court.

The High Court took the view that throughout all the stages prior to the High Court's decree, the parties, the transport authorities vested with the power to issue permits, and the Government also proceeded upon the footing that the transfer of the permits was dependent on the title to the buses and that Veerappa Pillai obtained the temporary and permanent permits only in this capacity as transferee and not in his individual right. To quote the learned Chief Justice :

"the conduct of the parties, the attitude of the transport authorities including the Government are all explicable only on the assumption that the rights of parties were consequent on the ownership of the five vehicles in question. The fourth respondent having obtained the benefit of temporary and permanent permits as a transferee from Balasubramania Pillai all this time cannot be heard

now to say after the decision of this Court which has negatived his claim and upheld the claim of the applicant that the applicant should not enjoy the fruits of his success."

He further points out that the procedure laid down by the Motor Vehicles Act and the rules for grant of fresh permits was not followed and that long before the application for renewal was allowed, the Regional Transport Authority had been informed of the decision of the High Court. The order of the Central Road Traffic Board was in his opinion most unsatisfactory, as it was based on a quibbling distinction between "withdrawal" and "cancellation" of the permits. In his view, the orders complained against deprived Messrs. Raman and Raman Limited, of the fruits of the decree obtained by them at the hands of the High Court after much expenditure of time and money.

An examination of the relevant sections of the Motor Vehicles Act does not support the view that the issue of a permit for a bus—which falls within the definition of a "stage carriage"—is necessarily dependent on the ownership of the vehicle. All that is required for obtaining a permit is possession of the bus. As ownership is not a condition precedent for the grant of permits and as a person can get a permit provided he is in possession of a vehicle which satisfies the requirements of the statute or the rules framed thereunder, we have to hold that the parties and the authorities were labouring under a misconception if they entertained a contrary view. But the assumption on which they proceeded may perhaps be explained, if not justified, on the ground that it was supposed that the question of ownership of the vehicles had an important or material bearing on the question as to which of them had a preferential claim for the permits. It may well be it was one of the factors to be taken into account and it seems to us that this was apparently the reason why the question of issue of permanent permits was postponed from time to time till we come to the order of the Government, dated 29th March, 1949, on petitions presented by both the contestants.

If matters had stood as they were till the Government had made this order, something could have been said in favour of Messrs. Raman and Raman Limited, in the event of their ultimate success in the High Court as regards the title to the five buses. But the said order altered the situation. In the order, the direction for the grant of permanent permits is not rested solely on the decision of the Sub-Court in favour of Veerappa Pillai but another reason was also given, namely, that Government considered it undesirable to keep the buses running on temporary permits for a long and indefinite period. In giving this reason, they were stating a policy.

As observed already, the High Court by their judgment, dated 2nd September, 1949, reversed the decree of the Subordinate Judge and dismissed Veerappa Pillai's suit for possession of the buses based on his title. If it were the law that the question of possession based on ownership was decisive as regards the grant of permits, and if no other circumstances were available to be taken into account when the question of the issue of permanent permits again came up for consideration, it would have been easy to hold that Messrs. Raman and Raman Limited, had at least a preferential claim. But unfortunately for them both these requisites are not satisfied. It has been pointed out already that nowhere do we find in the Act anything to indicate that the issue of permits depends on ownership. Other circumstances which had a material bearing as to which of them was entitled to the permits had come into existence since the date of the original joint application and were taken into account by the transport authorities and by the Government. The order of 19th January, 1950, of the Regional Transport Authority sought to render rough and ready justice between the parties by the adoption of what may be called a middle course. The terms of the order have already been set out. Before disposing of the appeals of both the parties, the Central Traffic Board appears to have called for a report from the Regional Transport Officer. In this report, attention was drawn to the fact that all the five buses had been replaced by new vehicles and that the registration certificates had been cancelled as a result of the replacement. After Balasubramania Pillai it was Veerappa Pillai who was running the buses continuously

on this route for nearly five years and he also obtained the privilege of securing the permanent permits. The Central Traffic Board's order of 3rd March, 1950, restoring the permanent Permits of Veerappa Pillai was based on the fact that Messrs. Raman and Raman Limited, asked for withdrawal of the permits and not their cancellation and that no opportunity had been given to Veerappa Pillai to show cause why his permits should not be cancelled ; and the procedure prescribed for cancellation was not followed.

When the Government was moved by Messrs. Raman and Raman Limited, under section 64-A of the Motor Vehicles Act, they had before them a petition for withdrawal of the permanent permits issued to Veerappa Pillai and for transfer or grant of five 'Pucca permits' relating to the five buses. The Government granted stay of the appellate order of the Central Road Traffic Board pending disposal of the revision petition and called for a report from the subordinate transport authorities. Two important facts were brought to the notice of the Government in the report. Messrs. Raman and Raman Limited, did not file any objections to the renewal of the permits sought by Veerappa Pillai. What is more important, they had no permits from the French authorities enabling them to run any buses on the portion of the route which lay in French territory. It was further pointed out that there was no subsisting joint application to support the request for transfer and that the original permits in the name of Balasubramanian had ceased to exist after 31st December, 1944. The Government had also before them two petitions dated 8th March, 1950, and 25th October, 1950, from Messrs. Raman and Raman Limited, and two petitions, dated 29th March, 1950 and 8th June, 1950, from Veerappa Pillai. It is on the basis of all these materials that the Government declined to interfere with the decision of the Central Road Traffic Board.

It is contended for the appellant that in this state of affairs the High Court acting under Article 226 of the Constitution had no right to interfere with the orders of the transport authorities.

It is unnecessary for the disposal of this appeal to consider and decide on the exact scope and extent of the jurisdiction of the High Court under Article 226. Whether the writs it can issue must be analogous to the writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* specified therein and the power is subject to all the limitations, or restrictions imposed on the exercise of this jurisdiction, or whether the High Court is at liberty to issue any suitable directions or orders or writs untrammelled by any conditions, whenever the interests of justice so require, is a large and somewhat difficult problem which does not arise for solution now. Mr. Setalvad appearing for the appellant urged two narrower grounds as sufficient for his purposes. Firstly, he urged that however wide the jurisdiction of the High Court might be under Article 226, it could never exercise its powers under the Article in such a manner as to convert itself into a Court of appeal sitting in judgment over every tribunal or authority in the State discharging administrative or quasi-judicial functions. Secondly, he maintained that the Motor Vehicles Act with the rules framed thereunder dealing with the grant of permits is a self-contained code and that in respect of the rights and liabilities created by such a statute the manner of enforcement must be sought within the statute itself. It was further urged by him that in any event, the High Court could not substitute its own view or discretion for the view taken or discretion exercised by the specified authorities, even if it was erroneous or unsound.

Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the

decisions impugned and decide what is the proper view to be taken or the order to be made. Mr. Daphtary, who appeared for the respondent, said nothing to controvert this position. His argument was that if all along the authorities and the Government had proceeded upon a particular footing and dealt with the rights of the parties on that basis, it was not open to them afterwards to change front and give the go-by altogether to the conception of the rights of parties entertained by them till then. According to him, there was manifest injustice to his client in allowing them to do so and this was the reason which impelled the High Court to make the order which is the subject-matter of challenge in this appeal.

The Motor Vehicles Act is a statute which creates new rights and liabilities and prescribes an elaborate procedure for their regulation. No one is entitled to a permit as of right even if he satisfies all the prescribed conditions. The grant of a permit is entirely within the discretion of the transport authorities and naturally depends on several circumstances which have to be taken into account. The Regional Transport Authority and the Provincial Transport Authority are entrusted under section 42 with this power. They may be described as administrative bodies exercising quasi-judicial functions in the matter of the grant of permits. Under rule 3 of the Madras Motor Vehicles Rules, the Regional Transport Authority is called the Road Traffic Board and the Provincial Transport Authority is called the Central Road Traffic Board. These bodies or authorities are constituted by the Provincial Government. The matters which are to be taken into account in granting or refusing a stage carriage permit are specified in section 47. By delegation under rule 134-A the Secretary of the Road Traffic Board may exercise certain powers as regards the grant or refusal of stage carriage permits and under rule 136 there is an appeal to the Board from these orders. Similar powers of delegation are vested in the Secretary to the Central Board and an appeal lies to the Central Board under rule 148 (1). From an original order of the Road Traffic Board there is an appeal to the Central Board and from the original orders of the Central Board to the Government, *vide* rules 147 and 148 An amendment introduced by the Madras Act XX of 1948 and found as section 64-A in the Act vests a power of revision in the Provincial Government. Besides this specific provision, there is a general provision in section 43-A that the Provincial Government may issue such orders and directions of a general character as it may consider necessary to the Provincial Transport Authority or a Regional Transport Authority in respect of any matter relating to road transport; and such transport authority shall give effect to all such orders and directions. There is, therefore, the regular hierarchy of administrative bodies established to deal with the regulation of Transport by means of motor vehicles.

Thus we have before us a complete and precise scheme for regulating the issue of permits, providing what matters are to be taken into consideration as relevant; and prescribing appeals and revisions from subordinate bodies to higher authorities. The remedies for the redress of grievances or the correction of errors are found in the statute itself and it is to these remedies that resort must generally be had. As observed already, the issue or refusal of permits is solely within the discretion of the transport authorities and it is not a matter of right.

We are accordingly of opinion that this was not a case for interference with the discretion that was exercised by Transport Authorities paying regard to all the facts and the surrounding circumstances.

Further, it will be noticed that the High Court here did not content itself with merely quashing the proceedings, it went further and directed the Regional Transport Authority, Tanjore,

"to grant to the petitioner permits in respect of the five buses in respect of which a joint application was made originally by the petitioner and Balasubramania Pillai and that in case the above buses have been condemned, the petitioner shall be at liberty to provide substitutes within such time as may be prescribed by the authorities."

Such a direction was clearly in excess of its powers and jurisdiction.

For the reasons given above, the appeal is allowed and the order of the High Court set aside. Each party will bear their own costs of these proceedings throughout.

Agent for Appellant : *S. Subramaniam.*

Agent for Respondent No. 1 : *M. S. K. Sastri.*

Agent for Respondent No. 4 : *P. A. Mehta.*

G.R./K.S.. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Civil Appellate Jurisdiction.]

PRESENT :—S. FAZL ALI, B. K. MUKHERJEA AND S. R. DAS, JJ.

Messrs. Parry and Company, Ltd., Dare House, Madras .. *Appellant* *

v.

Commercial Employees Association, Madras and another .. *Respondents.*

Certiorari—*Writ of—When can issue to quash decision of inferior tribunal—Labour Commissioner deciding matter referred to him under Madras Shops and Establishments Act* (*XXXVI of* 1947)—*High Court's power to quash decision—Limits.*

Where the Labour Commissioner acting within his jurisdiction decides a question referred to him under the Madras Shops and Establishments Acts, though he might have come to an erroneous conclusion there is no ground for issuing a writ of *certiorari.* The High Court cannot exercise the powers of an appellate Court and correct what it considered to be an error in the decision of the Labour Commissioner. The position might be different if the Labour Commissioner had omitted to decide a matter which he was bound to decide and in such a case a *mandamus* might legitimately issue commanding the authority to determine questions which it left undecided ; but no *certiorari* is available to quash the decision passed with jurisdiction by an inferior tribunal on the mere ground that such decision is erroneous.

In spite of the provisions of section 51 of the Madras Shops and Establishments Act that the decision of the Labour Commissioner would be final the Superior Court is not absolutely deprived of the power to issue a writ, although it can do so only on the ground of either a manifest defect of jurisdiction in the tribunal that made the order or of a manifest fraud in the party procuring it.

On appeal from the Judgment and Order, dated the 1st April, 1949, of the High Court of Judicature, Madras (Rajamannar, *Chief Justice* and Balakrishna Ayyar, J.) in Civil Miscellaneous Petition No. 1317 of 1949, arising out of the Order, dated the 29th January, 1949, of the Commissioner of Labour, Madras.

S. C. Isaacs, Senior Advocate, (*S. N. Mukherji,* Advocate with him) for Appellant.

Respondents not represented.

The Judgment of the Court was delivered by

Mukherjea, J.—This appeal is directed against a judgment of a Division Bench of the Madras High Court, dated 1st April, 1949, passed in a *certiorari* proceeding, by which the learned Judges directed the issue of a writ of *certiorari* for quashing a portion of an order made by the Labour Commissioner, Madras, in an enquiry under section 51 of the Madras Shops and Establishments Act.

The facts material for our present purpose lie within a narrow compass and to appreciate the point that requires consideration in this appeal it will be convenient first of all to advert to a few relevant provisions of the Madras Act referred to above. The Act was passed in 1947 and its object, as stated in the preamble, is to provide for the regulation of conditions of work in shops and other establishments. Section 14 (1) of the Act sets a statutory limitation upon the working hours and lays down :

"Subject to the other provisions of the Act, no person employed in any establishment shall be required or allowed to work for more than 8 hours in any day and 48 hours in any week."

A proviso attached to the sub-section which, by way of exception to the rule enunciated therein, allows employment of a person in any establishment for any

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* C. A. No. 154 of 1951. 10th April, 1952.

period in excess of this statutory limit subject to payment of overtime wages, provided the period of work including overtime work does not exceed 10 hours in any day, and in the aggregate 54 hours in any week. Section 31 provides :

"Where any person employed in any establishment is required to work overtime he shall be entitled, in respect of such overtime work to wages at twice the rate of ordinary rate of wages."

Section 50 preserves the existing rights and privileges of an employee in any establishment if these rights and privileges are more favourable to him than those created by the Act.

The section runs as follows :—

"Nothing contained in this Act shall affect any rights or privileges which any person employed in any establishment is entitled to on the date on which this Act comes into operation in respect of such establishment under any other law, contract, custom or usage applicable to such establishment if such rights and privileges are more favourable to him than those to which he would be entitled under this Act."

The only other relevant section is section 51 which says :—

"If any question arises whether all or any of the provisions of this Act apply to an establishment or to a person employed therein or whether section 50 applies to any case or not, it shall be decided by the Commissioner of Labour and his decision thereon shall be final and shall not be liable to be questioned in a Court of law."

The appellant is a limited company carrying on business in Madras, while the respondent is an association of clerical employees including those working under the appellant. On 10th November, 1948, the respondent presented an application before the Labour Commissioner, Madras, under section 51 of the Shops and Establishments Act for decision of certain questions referred to in the petition which related to the rights and privileges of the employees of the appellant. The Commissioner issued a notice calling upon the appellant to appear and answer the contentions raised on behalf of the employees. The parties appeared before the Commissioner on 26th November, 1948 and again on 16th December following when they were represented by lawyers. After hearing the parties and on a consideration of the evidence adduced by them, the Labour Commissioner made his decision on 29th January, 1949. The questions raised by the employees were classified by the Commissioner under six separate issues and two of them, which are material for our present purpose, are worded as follows :—

Issue No. 5.—Whether there has been an increase in working hours from 6 to 6¾ on week days from 12th October, 1948 and the increase is permissible ?

Issue No. 6.—Whether overtime wages at twice the ordinary rates should not be paid for work done by the employees after the normal working hours ?

On Issue No. 5 the decision of the Commissioner was that the business hours of the company were six and half prior to 1st April, 1948, when the Act came into force and they continue to be so even now. It is true that a circular was issued which was to take effect from 12th October, 1948, under which the lunch interval was reduced by half an hour, but at the same time it was directed that the office would close for business with the general public at 5 P.M. instead of 5-30 P.M. on all working days so far as business hours are concerned.

As regards Issue No. 6, the Labour Commissioner observes first of all that although it is customary in many establishments to fix certain hours of business during which business is transacted with the outside public, yet they are not the real hours of employment and as a matter of fact the employees do work outside these business hours, for which they are not entitled to any extra remuneration provided the statutory limit of 8 hours a day is not exceeded. In the opinion of the Commissioner if the normal hours of work were previously fixed and strictly adhered to, the employees could have acquired a right or privilege to work only for such hours and they would be entitled to seek protection under section 50 of the Act against the imposition of longer hours without a corresponding increase in emoluments. The Commissioner goes on to say that in such cases

it would be sufficient if compensatory wages are paid at the ordinary rate calculated according to rule 10 of the Madras Shops and Establishments Rules for work in excess of the normal hours but less than the statutory hours. But for work of more than 8 hours a day or 48 hours a week, wages at twice the ordinary rates should be paid as required by the proviso to section 14 (1) and section 31 of the Act. The conclusion reached by the Commissioner with regard to this issue is expressed by him in the following words :

"I hold that the case of Messrs. Parry and Company's employees falls under the former category and that the employees in this company will be entitled to overtime wages only when the statutory hours are exceeded."

This order, as said above was made on 29th January, 1949 and on 16th of February following the respondent association filed a petition before the High Court at Madras, praying for a writ of *certiorari* to quash the same. This application was heard by a Bench of two Judges and by the judgment dated 1st of April, 1949, the learned Judges allowed the petition in part and quashed the order of the Labour Commissioner in so far as it decided that the employees of the appellant will be entitled to overtime wages only when the statutory hours were exceeded. It is the propriety of this decision that has been challenged before us in this appeal.

It is somewhat unfortunate that the respondent remained unrepresented before us and the appeal had to be heard *ex parte*. Mr. Isaacs, who appeared on behalf of the appellant, has, however, rendered every assistance that he possibly could and has placed before us all the material facts and relevant provisions of law. Having given the matter our best consideration, we are of the opinion that the order of the High Court cannot be supported and that this appeal should be allowed.

The High Court seems to have based its decision on the ground that the Commissioner of Labour failed to answer the question raised by the association as to whether the company was entitled to require the employees to work more than six and half hours a day. According to the learned Judge, the Labour Commissioner was not right in holding that even if the working hours were fixed at six and half hours a day, the employees would be entitled to overtime wages only when the statutory hours are exceeded.

As has been pointed out already, the Labour Commissioner did decide that if the normal hours of work were previously fixed and rigidly adhered to, the employees would be entitled to seek protection under section 50 of the Act against imposition of longer hours of work without a corresponding increase in their emoluments. The increase in such cases, according to the Labour Commissioner, should be on the scale of compensatory wages allowed under rule 10 of the Madras Shops and Establishment Rules. If, however, the increase is more than the statutory period, the employees will be entitled to wages at double rate under section 31 of the Act. This decision may or may not be right, but it has not been and cannot be suggested that the Labour Commissioner acted without jurisdiction or in excess of his powers. Under section 51 of the Madras Shops and Establishments Act, the Labour Commissioner is the only proper and competent authority to determine the questions referred to it in that section ; and there is an express provision in it that the decision of the Labour Commissioner shall be final and not liable to be challenged in any court of law. It was the respondent who took the matter before the Labour Commissioner in the present case and invited his decision upon the questions raised in the petition. The Commissioner was certainly bound to decide the questions and he did decide them. At the worst, he may have come to an erroneous conclusion, but the conclusion is in respect of a matter which lies entirely within the jurisdiction of the Labour Commissioner to decide and it does not relate to anything collateral, an erroneous decision upon which might affect his jurisdiction. The records of the case do not disclose any error apparent on the face of the proceeding or any irregularity in the procedure adopted by the Labour Commissioner which goes contrary

to the principles of natural justice. Thus there was absolutely no grounds here which would justify a superior court in issuing a writ of *certiorari* for removal of an order or proceeding of an inferior tribunal vested with powers to exercise judicial or quasi-judicial functions. What the High Court has done really is to exercise the powers of an appellate court and correct what it considered to be an error in the decision of the Labour Commissioner. This obviously it cannot do. The position might have been different if the Labour Commissioner had omitted to decide a matter which he was bound to decide and in such cases a *mandamus* might legitimately issue commanding the authority to determine questions which it left undecided[1]; but no *certiorari* is available to quash a decision passed with jurisdiction by an inferior tribunal on the mere ground that such decision is erroneous. The judgment of the High Court, therefore, in our opinion, is plainly unsustainable. In the view which we have taken, it is unnecessary to express any opinion as to whether *certiorari* has been taken away—if it can be taken away at all under our Constitution—by the provision of section 51 of the Madras Shops and Establishments Act which lays down that the decision of the Labour Commissioner would be final and incapable of being challenged in any court of law. It was conceded by Mr. Isaacs that in spite of such statutory provisions the superior court is not absolutely deprived of the power to issue a writ, although it can do so only on the ground of either a manifest defect of jurisdiction in the tribunal that made the order or of a manifest fraud in the party procuring it.[2] The result is, that in our opinion the appeal succeeds and the judgment of the High Court is set aside and the order of the Labour Commissioner affirmed. As the respondent was absent, wo do not think it proper, in the circumstances of this case, to make any order for costs.

Agent for Appellant : *P. K. Mukherjee.*

G.R./K.S. *Appeal allowed.*

[THE SUPREME COURT OF INDIA.]

[Criminal Appellate Jurisdiction.]

PRESENT :—S. FAZL ALI AND VIVIAN BOSE, JJ.

Bhagwan Singh .. *Appellant* *

v.

The State of Punjab (I) .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 540 and 537—Scope—Witnesses who were not examined before committing Court—Examination as prosecution witness in Sessions Court—Propriety—Section 288—Prosecution witness giving conflicting versions in chief and cross-examination—Use of statement in committing Court as substantive evidence—Permissibility—Section 360—Object of reading over depositions to the witness—Certificate of Magistrate that it was read over and admitted by witness to be correct—Presumption of correctness—Rebuttal—Burden of proof—Evidence Act (I of 1872), section 80—Applicability.

The Sessions Court has power to examine witnesses who were not examined before the Committing Magistrate because of section 540 of the Criminal Procedure Code, and if the witness is treated as a prosecution witness and examined by the prosecuting counsel instead of by the Court itself that at best would be an irregularity curable by section 537. The proper time to object to such a procedure would be at the trial itself, and it is too late to object to such venial irregularity in the Court of appeal.

Where a prosecution witness at the trial gives conflicting versions in chief and in cross-examination the prosecution is entitled to use the former statement of such witness in the Committing Court either to contradict what was said in cross-examination or to corroborate what was said in chief. In either event, section 288 of the Criminal Procedure Code could be used to make the former statement substantive evidence.

The Court is bound to accept as correct until it is proved to be untrue the certificate of the committing Magistrate endorsed on the deposition sheet stating that the deposition was read out to the witness and that the witness admitted it to be correct. The burden is on the person seeking to displace the statutory presumption and if he chooses to rely on the testimony of a witness which the Court is not prepared to believe the matter ends there. It cannot be suggested that the Com-

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1. Vide *Board of Education* v. *Rice and others,* (1911) A.C. 179.

2. Vide *Colonial Bank of Australasia* v. *Robert Willan,* (1874) 5 P.C. Appeals 417.

* Crl. Appeal No. 12 of 1952. 30th April, 1952.

mitting Magistrate should have been examined to prove the truth of the certificate. Even if the fact be true that the deposition was not read-over, that would only amount to a curable irregularity. The object of reading over prescribed by section 360, Criminal Procedure Code is not to enable the witness to change his story but to ensure that the record faithfully and accurately embodies the gist of what the witness actually said. Before prejudice by not reading over can be substantiated it must be disclosed by affidavit exactly where the inaccuracy lies.

On appeal by special leave from the Judgment and Order, dated the 4th June, 1951, of the High Court of Judicature for the State of Punjab (I) at Simla (Bhandari and Soni, JJ.) in Criminal Appeal No. 109 of 1951, arising out of Judgment and Order, dated the 19th March, 1951, of the Court of the Additional Sessions Judge, Ferozepore, in Sessions Trial No. 18 of 1951.

T. R. Bhasin, Advocate for Appellant.

Gopal Singh, Advocate for Respondent.

The Judgment of the Court was delivered by

Bose, J.—This is a simple case though it was argued at great length on behalf of the appellant and a number of technical objections to the validity of the trial taken.

The appellant Bhagwan Singh has been convicted of the murder of one Buggar Singh and sentenced to death. He has also been convicted under section 19 (*f*) of the Indian Arms Act but we are not concerned with that here.

The prosecution story is that the appellant bore a grudge against the deceased because the deceased had fired at the appellant's brother some six or seven years before the present occurrence and was sent to jail for it. When he came out of jail the police thought it prudent to take proceedings against both sides under section 107 of the Code of Criminal Procedure. This resulted in the appellant's two brothers and his cousins being bound down, as also the deceased. This, it is said, constituted the motive for the present crime.

On the date of the occurrence, the 7th of September, 1950, the prosecution state that the appellant was sitting at the shop of Jit Singh, P.W. 2, when the deceased came there about 12-15 P.M. and borrowed Rs. 5 from Jit Singh who lent him the money and entered the transaction in his account book. When the deceased left the shop he was followed by the appellant who shot him at point blank range with a pistol only 4 or 5 karams from the shop. This attracted the attention of a number of bystanders who immediately chased the appellant and apprehended him after a short run of about 30 karams. He was still carrying the pistol. It was taken away from him by Jagir Singh Patwari, P.W. 4.

The appellant was immediately taken to the local police post about 100 karams distant and the shopkeeper Jit Singh, P.W. 2, made the first information report at 12-30 P.M. within 15 minutes of the occurrence.

The motive is proved by Bhag Singh, P.W. 7, who has been believed and that part of the case was not challenged before us.

The occurrence was witnessed by a large number of persons of whom the prosecution examined only five. Two of them turned hostile in the Sessions Court and one gave evidence which has been regarded by the High Court as neutral. The remaining two, Balbir Singh (P.W. 5) and Jaswant Singh (P.W. 6) have been believed. The only questions are (1) whether the conviction can be rested on their testimony and (2) whether certain irregularities in the trial vitiate it.

No attack was made on the testimony of Balbir Singh, P.W. 5, except that the two eye-witnesses who resiled in the Sessions Court contradict him. But it was argued that the evidence of Jaswant Singh, P.W. 6, is vitiated because he was not examined by the Committing Magistrate. It was said that that makes his evidence in the Sessions Court inadmissible.

This raises a question which is largely academic in this case because the reason Jaswant Singh, P.W. 6, was not examined by the Committing Magistrate is that the witness had gone away and was not available and it would have been

a needless, and indeed unjustifiable, holding up of the proceedings to wait till he could be found and summoned. It is evident that the Sessions Court has power to examine witnesses who were not examined before the Committing Magistrate because of section 540 of the Criminal Procedure Code, and if the witness is treated as a prosecution witness and examined by the prosecuting counsel instead of by the Court itself that at best would be an irregularity curable by section 537. The proper time to object to such a procedure would be at the trial itself, and as the appellant was represented in the Sessions Court by two counsel it is too late to object to such a venial irregularity in this Court.

The learned counsel for the appellant took us elaborately through the provisions of Chapter XVIII of the Criminal Procedure Code and stressed in particular section 208 (1) but we need not enter into this because section 540 is a complete answer in this particular case. None of the cases cited goes so far as to say that no witness who was not produced in the committal proceedings can be examined at the trial and we would be unable to agree if they did. The decision most in favour of the appellant's contention is *Sher Bahadur* v. *The Crown*[1], but that does no more than consider such an omission as a curable defect. Abdul Qadir, J., said at pages 338 and 342 that it was conceded before them that section 540 could be called in aid in such a case, and at page 339 the learned Judge dealt with the question of prejudice and concluded at page 344 with the remark that the question is one of fact in each case and that in his opinion there was prejudice in that particular case. The other learned Judge took the same view at pages 347 and 348 and said—

"The Court can, of course, always use its discretion and allow the production of further evidence."

It is to be observed that the objection in that case was raised at a very early stage and before the sessions trial had commenced; also that the prosecution wished to examine no less than eight material witnesses (out of a total of sixteen) which they had deliberately withheld in the committal proceedings. We make no remarks about the correctness of the observations which travel beyond the question of prejudice because that is unnecessary here. It is sufficient to say that the learned Judges conceded the power under section 540 and decided the case on the question of prejudice.

The question raised in *Queen-Empress* v. *G. W. Hayfield*[2] does not arise here because the Sessions Court did not refuse to examine Jaswant Singh, P.W. 6, and so the question whether the prosecution could demand his examination as a matter of right never arose. The fact remains that they were permitted to do so and the defence raised no objection.

The decision of the Allahabad High Court in *S. H. Jhabwala* v. *Emperor*[3] and the Full Bench of the Lahore High Court in *Mussammat Niamat* v. *The Crown*[4] is against the learned counsel's contention.

The decision of the Full Bench of the Lower Burma Chief Court in *Emperor* v. *Channing Arnold*[5] is not in point because the Committing Magistrate there refused to examine witnesses which the prosecution wanted, and indeed insisted that he should examine, and what was worse he prevented the accused from completing the cross-examination of the only prosecution witness which the Committing Magistrate thought fit to examine. Whatever else may be thought of section 208 it is evident that the accused has the right to cross-examine, at any rate, those of the witnesses who are examined by the Committing Magistrate on behalf of the prosecution and section 347 cannot be used as a cloak for a hasty committal before such cross-examination is complete.

In our opinion, the cases cited do not justify the extreme position taken up by the learned counsel for the appellant and as section 540 is a complete answer

1. (1934) I.L.R. 15 Lah. 331.
2. (1892) I.L.R. 14 All. 212.
3. A.I.R. 1933 All. 690.
4. (1936) I.L.R. 17 Lah. 176 (F.B.).
5. (1912) 13 Cr.L.J. 877 (F.B.).

in this case all we need consider is the question of prejudice. We do not hold that the Court is bound to examine a witness called under section 540 itself as a court witness and that it can never entrust the examination to the prosecuting counsel because even if that be the proper procedure no prejudice has been occasioned in this particular case. The irregularity here on this score, if indeed it is one, is so trivial as to be innocuous.

A more important question is, was the appellant taken by surprise and was prejudice occasioned because of that? We do not think so because Jaswant Singh was mentioned in the first information report, recorded within 15 minutes of the occurrence, as one of the eye-witnesses and he was again mentioned as an eye-witness in the calendar of the committal proceedings. The appellant was presumably supplied with the witnesses' statement to the police or at any rate he had the right to demand a copy under section 162 and if he did not do so, it was presumably because neither he nor his two learned counsel wanted it. The first information report is a full one and sets out all the essentials of the prosecution case; therefore, with all that information in the possession of the appellant and his counsel it could be impossible for him to contend that he did not know what this witness was to prove.

Had the witness travelled beyond the statements embodied in the first information report, objection to the use of anything not contained in it would have been understandable, though to be effective such objection would ordinarily have to be raised at the trial, but as the witness does not do that, there can be no objection on the score of prejudice. It is to be observed that the Explanation to section 537 requires a Court to take into consideration the fact whether any objection on the score of irregularity could have been raised at an earlier stage.

Now the High Court bases its decision on the evidence of these eye-witnesses and on the fact that the appellant was apprehended on the spot within a minute or two of the murder with the pistol still in his possession, and had the learned Judges stopped there, there would have been no foundation for the very elaborate net work of technicalities upon which the learned counsel for the appellant embarked. But Bhandari, J. (Soni, J., concurring) after saying that

> "After a careful consideration of all the facts and circumstances of the case, I entertain no doubt in my mind that Balbir Singh and Jaswant Singh P.Ws. have told nothing but the truth,"

went on to say—

> "and that Jit Singh and Jagir Singh who made correct statements before the police and before the Committing Magistrate have given false evidence in the trial Court with the object of saving the appellant from the gallows."

It was argued that the learned Judges have here used the evidence of these witnesses before the Committing Magistrate as substantive evidence despite the fact that it was legally inadmissible for that purpose because the formalities prescribed by section 288 were not observed. Reliance was placed upon *Tara Singh* v. *The State*[1].

Even if that be so, it would make no difference because the evidence of Balbir Singh and Jaswant Singh whom the learned Judges primarily believe, is sufficient to afford a basis for the conviction and the mere fact that extraneous matter not necessary for the conviction was also called in aid would not affect the result. But as a matter of fact the foundation for this attack is based upon incorrect assumptions.

We will deal with Jit Singh, P.W. 2, first. He supported the prosecution case in his examination-in-chief but resiled when cross-examined. He was therefore treated as hostile and the learned Public Prosecutor was permitted to cross-examine him. In cross-examination the witnesses' statement in the Committal Court was read out to him and he was asked whether he had made such a statement and he said "Yes." When that statement is read it is found to tally

1. (1951) 2 M.L.J. 291 : 1951 S.C.J. 518 : (1951) S.C.R. 729 at 743.

with his evidence in chief and with the depositions of Balbir Singh and Jaswant Singh and with the first information report. Now it was not necessary to use the former statement as substantive evidence at all and the fact that the learned High Court Judges placed this on a par with the statements to the police, including of course the first information report, indicates that they were not using the former statements as substantive evidence, but merely as corroboration of what was said in chief. The distinction is a subtle one and can perhaps be best explained in the following way.

A witness is called and he says in chief, "I saw the accused shoot *X*". In cross-examination he resiles and says "I did not see it at all." He is then asked "but didn't you tell *A*, *B* and *C* on the spot that you had seen it?" He replies "yes, I did." We have, of set purpose, chosen as an illustration a statement which was not reduced to writing and which was not made either to the police or to a magistrate. Now, the former statement could not be used as substantive evidence. It could only be used as corroboration of the evidence in chief under section 157 of the Evidence Act or to shake the witness' credit or test his veracity under section 146. Section 145 is not called into play at all in such a case. Resort to section 145 would only be necessary if the witness *denies* that he made the former statement. In that event, it would be necessary to prove that he did, and *if the former statement was reduced to writing*, then section 145 requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made.

Of course that statement cannot be used as substantive evidence unless section 288 of the Criminal Procedure Code is called in aid. But even without section 288 a Court would be entitled to say in such a case, *basing on the evidence in chief, which is substantive evidence, that* what the witness said to the police, or to the Committing Magistrate, is the true version, not because those statements form substantive evidence but because they tally with the evidence in chief which *is* substantive. This is only one of the many ways in which a witness' testimony can be sifted and examined. Corroboration is as useful to test the truth of a story as any other method. In such a case, what the Court really does, though it may happen to put the matter the other way round, is to say that in its opinion the substantive evidence given in chief is true because it is corroborated by an earlier statement and for that reason, namely because the version in chief is the true one the contradictory version given in cross-examination is wrong, not because of the contradiction embodied in the former statement but because of what was said in chief, a version which it is now safe to believe on account of the corroboration afforded by the earlier statement. It is true the earlier statement could also have been used for contradicting the version given in cross-examination and in that event, if it is in writing, the limitations imposed by section 145 of the Evidence Act would have to be observed, but the prosecution is not bound to do that. It has a choice. It can, if it so chooses, build up the version given in chief in any way it pleases and, having done that, use the version in chief to destroy the version in cross-examination.

But in the case before us there is no need to resort to these subtleties because here the depositions were brought on record and could be used as substantive evidence even if the formalities prescribed by section 145 of the Evidence Act were not observed for the very simple reason that there was no need in this cause to resort to section 145. As we have said, the prosecution had a choice here because of the two conflicting versions given in chief and in cross-examination. It was entitled to use the former statement *either* to contradict what was said in cross-examination or to corroborate what was said in chief. In either event, section 288 of the Criminal Procedure Code could be used to make the former statement substantive evidence because what the section says is "subject to the provisions of the

Indian Evidence Act," and not subject to any particular section in it. Section 157 is as much a provision of the Indian Evidence Act as section 145 and if the former statement can be brought in under section 157, it can be transmuted into substantive evidence by the application of section 288. *Tara Singh* v. *The State*[1] is to be distinguished because there, there were no two versions in the course of the same testimony. The witness in question was hostile from the start in the Sessions Court and the whole purpose of resorting to section 288 was to contradict what he said there and no question of corroboration arose. The prosecution had no choice there, as it was here, of using the former statement either to contradict or to corroborate.

We turn next to Jagir Singh, P.W. 4. In his case there was no choice. He was hostile from the start and in his case our observations in the ruling just referred to apply in full. But on an examination of his evidence we find that the formalities prescribed by section 145 were complied with. His cross-examination, in contrast to Jit Singh's where such a procedure was not necessary, shows that every circumstance intended to be used as contradiction, was put to him point by point and passage by passage. That was conceded, but it was argued that this was done without drawing the witness' attention to the parts of the writing which were to be used for the purposes of contradiction.

We are by no means satisfied that that is the case because at least one of the passages is reproduced in inverted commas and so must have been read out from the statement. But that apart. Immediately after the witness had been questioned about each separate fact point by point, the whole statement was read out to him and he admitted that he had made it in the Committing Court. Now this procedure may be open to objection when the previous statement is a long one and only one or two small passages in it are used for contradiction—that may, in a given case, confuse a witness and not be a fair method of affording him an opportunity to explain—but in the present case the previous statement is a short one and the witness was questioned about every material passage in it point by point. Accordingly, the procedure adopted here was in substantial compliance with what section 145 requires. There can be no hard and fast rule. All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner. We are satisfied that that was done here. The matter is one of substance and not of mere form.

Jit Singh, P.W. 2, said that the statement made by him in the committal proceedings was not read over to him and so did Jagir Singh, P.W. 4. It was argued that in the absence of an enquiry that must be accepted as true, and if true, the evidence becomes inadmissible.

Now the certificate of the Committing Magistrate endorsed on the deposition sheet states that the deposition was read out to the witness and that the witness admitted it to be correct. The Court is bound to accept this as correct under section 80 of the Indian Evidence Act until it is proved to be untrue. The burden is on the person seeking to displace the statutory presumption and if he chooses to rely on the testimony of a witness which the Court is not prepared to believe the matter ends there. The duty of displacing the presumption lies on the person who questions it. The Court is of course bound to consider such evidence as is adduced but it is not bound to believe such evidence nor is there any duty whatever on the Court to conduct an enquiry on its own. There is nothing in this point. But we again wish to discountenance the suggestion that the Committing Magistrate should have been examined to prove the truth of his certificate and we endorse

1. (1951) S.C.J. 518 : 1951 S.C.R. 729 at 743 : (1951) 2 M.L.J. 291.

the remarks we made in *Kashmera Singh* v. *The State of Madhya Pradesh*[1] based on the decision of the Privy Council in *Nazir Ahmed* v. *King-Emperor*[2], regarding the undesirability of any such practice.

But even if the fact be true that the deposition was not read over, that would only amount to a curable irregularity and, as the Privy Council observed in *Abdul Rahman* v. *King-Emperor*[3], in the absence of prejudice which must be disclosed in an affidavit which shows exactly where the record departs from what the witness actually said, there is no point in the objection. The object of the reading over prescribed by section 360 of the Code of Criminal Procedure is not to enable the witness to change his story but to ensure that the record faithfully and accurately embodies the gist of what the witness actually said. Therefore, before prejudice can be substantiated on this score, it must be disclosed by affidavit exactly where the inaccuracy lies.

The next and last objection is on similar lines. Jit Singh, P.W. 2 and Jagir Singh, P.W. 4, said that their statements before the Committing Magistrate were made under the threats and duress of the police. It was argued that that should not have been rejected without further enquiry, and a ruling in which a further enquiry was considered necessary was cited. Here again, it is no part of a Court's duty to enter upon a roving enquiry in the middle of a trial on matters which are collateral to the main issue. The burden is on the person making these allegations to substantiate them and if he chooses to rely on evidence which does not satisfy the Court he must suffer the same fate as every other person who is unable to discharge an onus which the law places upon him.

It was also argued that there was no proper compliance with the provisions of section 342 of the Criminal Procedure Code. We are satisfied that there was substantial compliance in this case. The facts were simple and few and the crucial matters were brought to the attention of the appellant. In any event, the learned counsel was unable to tell us even at the argument stage exactly how his client was prejudiced and tell us what answers his client would have given to the questions which, according to counsel, ought to have been put to the appellant. We pressed him several times to disclose that but he was unable to do so.

As we said at the outset, the case is a very simple one in which a man was caught red-handed with a pistol still in his hand and in which the first information report was recorded practically on the spot within 15 minutes of the occurrence. The murder was committed in day light and there was no dearth of eye-witnesses. Two have been believed, and in the case of the other two, certain statements made by them in the Sessions Court resiling from statements previously recorded in the committal proceedings, have been disbelieved.

The appeal fails and is dismissed. We see no reason to interfere with the sentence of death.

Agent for appellant : *Shankar Das.*

Agent for respondent : *P. A. Mehta.*

G.R./K.S. *Appeal dismissed.*

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1. Crl. Appeal No. 53 of 1951, since reported in (1952) S.C.J. 201 : (1952) 1 M.L.J. 754.
2. (1936) 71 M.L.J. 76 : L.R. 63 I.A. 372 : I.L.R. 17 Lah. 629 : A.I.R. 1936 P.C. 253 at 258 (P.C.).
3. (1925) 52 M.L.J. 585 : L.R. 54 I.A. 96 : I.L.R. 5 Rang. 53 : A.I.R. 1927 P.C. 44 at 46 and 47 (P.C.).

[THE SUPREME COURT OF INDIA.]

(Civil Appellate Jurisdiction.)

PRESENT :—MEHRCHAND MAHAJAN, N. CHANDRASEKHARA AIYAR AND VIVIAN BOSE, JJ.

Musammat Phool Kuer .. *Appellant**

v.

Musammat Pem Kuer, and after her death Bohre Manohar Lal and another .. *Respondents.*

Hindu Law—Widows—Surrender—Essentials for validity—Family settlement entered into by widows—When binding on ultimate reversioners.

The principle underlying the doctrine of surrender is that it cannot possibly be made in favour of anybody except the next heir of the husband. Vesting of the estate in the next reversioner takes place under operation of law and it is not possible for the widow to say that she is withdrawing herself from the husband's estate in order that it may vest in somebody other than the next heir of the husband. Where the surrender of the totality of interest of the widow was not made in favour of the next heir it cannot operate as a valid surrender and succession to the estate will open on the death of the widow. Where in a suit by persons claiming to be legatees under an alleged will of the husband the widow compromised the suit but only safeguarded her personal right only and agreed to let the estate go after her death to the plaintiffs in that suit, though one of them was a remote reversioner, the compromise being made in disregard of the interests of ultimate reversioners will not be binding on the ultimate reversioners as a family settlement.

Appeals from the Judgment and Decree dated the 26th October, 1943, of the High Court of Judicature at Allahabad (Verma and Yorke, JJ.) in First Appeal No. 48 of 1938, arising out of Judgment and Decree dated the 6th August, 1937, of the Court of the Additional Civil Judge at Agra in Suit No. 30 of 1936.

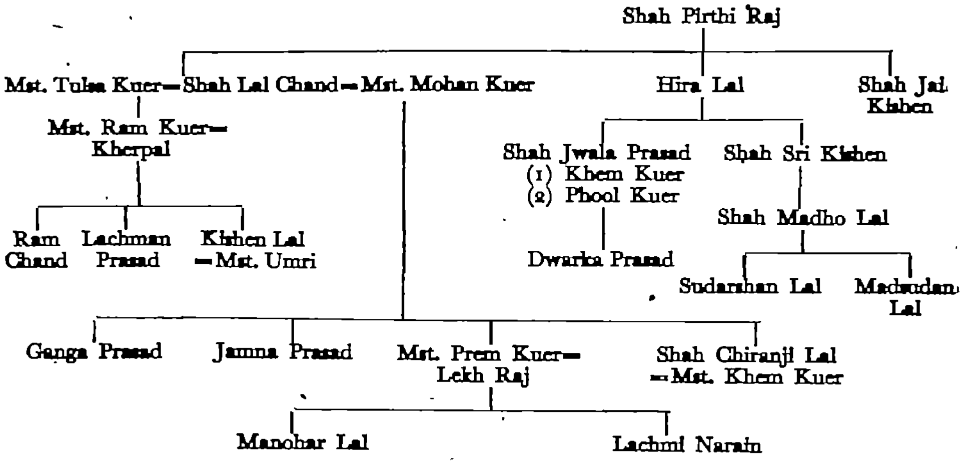
M. C. Setalvad and *Kirpa Ram*, Senior Advocates (*K. B. Asthana*, Advocate, with them) for Appellant in Civil Appeal No. 29 of 1951.

K. N. Agarwal, Advocate, for Appellant in Civil Appeal No. 30 of 1951.

C. K. Daphtary, Senior Advocate (*G. C. Mathur*, Advocate, with him) for Respondents in Civil Appeals Nos. 29 and 30 of 1951.

The Judgment of the Court was delivered by

Mahajan, J.—The dispute in this appeal concerns the zamindari and house properties last owned by Shah Chiranji Lal who died at a young age on the 14th May, 1913, leaving him surviving a widow, Mst. Khem Kuer, and his mother Mst. Mohan Kuer, besides a number of collaterals, indicated in the pedigree table below :



* Civil Appeals Nos. 29 and 30 of 1951. 24th April, 1952.

Mst. Khem Kuer, the young widow of Shah Chiranji Lal was murdered on the 28th August, 1919 and Mst. Mohan Kuer, the mother, died on the 5th December, 1932. Mst. Prem Kuer, the respondent in the appeal, claiming herself to be the heir to Shah Chiranji Lal as his sister, brought the suit giving rise to this appeal in the Court of the Civil Judge, Agra, against, amongst others, Mst. Phool Kuer, the present appellant, for recovery of possession of the properties of Shah Chiranji Lal and mesne profits.

Mst. Prem Kuer joined her half-sister Mst. Ram Kuer and their sons as plaintiffs along with herself. In the array of defendants were impleaded Mst. Phool Kuer and Mst. Khem Kuer, widows of Shah Jwala Prasad and Shah Madho Lal and his sons and a host of others as transferees of the properties.

The main defence to the suit was that Shah Jwala Prasad and Shah Madho Lal were recognised to be the owners and heirs to the entire estate of Shah Chiranji Lal by Khem Kuer and Mohan Kuer in a family settlement arrived at between the parties in suit No. 120 of 1915, that by virtue of this family settlement the estate of the deceased was vested in them subject to the life estates of the two women and that the plaintiffs who came to be recognised as reversioners by the Hindu Law of Inheritance (Amendment) Act II of 1929, were not entitled to claim it. It was further pleaded that on the death of Khem Kuer in 1919, Mohan Kuer surrendered the estate in favour of Jwala Prasad and Madho Lal and they took possession of it as owners and the plaintiffs who subsequently became statutory heirs in 1929 could not be allowed to question the surrender and re-open the succession which could not remain in abeyance.

The learned Additional Civil Judge who tried the suit, dismissed it holding that the compromise of 1915 was a *bona fide* settlement of a *bona fide* dispute and was binding as a family settlement being for the benefit of the estate, that Mohan Kuer surrendered the estate validly in favour of Jwala Prasad and Madho Lal and they entered into possession of it after the death of Khem Kuer. Some of the transferees who had been impleaded as defendants compromised the suit with the plaintiffs and that part of the suit was decided according to the terms thereof between those parties.

Mst. Prem Kuer preferred an appeal to the High Court of Judicature at Allahabad against the decree dismissing her suit. The High Court by its judgment dated the 26th October, 1943, allowed the appeal, reversed the findings of the learned additional civil judge on the above issues and decreed the plaintiffs' suit with costs. Some of the transferee-defendants compromised with the plaintiff-appellant in the High Court and the appeal was decided in terms thereof in their favour.

Two main points which are in controversy in this appeal and require consideration, are,

1. Whether the compromise in suit No. 120 of 1915 amounts to a family settlement and binds the plaintiff-respondent, and

2. Whether the surrender by Mst. Mohan Kuer was a valid surrender under Hindu Law.

In order to appreciate the respective contentions of the parties, it is necessary to set out shortly in chronological order the history of the events which has resulted in this controversy.

As already stated, Shah Chiranji Lal died on the 14th May, 1913, leaving considerable movable and immovable property. At the time of his death, his widow Khem Kuer was about eleven years old and his mother Mohan Kuer was about 53 years old. The two reversioners, Shah Jwala Prasad and Shah Madho Lal made an application for mutation of names of the estate in their favour claiming it on the basis of a will alleged to have been made by Shah Chiranji Lal on the 13th May, 1913, a day before his death. On the 10th of September, 1913, an

application was made by Mohan Kuer for herself and as guardian of Khem Kuer challenging the genuineness of the will and claiming that the estate of the late Shah Chiranji Lal should be mutated in their names. Notice of this application was given to the two reversioners but they thought it prudent not to appear and to contest the contentions raised by the two ladies, with the result that the inheritance of the late Chiranji Lal was mutated in the name of the widow as sole heir under the guardianship of Mohan Kuer by an order dated the 28th October, 1913. The reversioners had also made applications in pending suits for getting themselves impleaded as legal representatives. Mohan Kuer applied for the removal of their names and for substitution of the name of the widow and of herself in those cases. Pending decision of these matters, on the 11th May, 1915, suit No. 120 of 1915 was filed by Jwala Prasad and Madho Lal on the basis of the alleged will of the 13th May, 1913. On the same day an application was made for the appointment of a receiver and an interim order appointing a receiver was passed by the Court. On the 18th May, 1915, Mohan Kuer for herself and as guardian of the minor widow made an application praying for the discharge of the receiver. By an order dated the 23rd September, 1915, the receiver was discharged and it was held by the civil judge that the plaintiffs had no *prima facie* case and that the will propounded by them was a suspicious document. On the 18th December, 1915, suit No. 120 of 1915 was compromised between the parties. This compromise is in the following terms :—

"1. The plaintiffs relinquish their claim for possession over the estate of Shah Chiranji Lal.

2. The defendants shall have all those rights to the estate of Shah Chiranji Lal, which she had as a Hindu widow according to law. After the death of the two Musammats, the plaintiffs in equal shares and, after them, their heirs, who might have the right of survivorship one after the other, shall be the owners of the estate of Shah Chiranji Lal.

3. The name of Mst. Mohan Kunwar defendant against one half of the property in lieu of maintenance, shall continue.

4. Mst. Mohan Kunwar and Mst. Khem Kunwar shall have power to do anything they might choose with the entire income from the movable and immovable property, cash, ornaments, amount of decrees and documents, household goods and other movables, which they might have in their possession. The plaintiffs or anyone else shall have no power to interfere or to ask for rendition of accounts.

5. In case Mohan Kunwar defendant dies first, Mst. Khem Kunwar shall, as a Hindu widow, become the owner in possession of the entire property, of which Mst. Mohan Kuer might have been in possession in any way, subject to the provisions of condition No. 4 In case Mst. Khem Kuer defendant dies first, Mst. Mohan Kuer shall, as a Hindu widow, become the owner in possession of the entire property of which Mst. Khem Kuer might have been in possession in any way, subject to the provisions of condition No. 4."

In accordance with the terms of this compromise suit No. 120 of 1915 was dismissed. In the proceedings that were pending for substitution of names the court on the 22nd December, 1915, ordered that Khem Kuer and Mohan Kuer be impleaded as legal representatives of the late Shah Chiranji Lal.

On the 2nd September, 1918, Khem Kuer brought a suit against her mother-in-law Mohan Kuer for a declaration to the effect that she alone was the lawful heir of Chiranji Lal and was the owner of the property mentioned in schedule A and that the defendant had no concern with it. This suit was compromised between the parties on the 22nd April, 1919. Mohan Kuer agreed that Khem Kuer's suit be decreed. Khem Kuer undertook to look after Mohan Kuer in every way and if she desired to live separately from her, she agreed to pay her a sum of Rs. 3,000 per annum by way of maintenance.

Khem Kuer did not live long after her having become owner of the entire estate of her husband under the terms of this compromise. As stated already, she was murdered on the 28th August, 1919. The estate thus became vested in Mohan Kuer both according to Hindu law as well as in accordance with the terms of the compromise of the 18th December, 1915. It is alleged that either on the fourth or the thirteenth day after the death of Khem Kuer, Mohan Kuer when asked about the mutation of the estate, said that she had no concern with it and

had relinquished it and had devoted herself to worship. On the 15th September, 1919, an application bearing the signature of Mohan Kuer in Hindi was presented by her mukhtar Chaturbhuj in the court of the subordinate judge at Agra, praying that the sale certificate in suit No. 1919 (*Shah Jwala Prasad* v. *Rai Bahadur Shah Durga Prasad*), be prepared in the names of Shah Jwala Prasad and Shah Madho Lal, for they were the heirs in possession of the properties of Shah Chiranji Lal. This application (Exhibit N-31) contains the following recital :—

"Mst. Khem Kuer died on the 28th of August, 1919. I do not want to take any proceedings in my own name. Shah Jwala Prasad and Shah Madho Lal are the *subsequent heirs* and it is in their names that all the mutation proceedings, etc., are being taken in the revenue Court. They have been made the heirs in possession of the entire property and an application has been filed in their names in this Court for preparation of the sale certificate. This petitioner has got no objection to the preparation of the sale certificate in their names, for they are the heirs and are in possession of the property."

The sale certificate was prepared accordingly. On the 16th September, 1919, Jwala Prasad and Madho Lal applied for mutation in respect of the lands relating to mauza Somra in the court of the tahsildar of Etmadpur. In column 5 of this application (Exhibit A-14) it was alleged that they were entitled to mutation by right of inheritance. Similar applications were made in respect of other villages also. (*Vide* Exhibit 128, etc.) Mutations were entered in all the villages on the basis that both of them were heirs in equal shares to the property of the deceased, though according to Hindu law, Shah Jwala Prasad alone was the next heir. During the course of the mutation proceedings one Chintaman, general attorney of Shah Jwala Prasad was examined on the 11th October, 1919 and he stated that Mst. Khem Kuer died on the 28th August, 1919, that Shah Jwala Prasad and Shah Madho Lal were her heirs in equal shares, that Mohan Kuer was the mother-in-law of the deceased and she did not want her name to be recorded and had made relinquishment in favour of Shah Madho Lal and Shah Jwala Prasad in the civil court on the 15th September, 1919. Chaturbhuj, general attorney of Mohan Kuer was examined in the same proceedings on the 27th October, 1919 and he stated that Mohan Kuer did not want her name to be recorded in place of the name of the deceased, that she had no objection to the entry of the names of Shah Jwala Prasad and Shah Madho Lal, that she had sent him for making that statement. He admitted the relinquishment filed by Mohan Kuer in the civil court with respect to the property of Mst. Khem Kuer but he was not able to state when that relinquishment had taken place. The tahsildar after recording these statements ordered the mutation of names in favour of the two reversioners (Exhibit M-2).

On the 22nd November, 1919, the two reversioners Shah Jwala Prasad and Shah Madho Lal, having entered into possession of the estate after the death of Khem Kuer made a gift of property of the value of about Rs. 50,000 in favour of the sisters of Shah Chiranji Lal by means of two deeds of gift. (*Vide* Exhibit M-16.) These gift deeds contain the following recitals :—

"Shah Chiranji Lal deceased was the owner of Katariha estate in which besides other villages the villa es specified below were also included, and as he had no issue after his death Mst. Khem Kuer became his heir as a Hindu widow of a joint family subject to Mitakshara school of law. On her death we the executants who were entitled to become the absolute owners of the estate of Shah Chiranji Lal according to Shastras became the absolute owner of the entire property of Shah Chiranji Lal by inheriting the estate from hi n. We obta ned possession o er everything and mutation of names also were effected in our favour from the revenue Court in respect of all villages. Shah Chiranji Lal deceased had two sisters Mst. Ram Kuer and Mst. Prem Kuer and he had a desire during his life-time to give them some property but owing to sudden death he could not himself fulfil his intention during his lifetime. We the executants accept this fact as desired by him. Besides this the mother of Shah Chiranji Lal also desires the same thing and it is our duty to fulfil the same, and to give property to the Musammats aforesaid is considered to be a pious and good act from the religious point of view. It is our duty also to respect their wishes and fulfil the same, so that the people of our caste and family might not think that after the death of Shah Chiranji Lal his wishes remained unfulfilled. Hence for the reasons set forth above and keeping in view the honour of the family and pious nature of the act we the executants while in a sound state of body and mind. . . . . . . make a gift of the following villages in favour of the donees."

The donees subsequently made a number of transfers of the property gifted to them and in every respect the gift deeds were acted upon. Jwala Prasad, the presumptive reversioner died in the year 1930.

In suit No. 49 of 1928 (same as No. 89 of 1929) one Pandit Rikh Ram had obtained a decree against Shah Madho Lal and his sons and they appealed against it to the High Court and also applied for postponement of the preparation of the final decree. Stay was ordered on the applicants furnishing security in the sum of Rs. 20,000 for future interest, costs, etc. On the 26th May, 1930, in compliance with the order of the High Court a security bond was executed by Shah Madho Lal and his sons as first party and by Mst. Mohan Kuer as second party, containing the following recitals :—

"After the death of Mst. Khem Kuer, Mst. Mohan Kuer was to become the owner of the property with limited interests as a Hindu mother but she relinquished her inheritance and did not agree to accept any property. By means of a private arrangement, *i.e.*, a family arrangement it was decided as between Shah Jwala Prasad and Shah Madho Lal that they should be the owners of the property aforesaid in equal shares. Documents in that connection were registered. Thus Shah Madho Lal executant No. 1 is the exclusive owner of the property given below which is being pledged and hypothecated under this security bond. Executant No. 4 the second party has, after hearing and understanding the contents of this security bond, joined in token of the veracity of the facts noted above so that in future she might not be able to take objection to it and so that she might have no objection of any sort to the security bond." (Executant No. 4 was Mst. Mohan Kuer.)

On the 30th June, 1930, an affidavit bearing the thumb impression of Mst. Mohan Kuer was filed in the same proceedings containing the following statements :—

"I solemnly affirm and say that after the death of Mst. Khem Kuer I did not agree to accept property nor was I the heir and that I relinquished the entire property in favour of Shah Jwala Prasad who became the owner of the entire property which was in possession of Khem Kuer."

The Subordinate Judge expressed the view that the bond could not be held to have been executed by Mohan Kuer, she being a pardanashin lady. He declined to accept the deed as sufficient and valid security. On the 9th July, 1930, the High Court of Judicature at Allahabad dismissed the application for stay of proceedings.

On the 15th July, 1931, Mohan Kuer instituted suit No. 24 of 1931 in the court of the subordinate judge of Mathura against the widows of Shah Jwala Prasad, Shah Madho Lal and his sons and a number of transferees who had taken the property from these two reversioners. In paragraph 8 of the plaint it was alleged that the plaintiff was an old pardanashin woman, was simple and of weak intellect and illiterate, that on account of the murder of Mst. Khem Kuer, she was very much terror-stricken and was full of sorrow and had no knowledge about her rights, that the third defendant and Jwala Prasad who wanted to get the property took undue advantage of the plaintiff's aforesaid condition and unlawfully entered into possession of the property left by Chiranji Lal deceased and caused the mutation of names in their favour. In paragraph 12 it was said that the defendants had got the thumb impressions of the plaintiff on certain documents without telling her the contents of those papers, simply by saying that a decree for a considerable amount had been passed against the property and it was going to be sold in auction and that a security bond must be furnished for saving the property. She prayed for a decree for possession of the property in dispute in her favour against the defendants. During the pendency of this suit Mohan Kuer died on the 5th December, and on her death an attempt was made by the present plaintiffs to get themselves impleaded as her legal representatives but on the 9th October, 1934, it was held that the claim of Mst. Mohan Kuer was of a personal character and the suit therefore could not proceed owing to abatement. It was, however, noted that the legal representatives could file a separate suit, if so advised. It is in consequence of this order that the suit out of which this appeal arises was filed on the 30th April, 1936.

It was contended by the learned Attorney-General that the High Court on mere suspicions and unwarranted assumptions had found the main issues in the case against the appellant and had erroneously held that the compromise in suit

No. 120 of 1915 was not binding on the plaintiffs and that the surrender by Mohan Kuer was not valid surrender under Hindu law. After hearing the learned counsel at considerable length, we do not think it necessary to hear the respondent in reply, as in our opinion, the decision of the High Court on both the points was right.

On the point of surrender, the learned Attorney-General contended that the widow effaced herself and put both the reversioners in possession of the property half and half, and agreed to take Rs. 3,000 from them for her maintenance and that the fact of surrender was satisfactorily proved from the conduct of Mohan Kuer in allowing the estate to be mutated in the names of the reversioners and in allowing them to take possession of it, also by the different statements made by her and from the other documentary and oral evidence led in the case. Emphasis was laid on the statements contained in the application (Exhibit M-31), on the statement of her mukhtar Chaturbhuj, and on the recitals of the security bond and the affidavit, Exhibit P-30.

Whether Mohan Kuer effaced herself and surrendered the property, or whether she merely abandoned it, or whether she entered into an arrangement for the division of the estate between herself, the two reversioners and the daughters and their sons, it is not possible to predicate with any amount of certainty. No definite opinion can be offered on the question whether whatever she did, she did voluntarily after fully realizing the consequences of her act and whether as a pardanashin lady she had been properly advised on the matter or whether she merely acted on sentiment.

Considerable doubt is cast on the story of surrender set up by the defendants by the recitals in the two deeds of gift, dated 22nd November, 1919, extracted above. The donors did not base their title to the property either on the compromise of 1915 or on the surrender of Mohan Kuer of the year 1919 or on the will; on the other hand, they said that they had become owners of the property of Chiranji Lal by inheritance under Hindu law after the death of his widow. Both of them could not possibly inherit the property half and half under Hindu law. Moreover, there is no clear or definite evidence of either the time when the arrangement was made or of the terms thereof. The evidence on these points is vague and unsatisfactory. It is completely wanting as to the arrangement under which Mohan Kuer became entitled to receive Rs. 3,000 from them.

The conduct of Mohan Kuer and the various statements by her no doubt do indicate that she cut off her connection with the bulk of the estate of Chiranji Lal after the death of the widow and received a sum of Rs. 3,000 from the reversioners and it is also clear that at her instance the reversioners gave property of the value of Rs. 50,000 to her daughters, but in the absence of any satisfactory evidence as to the precise nature of this arrangement it is not possible to conclude that the widow after fully realizing as to what she was doing and after proper advice effaced herself. In this connection the allegations made by her in the suit of 1931 cannot be altogether ruled out from consideration.

Assuming however for the sake of argument that Mohan Kuer purported to relinquish her estate in favour of Jwala Prasad and Madho Lal, in our opinion, the relinquishment cannot in law operate as an extinction of her title in the estate. The principle underlying the doctrine of surrender is that it cannot possibly be made in favour of anybody except the next heir of the husband. Vesting of the estate in the next reversioner takes place under operation of law and it is not possible for the widow to say that she is withdrawing herself from the husband's estate in order that it may vest in somebody other than the next heir of the husband. It was held by this court in *Mummareddi Nagi Reddi* v. *Pitti Duraiaja Naidu*[1] that so far as the next heir is concerned, there cannot be a surrender of the totality of the interest which the widow had, if she actually directs that

1. (1952) S.C.J. 192 : 1951 S.C.R. 655 : (1952) 1 M.L.J. 746.

a portion of it should be held or enjoyed by somebody else other than the husband's heirs and that the position is not materially altered if the surrender is made in favour of the next heir with whom a stranger is associated and the widow purports to relinquish the estate in order that it may vest in both of them. Though in the written statements of the two sets of defendants different versions of the character of the arrangement were pleaded, the learned Attorney-General before us stated that the surrender by the widow was made both in favour of Jwala Prasad and Madho Lal in equal moieties. Madho Lal admittedly was not the next reversioner entitled to succeed to the estate. Thus the surrender of the totality of the interest of the widow was not made in favour of the next heir. That being so, it cannot operate as a valid surrender. If the surrender could be held a valid one, then obviously succession that had opened out in 1919 and vested in the next heirs could not be divested at the instance of the plaintiffs in the year 1932 on the death of Mohan Kuer, but in view of the invalidity of the surrender it has to be held that succession to Shah Chiranji Lal's estate opened in 1932 and the plaintiffs as next heirs were entitled to take it.

The next question for consideration is whether the compromise of 1915 entered into between Mohan Kuer as guardian of Khem Kuer, and the two reversioners who had claimed the estate on the basis of a will, was a *bona fide* family arrangement and thus binding on the ultimate reversioners, the plaintiffs. It is well settled that when the estate of a deceased Hindu vests in a female heir, a decree fairly and properly obtained against her in regard to the estate is in the absence of fraud or collusion binding on the reversionary heir, but the decree against the female holder must have involved the decision of a question of title and not merely a question of the widow's possession during her life. (Vide *Venayeck Anundrow* v. *Luxumeebaee*[1].) This principle of *res judicata* is not limited to decrees in suits contested and it is competent to a widow to enter into a compromise in the course of a suit *bona fide* in the interest of the estate, and not for her personal advantage, and a decree passed on such compromise is binding upon the reversioner. The question whether the transaction is a *bona fide* settlement of a disputed right between the parties depends on the substance of the transaction and in order that it may bind the estate it should be a prudent and reasonable act in the circumstances of the case. As observed by their Lordships of the Privy Council in *Ramsumran Prasad* v. *Shyam Kumari*[2], the true doctrine is laid down in *Mohendra Nath Biswas* v. *Shamsunnessa Khatun*[3] decided in 1914, and it is that a compromise made *bona fide* for the benefit of the estate and not for the personal advantage of a limited owner will bind the reversioner quite as much as a decree against her after contest.

That being so, we proceed to inquire whether the compromise in the present case is one that can be supported on these principles. In agreement with the High Court we are of the opinion that it cannot be so supported. Mohan Kuer in entering into the compromise on behalf of the minor widow never applied her mind to the interests of the ultimate reversioners. She entered into it for her own personal benefit and for the personal benefit of the minor widow in complete indifference as to what was to happen to the estate after their respective deaths. Under this compromise these two ladies got all the rights they had under Hindu law without sacrificing an iota of their property and then they agreed that after their death the plaintiffs in equal shares and after them their heirs shall be the owners of the estate of Chiranji Lal. It did not matter in the least to the two ladies what was to happen to the estate after their deaths and they were quite willing to let this estate go to the plaintiffs in the suit, though one of them was a remote reversioner. The compromise therefore was made in the interest of the actual parties to the suit in complete disregard of the interests of the ultimate reversioners. The widows undoubtedly acted with reasonableness

1. (1864) 9 M.I.A. 516 at 520.
2. (1922) 44 M.L.J. 751 : L.R. 49 I.A. 342 : I.L.R. 1 Pat. 741 (P.C.).
3. (1914) 21 C.L.J. 157.

and prudence so far as their personal interest was concerned but further than that they did not see. The claim of the two plaintiffs in suit No. 120 of 1916 was adverse to the interests of the reversion as they were claiming as legatees under the will. The widows while entering into the compromise safeguarded their personal rights only and thus in entering into it they only represented themselves and not the estate or the reversioners and surrendered nothing out of their rights, and it cannot be said that in the true sense of the term it was a *bona fide* settlement of disputed rights where each party gave up something of its own rights to the other. The plaintiffs got an admission from the widows in regard to the future succession of the estate that after their deaths they would succeed though they were not heirs in accordance with Hindu law. By this admission the widows lost nothing whatsoever. Those who lost were the ultimate reversioners and their interest was not in the least either considered or safeguarded. In these circumstances it seems to us that the compromise cannot be held to be a *bona fide* settlement or family arrangement of disputed rights and was entered into by Mohan Kuer for her personal advantage and of the advantage of Khem Kuer. The present case is analogous to the decision of the Privy Council in *Imrit Konwur* v. *Roop Narain Singh*[1]. There in a dispute between a person claiming to be an adopted son of the previous owner and the widow and her daughters who would have title after her, the widow gave up her daughters' rights in consideration of her receiving practically unimpaired what she could. Their Lordships held that such a compromise could not stand, as indeed it was not a compromise at all.

The learned Attorney-General laid considerable emphasis on the decision of their Lordships of the Privy Council in *Mata Prasad* v. *Nageshar Sahai*[2]. In that case the widow admitted the right of the reversioner under Act I of 1869 and agreed that succession will be governed by that Act. The reversioner agreed to let her remain in possession and undertook that he would not alienate the property during that period. The widow in that case was not constituted a full owner under Hindu law and she did not get her full rights under the compromise but as a matter of concession was allowed to remain in possession by the reversioner and as a matter of fact she sacrificed her rights to a considerable extent and did not act for her personal benefit at all except to the limited extent mentioned above. In the circumstances of that case it was held that the compromise was a *bona fide* family settlement of disputed claims and was binding on the reversioners. In the present case the devolution of the property after the death of Chiranji Lal was agreed to be in accordance with Hindu law and that being so, the further devolution of the property after their death was no concern of the widows. That was a matter of law. The ultimate reversioners were stabbed in the back by the widow and such a compromise cannot be held to be binding on them. A large number of cases were cited before us in which compromises under different circumstances had been held to be binding on the reversioners. We consider that it is wholly unnecessary to examine those cases because the circumstances in which those compromises were made were quite different from the circumstances of the present case. Considering all the materials which were placed before us, we hold in agreement with the High Court that the compromise in the present case was neither prudent nor reasonable so far as it affected the interests of the estate and that of the ultimate reversioners and that being so, is not binding on the plaintiffs. For the reasons given above this appeal fails and is dismissed with costs.

Civil Appeal No. 30 of 1951.

This is an appeal by one of the transferees and arises out of the same suit out of which arises appeal No. 29 of 1951. On the 13th June, 1928, Shah Madho Lal and his son Shah Madhusudan Lal executed a sale deed (Exhibit M-13) in favour of the appellant for the sum of Rs. 21,000. The transferee while adopt-

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1. 6 C.L.R. 76. I.L.R. 47 All. 883 (P.C.).
2. (1925) 50 M.L.J. 18 : L.R. 52 I.A. 398 :

ing the defence taken by Madho Lal and by the heirs of Jwala Prasad, pleaded that he was protected by the provisions of section 41 of the Transfer of Property Act. The High Court held that in cases where a person who has allowed another to occupy the position of an ostensible owner has a limited estate, the rule of section 41 applies only during the lifetime of the limited owner and is not available to protect transferees against the claim of the reversioners. A number of authorities were cited in support of this proposition. The learned counsel for the appellant was unable to displace this proposition. It is quite clear that the plea of section 41 of the Transfer of Property Act could only be raised against Mohan Kuer or her legal representatives but is not available against the plaintiff, Mohan Kuer having acquired a limited life estate. This contention is therefore rejected.

The learned counsel then contended that the plaintiff Prem Kuer had relinquished her rights in favour of her sons in 1933 and she had no *locus standi* to maintain the suit or to appeal against the decision of the trial judge as the title to the estate had vested in her sons. The plaintiffs had alleged in paragraph 13 of the plaint that the relinquishment was inoperative and void. The defendants did not dispute that allegation and it is not open to them at this stage to take up the plea which they could have taken in the trial court or in the appellate court. Even in the grounds of appeal to this Court the point was not taken. If the point was taken at the proper stage the plaintiffs might well have proved that the relinquishment was no longer operative or they might have amended the plaint and put it in proper form.

The learned counsel adopted the arguments of the learned Attorney-General in the other appeal and for the reasons given therein these points are decided against him. This appeal therefore also fails and is dismissed with costs.

Agent for Appellant in C. A. No. 29 of 1951 : *S. S. Shukla.*

Agent for Appellant in C. A. No. 30 of 1951 : *P. C. Agarwal.*

Agent for Respondents in C. A. Nos. 29 and 30 of 1951 : *Rajinder Narain.*

G.R./K.S.　*Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Chemmanghat Kunnath Melethil Ramankutty Vaidyar's wife Kunhumalu .. *Appellant**

v.

M. K. Gopalakrishna Iyer, the present executive trustee of Chokkanathapuram Sri Meenakshisundareswaraswami Devasthanam and others .. *Respondents.*

Malabar Compensation for Tenants Improvements Act (*I of* 1900), *sections* 5 (2) *and* 3 (1)—*Person in possession under a mortgage which is found to be invalid as executed in contravention of section* 76, *Madras Hindu Religious Endowments Act* (*II of* 1926)—*Not liable for mesne profits.*

A person in possession under a mortgage which is found to be invalid as executed in contravention of the provisions of section 76 of the Madras Hindu Religious Endowments Act will be a "tenant" entitled to remain in possession until he is evicted in execution of a decree and till he is evicted he will be subject to the terms of the mortgage. Such a person in possession in good faith believing himself to be a mortgagee will be a statutory tenant under Malabar Compensation for Tenants Improvements Act and it cannot be held that such a person is in wrongful possession of the properties liable to pay mesne profits.

Parameswara v. *Valia Mannadiar*, (1917) 33 M.L.J. 591 and *Manager Sankunni Variar* v. *Kunji Nangaparamma*, (1919) 37 M.L.J. 206 : 10 L.W. 300, applied.

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat in A.S. No. 206 of 1945 preferred against the decree of the District Munsif's Court, Palghat, in O.S. No. 231 of 1943.

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* S. A. No. 2565 of 1947.　11th July, 1951.

K. Kuttikrishna Menon and *K. N. Karunakaran* for Appellant.

C. S. Swaminathan, M. K. Nambiar and *M. Sekara Menon* for Respondents.

The Court delivered the following

JUDGMENT.—The only question that arises in this second appeal is whether the first defendant-appellant is liable to pay mesne profits. The relevant facts may be briefly stated. The properties described in the schedule annexed to the plaint belong in jenm to Sree Meenakshisundareswara Swami Devaswom in Puttur Amsom, Palghat taluk. The temple was an ancient one and from its origin it was under the management of Naduvil Edam. The Edam had on various occasions in the past demised the properties on kanoms and also mortgaged them. On 25th March, 1929, one Pangi Achan of the Edam executed a possessory mortgage to the first defendant in regard to the suit properties for Rs. 3,000 under Exhibit P-4. As the Devaswom was mismanaged, on 30th November, 1935, the Madras Hindu Religious Endowments Board framed a scheme and the first plaintiff was appointed as Executive Officer. The second plaintiff is his successor. Defendants 2 to 4 are the members of Naduvil Edam. The temple by its executive officer filed O.S. No. 231 of 1943 on the file of the District Munsif's Court, Palghat, for possession of the suit properties and for mesne profits. The learned District Munsif of Palghat held that the mortgage deed was supported by consideration and that the mortgagee was a *bona fide* creditor but that the mortgage was invalid as it was executed in contravention of the provisions of section 76 of the Madras Hindu Religious Endowments Act. He further held that the defendant would be entitled to the cost of improvements under the Malabar Compensation for Tenants Improvements Act (I of 1900) (hereinafter referred to as "the Act") but was liable to pay mesne profits. In appeal the learned Subordinate Judge also accepted the said findings, though he made some slight modifications in regard to the amount of mesne profits payable by the first defendant to the plaintiff. The first defendant preferred the above second appeal.

The learned counsel for the appellant confined his arguments to the sole question of mesne profits. He contended that his client would not be liable to mesne profits as he was a statutory tenant under the Act and therefore was not in wrongful possession of the suit lands. The answer to the question turns upon the consideration of the relevant provisions of the Act. Section 3 (1) of the Act defines a "tenant". It reads :

> "'tenant,' with its grammatical variations and cognate expressions, includes a person who as lessee, sub-lessee, mortgagee or sub-mortgagee or in good faith believing himself to be lessee, sub-lessee, mortgagee or sub-mortgagee of land is in possession thereof, or who, with the *bona fide* intention of attorning and paying the customary rent to the person entitled to cultivate or let waste land, but without the permission of such person, brings such land under cultivation and is in occupation thereof as cultivator."

Section 5 (1) says :

> "Every tenant shall on ejectment be entitled to compensation for improvements which have been made by him, his predecessor in interest, or by any person not in occupation at the time of the ejectment who derived title from either of them and for which compensation has not already been paid ; and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy or the payment or tender of the mortgage money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court."

Section 5 (2) runs :

> "A tenant so continuing in possession shall during such continuance hold as a tenant subject to the terms of his lease or of the mortgage, as the case may be."

Section 6 provides for delivery of possession to the plaintiff after the amount of compensation payable by the tenant is ascertained and after giving credit to amounts payable by the defendant to the plaintiff in respect of the tenancy.

From the aforesaid provisions it is clear that for the purpose of the Act the word "tenant" is given a very wide connotation so as to take in even a trespasser who cultivates a land intending to pay the customary rent. It includes also a

person in possession of land in good faith believing himself to be a mortgagee. Under section 5 such a tenant is entitled to be in possession until he is evicted in execution of the decree. Under section 5 (2) till he is evicted he will be subject to the terms of the lease or mortgage as the case may be. It will follow that a person in possession in good faith believing himself to be a mortgagee will be a statutory tenant under the provisions of the Act and his rights and liabilities will have to be worked out as per the terms of the said provisions. So understood, I find it very difficult to hold that such a person is in wrongful possession of the mortgage properties notwithstanding the fact that the mortgage deed was invalid. The legislature designedly conferred certain rights on such a person and legalised his possession till he is duly evicted under section 6 (1) of the Act. Sadasiva Aiyar, J. had occasion to consider the scope of section 5 and section 6 of the Malabar Tenancy Act in *Parameswara* v. *Valia Munnadiar*[1]. There a suit was filed for ejectment and the question was whether the mortgagee was bound to pay mesne profits from the date of the tender of the amount due under the mortgage into court when it was found that the money tendered sufficiently covered the compensation for improvements also. The learned Judge held that till compensation was actually paid the mortgagee remained in possession as mortgagee despite the valid tender. The same learned Judge sitting with Napier, J. said in *Manager Sankunni Variar* v. *Kunji Nangayaramma*[2] that

> "the mortgagee in Malabar has a right to remain in possession till he is actually paid or till he is ejected by a decree of court and hence he is not accountable for mesne profits till either of these events happens."

Mr. Swaminathan appearing for the respondents did not question the correctness of the decisions, but contended that those cases related to valid mortgages and therefore the principle accepted therein could not be applied to a mortgage which was held to be invalid. In support of his argument he relied on the provisions of section 5 (2) of the Act and argued that that sub-section applied only to valid mortgages and as in the present case the mortgage was invalid the liability of the tenant would be governed by general law. I do not see any difficulty in reconciling the provisions of section 5 (2) with the other sections of the Act. If the definition of a tenant is wide enough to take in a person holding under an invalid mortgage in the circumstances mentioned in the definition and if such a person is entitled to be in possession till he is evicted in execution of a decree, there is no reason why the word "mortgage" in section 5 (2) cannot be understood to comprehend an invalid mortgage under which such a person continued to be in possession. For the purpose of applying the provisions of the Act without giving undue advantage to the mortgagee at the expense of the mortgagor, such a person's tenure is made subject to the terms of the mortgage deed during the period of his statutory tenancy. I cannot also distinguish the aforesaid Bench decisions in the manner suggested by the learned counsel for the respondents, as, even in these cases the mortgagee would not under general law be entitled to be in possession if the entire amount due to him was legally tendered. I therefore hold that the first defendant is not liable to pay mesne profits. In the result the decree of the lower court is modified and the parties are directed to pay and receive proportionate costs in the courts below. Here the parties will bear their own costs.

Leave granted.

K.S. *Decree modified.*

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1. (1917) 33 M.L.J. 591.

2. (1919) 37 M.L.J. 206 : 10 L.W. 300.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO.

Nodiyodath Kunhi Krishnan's son Chozhi .. *Appellant* *

v.

Melepurakkal deceased Raman's widow Lakshmi .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938) as amended by Act (XXIII of 1948), sections 8, 9, 9-A and 10—Scope—Debtor who has already obtained relief under sections 8 and 9 on the basis that the transaction was not an usufructuary mortgage as defined under section 10 (2)—If can again claim relief under section 9-A as usufructuary mortgagee.

A party to a suit or proceeding can acquire a new right by reason of an amending Act. But where the new right depends upon a fact namely whether a document is an usufructuary mortgage or not, if the party got relief from the Court under sections 8 and 9 of Madras Act IV of 1938 on the basis that it was not an usufructuary mortgage as defined under section 10 (2) he cannot claim relief under section 9-A conferred by the amending Act of 1948 on the basis that the suit document is an usufructuary mortgage.

No party to a suit can be allowed to get relief on inconsistent positions on the principle of "approbate and reprobate."

Narayana Iyengar v. *Subramania Chettiar*, (1937) 1 M.L.J. 233, distinguished.

Appeal against the order of the Court of the Subordinate Judge, Ottapalam, in A.S. No. 144 of 1949 (E.A. No. 233 of 1949 in O.S. No. 145 of 1948) District Munsif's Court of Chowghat.

K. P. Ramakrishna Aiyar for Appellant.

N. Sundara Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is a civil miscellaneous second appeal against the order of the Court of the Subordinate Judge of Ottapalam in A.S. No. 144 of 1949 setting aside that of the District Munsif of Chowghat in E.A. No. 233 of 1949.

The appellant executed a possessory mortgage deed, dated 29th July, 1913, in favour of the respondent. Under that document the mortgagor was liable to pay Rs. 2 to the mortgagee in addition to the income for the purpose of paying the Government assessment as the income was not sufficient to pay the interest. The appellant filed O.S. No. 145 of 1948 for redemption of the mortgage. In that suit he claimed relief under sections 8 and 9 of the Madras Agriculturists Relief Act (IV of 1938). He contended that the Rs. 2 payable by him represented a payment towards interest on the mortgage amount and that the amount was liable to be scaled down under section 8 of Act IV of 1938. The District Munsif accepted his contentions and scaled down the debt on 20th October, 1948.

Subsequently, under the Amending Act, (XXIII of 1948), the Legislature introduced section 9-A whereby under certain circumstances an usufructuary mortgage debt would be deemed to be completely discharged, or substantially reduced. Taking advantage of that section, the appellant again filed E.A. No. 233 of 1949 for reopening the decree and scaling down under the new Act. The learned District Munsif amended the decree showing that the amount payable by the appellant was Rs. 22 for interest, Rs. 31-8-0 as costs of suit and Rs. 173-0-3 for value of the improvements.

The relevant provisions of Act IV of 1938 may now be read :

Section 10 (2) : "Nothing contained in sections 8 and 9 shall affect any mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated as due to the mortgagee except to the extent provided for in section 9-A."

Section 9-A : "Where a usufructuary mortgage was executed at any time before 30th September, 1947 and the mortgagee is in possession of the property mortgaged to him, the mortgagor shall be entitled to redeem the property notwithstanding that the time, if any, fixed in the mortgage deed for redeeming the mortgage has not arrived."

* A. A. A. O. No. 105 of 1950. 23rd November, 1951.

Under the other provisions of section 9-A the mortgage amount would be scaled down having regard to the circumstances mentioned therein. The explanation to section 9-A runs thus :

> "An 'usufructuary mortgage' in this section means any mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated as due to the mortgagee."

Under section 10 of the Act a mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated, cannot be scaled down under sections 8 and 9 of Act IV of 1938, but by reason of section 9-A even such an usufructuary mortgage can be scaled down in the manner provided by that section.

In the suit the appellant contended that the document was not an usufructuary mortgage as defined under section 10 (2) and on that basis obtained reliefs under sections 8 and 9 of the Act. At the time when he sought for and obtained the relief section 9-A was not in the statute book. Section 9-A was introduced in the Act by Act XXIII of 1948. Now in the same proceedings he is seeking to amend the decree on the ground that it is an usufructuary mortgage within the meaning of the explanation added to section 9-A. An usufructuary mortgage in the explanation to section 9-A is defined in similar terms to an usufructuary mortgage defined under section 10 of the Act.

The position therefore is this : the appellant who obtained relief at one stage of the suit on the basis of a document which was not an usufructuary mortgage, now seeks to get a relief on an inconsistent basis namely that the suit document is an usufructuary mortgage. No party to a suit can be allowed to get relief on inconsistent positions on the principle of "approbate and reprobate". But Mr. Ramakrishna Aiyar contended that in accordance with law which then existed, he was able to get relief under sections 8 and 9 of the Act but the present relief is only based on the right conferred upon him under the amended section. It is true that a party to a suit or a proceeding can acquire a new right by reason of an amending Act. But in this case the new right conferred upon the petitioner depends upon a fact namely whether the document is an usufructuary mortgage or not. As the appellant got relief from the court on the basis that it was not an usufructuary mortgage, he cannot now rely upon a new provision on an inconsistent foundation.

The learned counsel then relied upon a Full Bench decision of this Court reported in *Narayana Iyengar* v. *Subramania Chettiar*[1]. In that case no principle of "approbate and reprobate" was raised or considered. Ramasam, J., who delivered the leading judgment, only laid down the well-recognised principle that there can be no *res judicata* by laying down a wrong rule of law between the parties for future guidance also and that that decision must be confined to matter to which it has been applied at the time to the former decision.

In the view I have taken it is unnecessary to consider the other question namely whether the document provided for a rate of interest within the meaning of section 10 (2) (*i*) of the Act.

The appeal fails and is dismissed with costs.

No leave.

K.S. *Appeal dismissed.*

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1. (1937) 1 M.L.J. 233.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BASHEER AHMED SAYEED.

T. M. A. Abdul Aziz .. *Petitioner.**

v.

Venkatachalam Pillai .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), sections 2 (1) and 12 (4)—Landlord in possession of a bunk constructed of timber measuring 5′ by 4½′ where business can be carried on—If can evict tenant on the ground that he had no place for carrying on his business—Wooden bunk—If "building"—Decision of District Judge on second appeal under section 12 (4)—Interference in revision.

A wooden bunk constructed of timber measuring 5′ by 4½′ where business can be carried on is a building or at any rate a hut within the definition in section 2 (1) of the Madras Buildings (Lease and Rent Control) Act. A landlord in possession of such a structure is not entitled to evict a tenant in occupation of another building of his on the ground that he had no place for carrying on his business.

Though a matter has been decided by two Courts possessing appellate authority, the decision of a Court subordinate to the High Court is subject to revision by the High Court.

A second application for eviction on the same facts will not lie.

Petition under Article 227 of the Constitution of India praying that the High Court will be pleased to revise the order of the District Court, West Tanjore at Tanjore in O.P. No. 67 of 1951 (C.M.A. No. 50 of 1949, Court of the Subordinate Judge of Kumbakonam, R.C.A. No. 180 of 1949 on the file of the Rent Controller, Kumbakonam).

K. S. Desikan for Petitioner.

S. Krishnamachariar for Respondent.

The Court delivered the following

JUDGMENT.—The tenant is the petitioner in this Civil Revision Petition. He is seeking to revise the order of the learned District Judge who has held that the wooden bunk which the respondent is using for the purpose of his business is not a "building" or "hut" within the meaning of the definition of "building" given in the Madras Buildings (Lease and Rent Control) Act (hereinafter referred to as the Act). In that Act, section 2 (1) defines a building as

"any building or hut or part of a building or hut let or to be let separately for residential or non-residential purposes"

and includes various other items referred to in sub-clauses (*a*) and (*b*) of section 2 (1).

The petitioner is in occupation as tenant under the respondent of a small building measuring about 14′ by 3½′ and is paying a rent of Rs. 6-8-0 per mensem. The respondent, on the other hand, is in possession of a bunk constructed completely of timber measuring about 5′ by 4½′. This bunk is placed upon cement blocks on the site belonging to Kumbeswaraswami temple in Kumbakonam. The respondent sought to evict the petitioner on the ground that he had no place for carrying on his business. In the petition filed by him he admitted that he was in occupation of a building by which he meant a wooden structure which he had constructed on the temple site and which structure happens to be removed every time when the deity is taken in procession for 10 days in the year. The Rent Controller, on the admission of the respondent, dismissed the petition. Thereupon an appeal was preferred against that order by the respondent before the learned Subordinate Judge and the learned Subordinate Judge confirmed that order. After sometime, the respondent again took out another application before the Rent Controller. The Rent Controller held that in view of the previous application and the orders thereon the second application was not tenable. On appeal, the learned Subordinate Judge reversed the order of the Rent Controller and remanded the petition for enquiry and investigation. On remand, the Rent Controller held that the superstructure was a building and that the respondent was not entitled to an order for eviction. On appeal, the learned Subordinate Judge held that the superstruc-

* C. R. P. No. 1641 of 1951. 27th November, 1951.

ture which the respondent was possessed of was not a building. A further appeal was preferred before the learned District Judge who concurred with the learned Subordinate Judge. This revision is now preferred against the decision of the learned District Judge.

The contention raised by the learned counsel for the petitioner is that except on new facts there can be no second application by the landlord for evicting the tenant when once he took out an application on the plea that the building was required for his own use and when he got an adverse order which was confirmed on appeal. The learned counsel for the petitioner relies upon the decision of a Bench of this Court in *Raghavalu Chetti* v. *Ramamurthi*[1] where it has been held that section 10 of the Act would not be a bar to a new application if there are new materials on which the application could be made. In this case the learned counsel's point is that no new materials have been placed before the Court for entertaining a fresh application for the simple reason that even in the very first application taken out by the landlord he had stated that he was in possession of a building and that has not ceased to be a building and therefore no new circumstances or new materials had been available in order to justify a fresh application being filed. The correctness of this contention would depend upon the fact as to whether the superstructure which is in the possession of the landlord is really a building and comes within the scope of the definition of the word "building" given in section 2 of the Act or whether it is not a building. If the superstructure of the description given above which the landlord respondent is in occupation and where he is carrying on his business were to be taken as a building then certainly a second application would not lie. If it is not a building or even a hut, then certainly the application of the respondent would lie. Then the whole question will turn upon the point as to whether the structure which the respondent is occupying and where he is carrying on his business is a building within the meaning of section 2 of the Act, or not.

The definition given in section 2 of the Act includes not merely any building or hut or part of a building or hut but it also goes on further to say that such a building or part of a building or hut should be one capable of being let separately for residential or non-residential purposes. So far as the structure in question is concerned, it cannot be disputed that the superstructure which is in the possession of the respondent is one that he let out on rent to any person who may carry on business similar to the one that respondent is carrying on. That being the case, the question that arises next is whether the superstructure of the kind in question is a building within the meaning of the definition contained in section 2 of the Act.

The learned counsel for the petitioner after inviting my attention to several decisions wherein wooden structures have been held to be buildings, has urged that even if this superstructure could not be considered as a building within the ordinary meaning of the term, still it will come perfectly within scope of the definition of hut. The definition of hut is given in Webster's dictionary as "temporary wooden structure". There is no limitation as to the length, breadth or height of any such wooden structure which can be called a hut. So that, when section 2 of the Act includes also a hut, this building even if it is to be considered a hut will fall within the scope of that section. Even though there may be considerable difficulty in arriving at the conclusion that the superstructure in question which is of small size measuring about 5' by 4½' can be called a building, nevertheless, in my view, this superstructure which the respondent has in his occupation and where he is carrying on business and which he has constructed on the site belonging to the temple authorities is certainly a hut. Therefore, when he is in occupation of a hut of his own he cannot certainly seek to evict the tenant who is in occupation of another building belonging to him and has been paying rent regularly.

Even though it may not be necessary to go further into the question as to whether the superstructure in question could be brought within the scope of the

1. (1951) 1 M.L.J. N.R.C. 46.

definition of building in view of what I have stated above still since the learned counsel for the petitioner has urged that it could be taken as a building and has referred me to a number of authorities, I would like to refer to them and examine the position.

The first of the series of authorities referred to by the learned Counsel for the petitioner is *Stevens* v. *Gourley*[1]. In that case, a wooden superstructure which was 16' by 13'8' was held to be a building. In *Nandumal* v. *Municipal Committee, Simla*[2], a wooden structure on wheels which was 10' by 8' was again held to be a building. In *Hanrahan* v. *Leigh-on-Sea Urban Council*[3], an old railway carriage which stood upon a plot of land and was converted into a dwelling house was held to have become a new building within the meaning of section 159 of the Public Health Act, 1875 (of England) and that since it did not comply with the requirements of the bye-laws for the purpose of erection, the urban council had power to pull down the whole building and not merely to remove and alter the work by which it was so converted. To similar effect is the decision in *Richardson* v. *Brown*[4], reported in Mews Digest Vol. 9, page 390. It appears from a consideration of all these decisions referred to by the learned counsel that even though a superstructure may be one of wooden substance and even though it may not be fixed to the ground and even if it is not of an everlasting character like masonry or stone building it has been held to be a building for the purpose of municipal laws. In this case it should be remembered that the definition of the word building is intended for the purpose of affording relief to tenants and it is the purpose of the Act to relieve congestion and unnecessary hardship that is caused by landlords evicting the tenants without any just case. When the relationship of the landlord and tenant is kept in view in regard to the hut, then the definition given in section 2 of the Act with regard to the hut assumes considerable significance and importance. It cannot therefore be argued with any force that huts of the kind involved in this petition have been sought to be excluded from the scope of the Act. If that were a proper construction of the scope of the Act, then it would amount to saying that as between the poor landlords and poor tenants, the Act provides no remedy. That will be defeating the very purpose of the Act.

The learned counsel for the respondent, however, has urged that the question as to whether any superstructure, be it of wood or of any other material or a building, is a question of fact and when two courts have held that the superstructure now involved in this petition is not a building, this court ought not to interfere with the findings of the courts below as there is no question of law involved for decision. It is difficult for me to agree with this contention of the learned counsel for the respondent. The whole case turns upon not merely on the applicability of section 10 of the Act which has been raised by the learned counsel for the petitioner, but also on the question as to whether a superstructure of the kind described in this petition is or is not a building. It involves the construction of the definition of the words "building" and "hut" given in section 2 of the Act, so that it cannot be argued that this is purely a question of fact involving no question of law. In so far as the definition has to be interpreted, I think there is justification for this court to interfere in revision in this petition.

The next point urged by the learned counsel for the respondent is that section 12 (4) of the Act does not give room for revision when already the matter has been decided by two courts, possessing appellate authority. I do not think that I can agree with the learned counsel for the respondent on this question. In so far as the District Judge is concerned, he is subordinate to the High Court and any decision of his is subject to revision by this Court. I think there is scope for the decision of the learned District Judge being interfered with in revision.

The further point taken by the learned counsel for the respondent is that in

1. 1 L.T. 33.
2. (1924) I.L.R. 5 Lah. 543.
3. (1909) 2 K.B. 257.
4. 49 J.P. 661.

the cases cited by the learned counsel for the petitioner the size of the wooden structures which formed the subject-matter of those decisions was considerable and that the superstructure involved in this petition being of very small size it ought not to be brought within the scope of the definition given in section 2 of the Act. I do not think this argument can be accepted. Even though the wooden structure in question in this petition is about 5' by 4½' nevertheless it serves a good purpose. It enables the respondent to carry on his business and the photographs which have been produced in this petition would convince any observer that the superstructure is a reasonably well proportioned hut where business is being carried on and can be carried on by any person if it is let on rent. No doubt, some of the decisions, particularly the one reported in *Stevens* v. *Gourley*[1], have stated that any superstructure of considerable size and which would last for a considerable time should be construed as a building but what that considerable size and what that considerable time for which such superstructure should last in order to be considered a building within the scope of the section, of the Acts which the Courts were called upon to construe, has not been defined anywhere. In the absence of such a definition, the contention of the learned counsel that since it is stated that they should be of considerable size and that they should last for a considerable time, this wooden superstructure involved in the suit cannot be a building or hut has not much force. I do not think that it will be right to say that the superstructure of the kind in question cannot be brought within the scope of the definition of a hut. On the other hand, this superstructure could last as long as any other building for the matter of that ; though it may be of timber, it cannot be said that timber lasts for lesser time than buildings of any other material.

The learned counsel has invited my attention to the decision in *Government of Bombay* v. *P. A. Wadia*[2], and has contended that in so far as the question now raised in this petition was not raised or was not in issue at an earlier stage, there may be no *res judicata* I do not think we are now considering the question of *res judicata* as such. The learned counsel for the petitioner has only relied upon section 10 of the Act and I think the principles of this section are not exactly the same as those that are contained in section 11, Civil Procedure Code. The ruling and the observations of that case do not apply to the facts of this case. The learned counsel for the respondent has also relied upon the decision in *Morr* v. *Williams*[3]. The observations and the ruling in that case also, in my view, do not apply to the facts of the present case. Even so, the decision in *Mohabir Das* v. *Gaya Municipality*[4], does not render any assistance to the learned counsel for the respondent, for in that decision a masonry wall which had the effect of extending certain building was held to be re-erection of the building. I do not think that in view of the objects of the Act and the definition given in section 2 of the word " building " which includes a hut and in view of my finding that the superstructure involved in this petition comes well within the definition of a hut, in the light of the decisions that have been referred to, I think that the decision of the learned District Judge has to be set aside. This petition is therefore allowed and the petitioner will have his costs in this court.

K.S. *Petition allowed.*

[END OF (1952) 1 M.L.J. (REPORTS.)]

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1. 1 L.T. 33.
2. (1949) 2 M.L.J. 161 : L.R. 76 I.A. 85 : I.L.R. 1949 Bom. 110 (P.C.).
3. (1892) 1 Q.B. 264.
4. (1914) 26 I.C. 651.

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